1959 *Present :* **Basnayake, C. J., K. D. de Silva, J., and H. N. G. Fernando, J.**

ABDUL MAJEED, Appellant, *and* UMMU ZANEERA *et al.*, Respondents

S. C. 260—D. C. Colombo, 6970/M

Co-owners—Prescriptive possession by a co-heir—Ouster—Fideicommissum for four generations—Computation of period—Prescription against remainder-men and minors—Burden of proof—Prescription Ordinance (Cap. 55), ss. 3, 13—Evidence Ordinance, s. 114.

On an issue of prescriptive title raised between co-heirs in respect of a property valued at Rs. 75,000 (land 12·61 perches in extent and a building covering practically the whole land)—

Held, by DE SILVA, J., and H. N. G. FERNANDO, J. (BASNAYAKE, C.J., dissenting), that proof that one of the co-heirs let out the premises and appropriated to himself the entire rent (which was not much) for thirty-seven years was insufficient, by itself, to bring the case within section 3 of the Prescription Ordinance.

Per DE SILVA, J.—" In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider the following, among other matters :—

(*a*) The income derived from the property.

(*b*) The value of the property.

(*c*) The relationship of the co-owners and where they reside in relation to the situation of the property.

(*d*) Documents executed on the basis of exclusive ownership ".

Per H. N. G. FERNANDO, J.—" Firstly, section 3 (of the Prescription Ordinance) imposes two requirements : ' undisturbed and uninterrupted possession ' *and* ' possession by a title adverse or independent ' ; secondly the question whether the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Council in *Corea's* case (*15 N. L. R. 65*) that a co-owner in possession can satisfy the second requirement in two different modes :—

(*a*) by proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title ; in fact Their Lordships, in *Corea's* case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner ;

(*b*) by proving that, although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been by an adverse or independent title ".

Considered also :—(i) Duration of a fideicommissum lasting for four generations. It would be only the fifth generation of fideicommissary heirs who would inherit the property free of the fideicommissum, (ii) Burden of proof in cases falling under the proviso to section 3 and section 13 of the Prescription Ordinance in relation to the issue of prescription against remainder-men and minors.

J. N. R 8263–1,995(2/60)

APPEAL from a judgment of the District Court, Colombo. The facts appear from the judgment of de Silva, J.

H. V. Perera, Q.C., with *H. Ismail*, for 13th Substituted Defendant-Appellant.

M. S. M. Nazeem, with *M. T. M. Sivardeen*, for Plaintiff-Respondent.

S. Sharvananda, with *M. Shanmugalingam*, for 4th to 8th Defendants-Respondents.

H. W. Jayewardene, Q.C., with *M. Rafeek* and *L. C. Seneviratne*, for 9th Defendant-Respondent and for 10th Substituted Defendant-Respondent.

H. Mohideen, with *S. M. Uvais*, for 12th Defendant-Respondent.

Cur. adv. vult.

December 11, 1959. BASNAYAKE, C.J.—

This is an action under the Partition Act, No. 16 of 1951, instituted on 17th September 1953. The main contest at the trial was whether deed No. 260 dated 16th July 1872 attested by J. W. Vanderstraaten created a *fideicommissum* which endured for four generations. The learned District Judge held that the deed created a *fideicommissum* and learned counsel for the 13th defendant-appellant, who may conveniently be referred to hereinafter as the appellant, does not challenge that finding. The appellant had also claimed that he was entitled to a decree in his favour under section 3 of the Prescription Ordinance as he had possessed the entire land since the year 1916.

The learned District Judge while in effect holding that the appellant had continuous and exclusive possession of the premises since 1916 rejected his claim for a decree in his favour under section 3 of the Prescription Ordinance on the ground that he had failed to prove that the proviso to section 3 and section 13 of the Ordinance did not apply to his claim. The decision that the burden of proving the exceptions rests on the appellant is canvassed in appeal. It is submitted that the learned District Judge has wrongly cast on the appellant the burden of proving matters which in law he is not bound to prove. The portion of the learned District Judge's judgment to which objection is taken runs as follows:—

> "In fact, the burden is on the 13th defendant to prove that he had acquired a title by prescriptive possession to the interests of all the parties to this action, who are the descendants of Muttu Natchia.

