1945 *Present:* **Howard C.J. and Canekeratne J.**

SIDERIS *et al.*, Appellants, *and* SIMON *et al.*, Respondents.

57—D. C. Colombo, 2,880.

Prescription—Co-owners—Long continued and undisturbed possession—Presumption of ouster—Question of fact.

In an action between co-owners the question whether a presumption of ouster may be made from long continued and undisturbed and uninterrupted possession is one of fact, which depends on the circumstances of each case.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *S. P. Wijewickrema*), for the first to fourth defendants, appellants.

N. E. Weerasooria, K.C. (with him *M. D. H. Jayawardene*), for the plaintiffs, respondents.

Cur. adv. vult.

June 18, 1945. HOWARD C.J.—

The first to fourth defendants appeal against a judgment of the Additional District Judge of Colombo, declaring the plaintiffs entitled to an undivided share in certain land, and ordering that the first to fourth defendants be ejected therefrom and the plaintiffs placed in possession.

The plaintiffs claimed that they and the fifth defendant were jointly entitled to the land in dispute and that the first to fourth defendants who had no manner of right or title to any portion of the said land wrongfully and unlawfully entered into a portion and cut and removed the crop which the plaintiffs had raised thereon. It was conceded that the land in dispute originally belonged to one Henchappu who had 4 sons and 3 daughters. The plaintiffs and the fifth defendant maintained that the four sons entered into exclusive possession of the land and acquired a title by prescription. The plaintiffs are the successors in title of the four sons of Henchappu whilst the second defendant is the son of one of the daughters of Henchappu and the first, third and fourth defendants are her grandchildren. The learned Judge held that the four sons of Henchappu and their successors were in exclusive possession of the land in question and acquired a prescriptive title thereto. In coming to this conclusion he thought that taking all the circumstances of the case into consideration and having regard to the documents produced and accepting the fact that the four sons of Henchappu and their successors possessed the field to the exclusion of the three daughters he was entitled to presume an ouster. It has been contended by Mr. Perera on behalf of the appellants that, inasmuch as the four sons and three daughters of Henchappu were co-owners, the learned Judge was wrong in coming to the conclusion that there had been an ouster. There have been numerous cases on the question as to the acquisition of rights by prescription against co-owners. In *Thomas v. Thomas* [1] it was held by Wood V.C. that possession is never considered adverse if it can be referred to a lawful title. This dictum was cited with approval in the Privy Council case of *Corea v. Appuhamy* [2]. In that case the principle was formulated that the possession of one co-parcener could not be held as adverse to the other co-parcener and in spite of over thirty years' possession the defendant's title by prescription was not upheld. The possession of one co-owner was the possession of all the co-owners. It was not possible, for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. The principle as laid down by the Privy Council in *Corea v. Appuhamy* was cited with approval in the later Privy Council cases of *Brito v. Muttunayagam* [3] and *Cadija Umma v. S. Don Manis Appu* [4]. It has been followed in the local cases of *Cooray v. Perera* [5] *Fernando v. Fernando* [6] and *Fernando v. Fernando and others* [7]. Doubts however, as to what was necessary to prove ouster have arisen since the judgment of Bertram C.J. in *Tillekeratne v. Bastian* [8] who accepted the principle formulated in *Corea v. Appuhamy* by stating that it was not

[1] *(1855) 2 K. & J. 83.*
[2] *15 N. L. R. 65.*
[3] *20 N. L. R. 327.*
[4] *40 N. L. R. 392.*
[5] *45 N. L. R. 455.*
[6] *44 N. L. R. 65.*
[7] *27 C. L W. 71.*
[8] *21 N. L. R. 12.*