His prescriptive possession has been interrupted always with the death of a fiduciary. It is for him to produce the death certificates of the successive fiduciaries and the birth certificates of the several fidei commissarii. Ansa Umma, one of the daughters of Muttu Natchia, died leaving three children, the 9th and 10th defendants and one Mohamed Razeen. Ansa Umma was a fidueiary. It is not known when she died. It is only after her death that the 13th defendant would start to possess adversely against the 9th and 10th defendants and Mohamed Razeen. There is no evidence as to the age of the 9th and 10th defendants. Similarly in the case of all the other defendants it cannot be held that the 13th defendant acquired a prescriptive title to their interests. I hold that the 13th defendant has not acquired prescriptive title to the interests of the plaintiff or any other defendants ".

The plaintiff and the other defendants claim the benefit of the proviso to section 3 and section 13. Those provisions read—

" Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

" 13. Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say—

(*a*) infancy,

(*b*) idiocy,

(*c*) unsoundness of mind,

(*d*) lunacy, or

(*e*) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen ; but no further time shall be allowed in respect of the disabilities of any other person :

" Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant."

Learned counsel's contention that the learned District Judge has wrongly cast on the appellant the burden of proving the exception is sound. The rule of evidence is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Those who assert that the period of ten years began to run as against them only after a certain date in view of the proviso to section 3 or section 13 must produce evidence of facts which bring their case within those provisions. Learned counsel's submission is supported by the decision of the Privy Council in the case of *Mohamedaly Adamjee v. Hadad Sadeen* [1] to which he has referred us. In that case the Board made the following observations :—

> " Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years."

In the instant case except in regard to the plaintiff, and the 1st and 2nd defendants, the parties have produced no evidence which brings their claims within the proviso to section 3 or section 13. But it is contended on behalf of the 9th and 10th defendants-respondents that the appellant is a co-heir and that proof that he collected the entire rent since the year 1916 is insufficient to bring his case within section 3. It is therefore necessary to deal with that aspect of the case with which the learned District Judge has not dealt specially though an argument in regard to it appears to have been addressed to him.

It has been laid down by the Privy Council in the case of *Corea v. Appuhamy* [2] that the possession of a co-owner is in law possession of the other co-owners ; that it is not possible for a co-owner to put an end to his possession *qua* co-owner by any secret intention in his mind ; that nothing short of ouster or something equivalent to ouster could bring about that result.

In the case of *Cadija Umma v. Don Manis* [3] in dealing with the case of an agent's possession the Privy Council said—

> " Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea's* case."

It is therefore necessary first to understand what the Privy Council meant by the words "his possession was in law the possession of his co-owners ". What is the kind of possession contemplated by these words ?

[1] *(1956) 53 N.L.R. 217 at 227.* [2] *(1911) 15 N.L.R. 65.*

[3] *(1938) 40 N.L.R. 392 at 396.*

Is it a possession in which the rights of the other co-owners are recognised or is it a possession in which they are not ? For the answers to these questions we have to look to the English Law, as section 3 of the Prescription Ordinance is based on concepts of English and not on those of Roman-Dutch law. The English law on the subject is nowhere better expressed than in *Doe v. Prosser*[1] wherein Lord Mansfield and Justice Acton have explained what is meant by adverse possession and ouster. The former explains the law thus :—

> " So in the case of tenants in common the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion ; because such possession is not adverse to the right of his companion, but in support of their common title ; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole and will not pay, and continues in possession ; such possession is adverse and ouster enough."

Justice Acton's words are pithy and to the point. He says—

> " There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. "

It would appear therefore that on the facts of the instant case the co-owners cannot claim the benefit of the appellant's possession as he has possessed not on their behalf but for himself without giving them their share of the rent.

Next let me consider whether in the instant case there is evidence of " ouster " or " something equivalent to ouster ". The meaning of " ouster " an expression which is not discussed in our reports must first be ascertained. Now " ouster " is a concept of English law. It is defined thus in Sweet's Law Dictionary :

> " To oust a person from land is to take the possession from him so as to deprive him of the freehold. An ouster may be either rightful or wrongful. A wrongful ouster is a disseisin."

According to Blackstone—

> " Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession : for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession,

[1] *1 Cowper 216—98 E.R. 1052 (1774).*

may either be of the *freehold*, or of *chattels real* ; ' a distinction which was formerly of the utmost importance, as the remedies for an ouster of the freehold were not only peculiar in their nature, but were confined in their use to that species of property ; while those which the law afforded for recovery of the possession of *chattels real* were totally inapplicable to all estates of freehold. We shall see afterwards how the action of ejectment has come to supply the place of nearly all these remedies '. "

" Ouster of the *freehold* then ' was, and in theory may still be ' effected by one of the following methods : 1. Abatement ; 2. Intrusion; 3. Disseisin ; 4. Discontinuance ; 5. Deforcement '. " (Blackstone, Vol. III p. 176—Kerr's edition 1862).

The last named is the form of ouster that applies to the case of a co-owner who decides to keep out the other co-owners. Blackstone describes it thus—(*ibid*, p. 182).

" The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer has now become unlawful, was that by deforcement. This, in its most extensive sense, is *nomen generalissimum* ; a much larger and more comprehensive expression than any of the former ; it then signifying the holding of any lands or tenements to which another person has a right. "

Blackstone gives many examples of deforcement and the only one germane to the subject under discussion is the following—(*ibid*, p. 182).

" Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other, as where the ancestor dies seized of an estate in fee-simple, which descends to two sisters as co-parceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety ; this is also a deforcement. "

In the instant case there is evidence of " ouster " in the sense stated in the passage from Blackstone last cited and the English cases I shall refer to later in this judgment. The appellant came into possession of the land in 1916 on the death of his father, who himself had been in possession of it, and has continued to take the entire rent from that day. The plaintiff and the 1st and 2nd defendants are the great-great-grand-children of the author of the *fideicommissum*. Several generations of his descendants have been content to allow the appellant and his father to collect the entire rent. There is no evidence that till the date of this action in September 1953 any one has even questioned the appellant's right to take the rent during these thirty-seven years.

Apart from actual ouster in the sense stated above English law recognises a presumption of ouster. The cases of *Doe v. Posser* (*supra*) and

Hornblower v. Read [1] decide that ouster may be presumed in a case where uninterrupted possession for thirty-six years is established. In the former case Lord Mansfield stated—

> " It is very true that I told the Jury, they were warranted by the length of time in this case, to presume an adverse possession and ouster by one of the tenants in common, of his companion ; and I continue still of the same opinion—Some ambiguity seems to have arisen from the term ' actual ouster ', as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. "

After enunciating the rule that the possession of one tenant in common, *eo nomine*, as a tenant in common, can never bar his companion ; because such possession is not adverse to the right of his companion, but in support of their common title, Lord Mansfield adds—

> " .....but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing. "

Justice Acton in the same case puts the proposition thus :

> " Now in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not ? "

Justice Willes in agreeing with Lord Mansfield and Justice Acton states—

> " The possession is a possession of 16 years above the 20 prescribed by the Statute of Limitations, without any claim, demand, or interruption whatsoever ; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster. "

[1] *1 East 568.*

In the latter case Lord Kenyon C. J. observes —

> " I have no hesitation in saying where the line of adverse possession begins and where it ends. Prima facie the possession of one tenant in common is that of another : every case and dictum in the book is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. "

In this discussion it is important to bear in mind the words of Lord Mansfield quoted above that actual ouster is not some act accompanied by force. The expression is defined in Black's Law Dictionary thus :

> " Actual ouster does not mean a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenant to participate in the profits. "

The presumption of ouster referred to in the cases cited by me is one that a court may draw under section 114 of the Evidence Ordinance, which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.

The facts of the instant case fall within the ambit of Lord Kenyon's words. Here the appellant has been in possession and received the rent to his own use without accounting to the others and those others have acquiesced in it for such a length of time as will enable the court to presume under all the circumstances an actual ouster of the others more than ten years before the institution of this action.

Before I part with this judgment I wish to add that in counting the number of generations for the purpose of a *fideicommissum* which endures for four generations the person who has been expressly named and is the immediate donee is not taken into account. This is what Van Leeuwen says :

> " It has been received as a general rule, that a *fideicommissum* of this or a similar kind in a case of doubt and when the prohibition is difficult to be understood, is not perpetual, but only extends to the fourth degree of succession, counting from him to whom after the death of the first heir the inheritance has come saddled with such a burden, up to the fourth degree beyond him inclusive, for the person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so. " (Censura Forensis, Part I, Book III, Ch. VII, S. 14, Ford's Translation, p. 92.)