possible for a co-owner to put an end to the title of another co-owner and to initiate a prescriptive title by any secret intention in his own mind and that nothing short of an " ouster or something equivalent to an ouster " could bring about the result. The learned Chief Justice then went on to say that although the question had been argued in the case and discussed in the judgment, the Privy Council in *Corea v. Appuhamy* had not decided whether an ouster could be presumed from the long continued possession of the co-owner in question. He then proceeded to formulate the principle that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner, has since become adverse. In *Tillekeratne v. Bastian* the claim on the ground of co-ownership had been dormant for a period of more than forty years. Moreover, the nature of the possession was significant. The land had no plantation worth considering. It was plumbago land and the defendants dug plumbago thereon both by themselves and through lessees all throughout. In these circumstances the principle to which I referred was formulated by the Court which held that the defendants had succeeded in establishing their claim to the whole land by prescription. The decision, however, did not go so far as to lay down that ouster could be presumed merely from long and exclusive possession. Such a decision would have been contrary to *Corea v. Appuhamy*. It is a question of fact in each case and the question as to whether from long continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case—*vide* judgment of Dalton J. in *Hamidu Lebbe v. Ganitha* [1]. In *Tillekeratne v. Bastian* there was long continued, undisturbed and uninterrupted possession for a period of over 40 years. The nature of the possession was for the purpose of digging plumbago both by the defendants and their lessees. In this connection De Sampayo J. in his judgment at page 28 drew a distinction between the possession of land for the purpose of extracting minerals and the possession for the taking of natural produce in the following passage:—

> " Moreover, the nature of the possession is significant. The land had no plantation worth considering; it was plumbago land, and the defendants dug plumbago therein both by themselves and through lessees all throughout. While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind or money."

Moreover, it would appear that the plaintiff Tillekeratne had bought the share of the co-owner, had worked a plumbago pit himself on another land in the neighbourhood, and had never claimed or taken a share in the plumbago which to his knowledge was being dug from the disputed land by the defendants and their lessees. It seems to me that the distinction drawn between the excavation and removal of minerals, an act definitely depreciating the value of the holding, and the taking of natural produce

[1] *27 N. L. R. at p. 39.*

such as the fruit of trees or the development of lands for the cultivation of paddy by expenditure incurred by the occupier is both logical and sound.

The only matter remaining for consideration is whether the learned Judge has correctly upheld the principles to which I have referred and rightly come to the conclusion that he was entitled to presume ouster. It may be conceded that the possession from 1904 to 1942 was long continued, undisturbed and uninterrupted. But this is not enough. What other circumstances existed leading to the presumption that there was an ouster ? It is suggested that various deeds written on the basis that the four sons of Henchappu are the owners supply the other circumstances from which ouster can be presumed. The earliest deed (5 D3) dated October 4, 1894, was by Davith Appu, one of the four sons and conveyed an undivided one-third share of the land to Peeris Appu and Deonis Appu. Davith Appu on the assumption that the four sons were entitled, should have conveyed one-fourth only. But it is clear that Davith conveyed more than the one-seventh share to which he was entitled if all the brothers and sisters were co-owners. The next document is a deed of lease (P 12) dated January 12, 1901, in which the lessors are two of the sons of Henchappu, Velun and Jeelis, William, a child of Saran who was another son of Henchappu and Peeris, one of the transferees on 5 D3. This deed dealt with the entirety of the land and none of the daughters of Henchappu joined in. There is also another deed dated January 20, 1904 (5 D1), in which Velun, one of the sons of Henchappu, reciting that he was entitled to an undivided one-fourth share of the land which he and his three brothers held and possessed by right of " Sambuddi " possession and " asweddumising ", sold to his daughter and her husband an extent of 10 kurunies. This deed ignores the rights of the daughters of Henchappu. But do these deeds inevitably point to an acquiescence by the daughters of Henchappu in the acquisition of their rights as co-owners by the sons? Was the making of these deeds something equivalent to an ouster? The land was being cultivated by the growing of paddy and hence any inference of acquiescence would not arise as it did in the case of *Tillekeratne v. Bastian* where the co-owner stood by when plumbago was excavated and removed. Moreover, there is no evidence that the daughters of Henchappu knew of the execution of the various deeds. Without such proof there was nothing more than a secret intention in the mind of the transferors and lessors to initiate a prescriptive title and put an end to the co-owners' co-possession. This is not sufficient to constitute ouster.

The judgment of the District Court is set aside and judgment must be entered for the first to fourth defendants with costs in this Court and the Court below.

CANEKERATNE J.—I agree.

Appeal allowed.