For the reasons stated above the appellant is entitled to a decree in his favour declaring him entitled to all the shares excluding those of the plaintiff and the 1st and 2nd defendants.

In regard to costs the appellant is entitled to the costs of the contested trial as against the plaintiff who alone resisted his claim. The other costs will be borne by the parties declared entitled to the land *pro rata*. The appellant would also be entitled to the costs of appeal payable by the 9th and 10th defendants.

DE SILVA, J.—

The plaintiff instituted this action under the Partition Act, No. 16 of 1951 praying for a sale of the premises described in the schedule to the plaint. Admittedly the property in question belonged to one Ibrahim Lebbe Ahamado Lebbe. He by deed No. 260 dated the 16th July, 1872 (P2) gifted it to his wife Muttu Natchia subject to certain conditions. The plaintiff and certain defendants contended that this deed created a valid *fideicommissum* in favour of the children and the remoter descendants of the donor and donee binding on four generations. Muttu Natchia and her husband died leaving two daughters and one son. The daughters were Candumma and Ansa Umma while the son was Abdul Rahaman. Abdul Majeed the 13th defendant is the only child of Abdul Rahaman. The plaintiff and the other defendants are the successors in title of the two daughters of Muttu Natchia. The 13th defendant took up the position that P2 did not create a valid *fideicommissum*. He also averred in his answer that Muttu Natchia had " put him in complete possession " of the property and that thereafter he had been in sole and exclusive possession of it and had acquired a prescriptive title to the entire property or at least to the shares claimed by the plaintiff and 1, 2, 5, 6, 7, 8, 11 and 12th defendants and the rights which the 9th and 10th defendants derived from one Noor Lahira the grand-child of Ansa Umma.

The learned District Judge held that P2 created a valid *fideicommissum* which endured for four generations and rejected the claim of the 13th defendant based on prescription. He allotted shares according to the devolution of title as set out in the plaint and entered a decree for sale. This appeal is by the 13th defendant against the judgment and decree.

At the hearing of this appeal the finding of the learned District Judge that the deed P2 created a valid *fideicommissum* binding on four generations was not challenged. The learned counsel for the appellant, however, contended that his client had established a prescriptive title to the half share which devolved on the 2nd to 9th defendants and Noor Lahira. That is the main question for decision on this appeal.

At the trial the counsel for the plaintiff made an admission regarding the possession of this land. It is recorded in the following terms. " Mr. Weerasinghe admits that the 13th defendant's father has been in possession from prior to 1916. " The only persons who gave evidence were the 2nd defendant and the 11th defendant. The 13th defendant neither gave evidence nor called any witness on his own behalf. The 2nd defendant was called on behalf of his sister the plaintiff while the 11th defendant did not give any evidence whatsoever in regard to

possession. However, it was elicited from the 2nd defendant in cross-examination that from the time he became aware of things the 13th defendant had been collecting the rent of this property. It is significant to observe that the age of the 2nd defendant when he gave evidence was 32. After the plaintiff's case was closed the following admission is also recorded. " Plaintiff admits that from 1916 the 13th defendant collected the rents. "

Thus the prescriptive title set up by the appellant rests solely on the two admissions I have quoted above and the statement of the 2nd defendant that from the time he came to know things the 13th defendant had been collecting the rent of the building which stands on this land which is 12·61 perches in extent. The plan P1 reveals that practically the whole land is covered by this building. It is rather remarkable that although it was elicited from the 2nd defendant in cross-examination that the 13th defendant collected the rent yet no attempt was made to obtain any admission from him that the entire rent collected was also appropriated by the 13th defendant. I do not think for a moment that when the counsel for the plaintiff admitted that from the year 1916 the 13th defendant was in possession and before that the latter's father had been in possession he meant to concede that the possession they had was of the character contemplated by section 3 of the Prescription Ordinance. The word " possession " was obviously used by him in a loose and vague sense. Probably he meant merely physical possession and this is made clearer by the 2nd admission which only conceded that the 13th defendant collected the rent. If he admitted that these two persons had possession in the sense the word is used in that section there was no purpose in going on with the trial thereafter. From the evidence of the 2nd defendant and the two admissions referred to, one cannot reasonably say that anything more was conceded than that the 13th defendant let out the premises and collected the entire rent. There is no definite evidence as to what he did with the rent whether he appropriated the whole of it for himself, shared it with the other co-owners, spent it on the maintenance of the building or used it for charitable purposes. It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners. If the 13th defendant did not appropriate for himself the entire rent his claim to this property on a prescriptive title is quite untenable. The prescriptive title is set up on the basis that he appropriated the entire rent for himself. Assuming that he did so, although the evidence is insufficient for so holding, is he entitled to succeed on the issue of prescription ?

As the deed P2 created a valid *fideicommissum* the 13th defendant and the other descendants of Muttu Natchia and her husband would be co-owners of this property. In *Corea v. Iseris Appuhamy* [1] the Privy

[1] *(1911) 15 N.L.R. 65.*

Council recognized the principle " Possession is never considered adverse if it can be referred to a lawful title ". There is no doubt that in the instant case the 13th defendant entered into possession of the property in the character of a co-owner. In that case the Privy Council further held that, in law, the possession of one co-owner is also the possession of his co-owners, that it was not possible to put an end to that possession by any secret intention in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession. An invitation by the counsel for the respondent to presume an ouster or something equivalent to an ouster from Iseris's long-continued possession was rejected by Their Lordships of the Privy Council in that case but the point was not fully considered.

In *Tillekeratne v. Bastian* [1] a case decided by a Bench of three Judges, this Court held that it was 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 had since become adverse. Bertram C.J. who delivered the main judgment in that case referred to the observations of Lord Mansfield in *Doe v. Prosser* [2] and followed the principle enunciated therein. Lord Mansfield said in that case " But if, upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough .....In this case no evidence whatever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is sufficient ground for the jury to presume an actual ouster....."

Whether the presumption of ouster is to be drawn or not depends on the circumstances of each case. In *Tillekeratne v. Bastian* [1] there were three circumstances of great importance which justified this Court in presuming an ouster. They were :—(1) Bastian whose share was in issue had not been recognized by the other members of his family as the lawful child of his father (2) Neither Bastian nor his vendee claimed a share of the plumbago dug from the land and (3) The share of this land purchased from Bastian was not included in the schedule of assets of the vendee when he became insolvent. There are no circumstances of such importance in the instant case.

In regard to the observations of Lord Mansfield referred to above I would venture to say that there is some risk in applying the principle enunciated by him indiscriminately to a set of similar circumstances existing in this country. Our land tenure is different from that prevailing in England and our laws of inheritance in respect of immovable property also differ from theirs. Common ownership of lands is rampant here whereas it is comparatively rare in England. Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of

[1] *(1913) 21 N.L.R. 12.* [2] *(1774) 1 Cowper 217.*

our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of the ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalized for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession.

In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider the following, among other matters :—

(*a*) The income derived from the property.

(*b*) The value of the property.

(*c*) The relationship of the co-owners and where they reside in relation to the situation of the property.

(*d*) Documents executed on the basis of exclusive ownership.

If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which when taken in conjunction with other matters would weigh heavily in favour of adverse possession on the part of that co-owner. The value of the property is also relevant in considering this question although it is not so important as the income. If the co-owners are not related to one another and they reside within equal proximity to the property it is more likely than not that such possession is adverse and it would be particularly so if the property is valuable or the income from it is considerable. If the co-owners are also co-heirs the position would be otherwise.

In this case it is unfortunate that no evidence has been led to show what the income from this property was. If the rent was high it would have been a point in favour of the 13th defendant if he appropriated the whole of it. The fact that no evidence was adduced by the 13th defendant on the question of rent, probably, indicates that the rent was not much. In the plaint the property is valued at Rs. 75,000. That would appear to be a fair valuation as the premises were situated in Prince Street, Pettah. The building on it must be an old one because none of the co-owners claimed to have constructed it. If the rent was small, not much would have been left, after paying the rates and taxes, to be shared by the co-owners. If that assumption is correct the fact that the other co-owners did not press the 13th defendant for their shares of the income would not be a strong point against them. That of course, is on the basis that the 13th defendant appropriated to himself the whole income. In this case the 13th defendant has failed to produce a single document executed by him on the basis that he was the sole owner of the property.

The absence of such documents goes to show that he did not intend to change the character of his possession or to assert a title to the whole property.

There is also no ostensible reason why the other co-owners should have meekly acquiesced if they became aware that the 13th defendant was setting up an independent title to the entire property.

In my view the evidence of possession by the 13th defendant is wholly insufficient to hold that he has acquired a prescriptive title to a share of any of the co-owners.

I am also inclined to the view that no occasion to draw a presumption of ouster arises where a co-owner relies only on his own exclusive possession, as in this case, in support of the prescriptive title he sets up. The 13th defendant relied on his possession alone according to the statement of claim filed by him. Therefore he ought to know when he decided to assert a title to the property adverse to the interests of his co-owners. What is the overt act he did which brought to the notice of his co-owners that he was denying their rights to the property ? Did he refuse to give their shares of the income ? He did not say so. But the burden was on him to establish the prescriptive title. The presumption of ouster is drawn, in certain circumstances, when the exclusive possession has been so long-continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was in fact a denial of the rights of the other co-owners. The duration of exclusive possession being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster. But in the instant case the party who claimed to have originated the adverse possession was alive at the time of the trial. He is no other than the 13th defendant himself. There was no necessity, therefore, to resort to a presumption of ouster. The 13th defendant's adverse possession, if any, was a question of fact which he could and should have proved. He failed to do so. In *Tillekeratne v. Bastian* [1] Bertram C.J. while dealing with the circumstances in which the presumption of ouster may be drawn stated " If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners ; that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the property, it is artificial in the highest degree to say that such person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can

[1] *(1918) 21 N. L. R. 12.*

be pointed to as originating or demonstrating the adverse possession." All the circumstances set out in this passage are not present in the exclusive possession attributed to the 13th defendant in this case. It is significant to note that the learned Chief Justice contemplates here a case where *a co-owner and his predecessors in interest* are concerned. I do not think that he would have been prepared to draw the presumption of ouster if the exclusive possession relied on was solely that of the co-owner who set up the prescriptive title. In such a case the ouster or something equivalent to ouster would have to be proved, as any other question of fact, by leading the necessary evidence.

The presumption that possession is never considered adverse if it can be referred to a lawful title may sometimes be displaced by the counter-presumption of ouster in appropriate circumstances. However, this counter presumption should not be reached lightly. It should be applied if and, only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time, in the distant past, the possession became adverse to the rights of the co-owners. Indeed, this is not such a case.

The appeal must therefore be dismissed. The judgment, however, needs variation on one point. The learned District Judge was of the view that the rights allotted to the plaintiff and certain defendants specified by him were free of the *fideicommissum*. That is not correct. Only the 1/9th share originally belonging to Noor Lahira and which devolved on 9 to 12th defendants will not be subject to the *fideicommissum*. As this *fideicommissum* endures for four generations it would be only the 5th generation of *fideicommissary* heirs who would inherit the property free of the *fideicommissum*. Therefore the proceeds of sale of the balance 8/9ths of the property should be deposited in Court and would be subject to the *fideicommissum*. The substituted defendants appellants will pay the costs of this appeal to the respondents.

H. N. G. FERNANDO, J.—

It is common ground in this case that the land which is the subject of the action belonged originally to one Ibrahim Lebbe Ahamado Lebbe. By a deed No. 260 of 16th July 1872 he made a gift of that land to his wife Muttu Natchia subject to certain conditions. Muttu Natchia had three children ; her son Abdul Rahuman was the father of the 13th defendant ; her two daughters were the ancestors of the plaintiff and the other defendants. When the plaintiff instituted this action for the partition of the land on the basis that the deed P2 created a *fideicommissum* in favour of the descendants of Muttu Natchia up to the fourth generation, the 13th defendant filed answer claiming that the deed P2 of 1872 did not create a *fideicommissum* and also that the deed was void for want of acceptance on behalf of the persons designated as *fideicommissaries*. In addition the 13th defendant claimed that Muttu Natchia had placed him (the 13th defendant) in complete possession of the property and that he

had acquired prescriptive title thereto as against all or some at least of the other parties to the action. The issues concerning the question whether the deed did create a valid *fideicommissum* and the question of due acceptance were answered in the lower Court against the 13th defendant, and the correctness of those answers has not been canvassed at the hearing of the appeal. On behalf however of the appellants, who are the heirs of the 13th defendant who died after the filing of the appeal, it has been strenuously argued that the appellants are entitled to a decree in their favour under section 3 of the Prescription Ordinance in respect of the shares of certain of the defendants in the action. I have therefore to refer to the evidence concerning possession and to the conclusions reached by the District Judge on the issue of prescription.

At the commencement of the trial, the Counsel who appeared for the plaintiff is recorded as having admitted that " the 13th defendant's father had been in possession from prior to 1916 and that the 13th defendant came into possession in 1916 ". Thereafter the second defendant, a brother of the plaintiff, gave evidence. According to this evidence, the plaintiff, her sister the first defendant, and her brother the second defendant succeeded to interests in the property on the death of their mother in 1939 but were all minors at that time. The second defendant, who was the eldest of the three was born in 1923, and would have attained majority only in 1944. The plaint having been filed in September 1953 it is clear that the 13th defendant cannot claim a decree under the Prescription Ordinance, in respect of the shares to which these three parties were entitled, and the District Judge so held. This finding is not now challenged.

In regard to the interests of certain other parties, there was no evidence which established clearly the time at which their interests accrued or their ages at that time. The learned District Judge however took the view that it was for the 13th defendant to prove the time of accrual of these interests and to establish that the parties have been free of the disability of minority for over ten years prior to the institution of the action. On this ground he held that the 13th defendant, having failed to establish the necessary matters, was not entitled to a decree in respect of the interests of the parties concerned. He accordingly allotted to the 13th defendant only the one-third share which under the deed P2 accrued to him as the only child of his father Abdul Rahaman and rejected his claim to the entirety of the property. It has been argued for the appellants that the District Judge wrongly placed on the 13th defendant the burden of showing when the interests of these other parties accrued and of further establishing that they were free of the disability of minority referred to in section 13. It seems to me that this argument is entitled to succeed, and in the absence of evidence to the contrary, I will assume that neither the proviso to section 3, nor the provisions of section 13 can be of avail to these parties.

The second defendant and the eleventh defendant were the only witnesses called at the trial, the second defendant being called on behalf of the plaintiff and the eleventh defendent on his own behalf. In his

evidence-in-chief the second defendant gave no evidence whatsoever concerning possession of the property, but in cross-examination the following questions and answers were recorded :—

Q. You know who is occupying these premises ?

A. A. R. Abdul Majeed the 13th defendant is occupying these premises.

Q. Has he not rented it out to anybody ?

A. He has rented it out and he is collecting the entire rent. From the time I became aware of things he has been collecting the rent.

The 11th defendant gave no evidence concerning possession and *the 13th defendant neither gave evidence himself nor called any witnesses.*

The learned District Judge did not expressly consider in his judgment the question whether the possession of the 13th defendant was of the character required by section 3 of the Ordinance. He has either assumed that his possession was of the requisite character, or else considered it unnecessary to deal with the question because he decided that in any event the claim of the 13th defendant had to fail on other grounds.

The arguments for the appellants have been, firstly that the learned District Judge impliedly held, and in view of the admission of plaintiff's Counsel could rightly hold that the possession of the 13th defendant was of the nature contemplated in section 3, and secondly that such a conclusion was justified by the evidence which is reproduced above. As to the first argument, I am quite unable to accede to it. Even if the admission " that the 13th defendant's father had been in possession before 1916 and that the 13th defendant came into possession in 1916 " can legitimately be construed to mean that the possession of the 13th defendant had been " undisturbed and uninterrupted " since 1916, it is inconceivable that the Counsel who appeared for the parties opposed to the 13th defendant did intend to concede to the latter the right to a decree under section 3. The admission, for what it was worth, was made at the commencement of the trial by Counsel appearing for the plaintiff, who could in no way be prejudiced by it, because he had been a minor and was in any event protected by section 13. No similar admission was made by Counsel representing the fourth to eighth defendants, or by Counsel representing the ninth and tenth defendants, all of whom are *fideicommissaries* under the deed P2. In fact at the stage of the addresses it was stated on behalf of the ninth and tenth defendants that, even if a *fideicommissum* had not been duly created, these defendants were in any event co-owners against whom the 13th defendant, who was not a stranger, could not prescribe. In these circumstances, it is impossible to regard the admission by the plaintiff's Counsel as having involved a concession, binding on the other parties, that the character of the 13th defendant's possession has been of such a nature that the possession could be of avail against his *co-fideicommissaries* or co-owners.

I have therefore to consider the second argument for the appellants, namely that the evidence reproduced above was sufficient to entitle the 13th defendant to a decree against all those parties who had failed to bring themselves within the protection afforded either by the proviso to section 3 or by section 13. Be it noted that this evidence was only to the effect that the 13th defendant let out the premises and had always *collected* the rents : there was no specific statement either that he had appropriated the rents exclusively for himself or that he had never given a share to any of the other fideicommissary heirs of Muttu Natchia.

But let me assume, although I cannot agree, that the only reasonable meaning of the evidence of the second defendant is that the 13th defendant for nearly forty years from 1916, not only gathered the rents of the premises, but also appropriated them solely for himself without ever giving or conceding a share in the rents to any descendants of his two aunts. Upon this assumption, the 13th defendant undoubtedly had *undisturbed and uninterrupted possession* of the property in the sense contemplated by section 3 of the Prescription Ordinance, for (in the language of the parenthesis in section 3) his possession was " unaccompanied by payment of rent, by the performance of any service or duty, or by any other act from which a right existing in any other person would fairly or naturally be inferred ". But a person is not entitled to a decree under section 3 by virtue of such possession alone : the section requires the proof of a second element, namely that the possession must be " *by a title adverse to or independent of that of the claimant or the plaintiff in such action* ". That this is a distinct and separate element was emphasised by Bertram C.J. in his judgment in *Tillekeratne v. Bastian*[1]. Having referred to a view earlier prevailing that the parenthesis was intended to be an explanation of everything which the section required the possessor to establish, and having cited certain judgments and Thompson's Institutes as endorsing that view, the learned Chief Justice, adopting an expression earlier used by Wendt, J., pointed out that the *coup de grace* had been administered by the decision in *Corea v. Appuhamy*[2] to the theory that the words in the parenthesis were intended as a definition of " adverse title ". He then referred to the suggestion made in Pereira's Laws of Ceylon that the parenthesis was intended to be explanatory of the expression " undisturbed and interrupted possession "—a suggestion which was expressly adopted by the Privy Council in *Corea's* case (at page 77) :—" The section explains what is meant by undisturbed and uninterrupted possession . . . . Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, *the question remains, has he given proof, as he was bound to do, of adverse or independent title ?* ".

Having regard to my own unfamiliarity with a subject which has received much critical and learned consideration from the Bench and the Bar, and in connection with which Lord Mansfield had observed :—" the more we read, unless we are very careful to distinguish, the more we shall be confounded ", I must be pardoned if, in the course of my attempt to analyse the problem which possession by a co-owner presents, I emphasise too much that which should have been obvious. Firstly, section 3 imposes two requirements : " undisturbed and uninterrupted possession "

[1] *(1918) 21 N. L. R. 12.* [2] *(1911) 15 N. L. R. 65.*

and " possession by a title adverse or independent " ; secondly the question whether the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Counsel in *Corea's* case that a co-owner in possession can satisfy the second requirement in two different modes :—

(*a*) by proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title ; in fact Their Lordships, in *Corea's* case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner ;

(*b*) by proving that, although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been by an adverse or independent title.

Long-continued possession by itself is clearly not contemplated in either of these two modes of proving that the possession of a co-owner had been " by a title adverse or independent ". The appellants therefore obtain no assistance from the decision in *Corea's* case. On the contrary I find it impossible to distinguish the facts of that case from the facts of the present one, and the decision operates strongly against the appellants. I have now to consider the so-called presumption of ouster which was referred to by the Privy Council in the judgment.

In *Tillekeratne v. Bastian*[1] Bertram C.J. adopted from *Smith's Leading Cases,* the definition of adverse possession, i.e. " possession held in a manner incompatible with the claimant's title ", and he observed that the question whether possession by a co-owner is adverse must be considered in the light of three principles of law, the third of which is :— " That a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity ". Having thereafter referred to the English Law, and to early Ceylon cases, he went on to hold that there is a counter-principle which is part of the law of Ceylon and that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, *to presume that possession originally that of a co-owner has since become adverse.* He later explained how this presumption should be applied :—" It is in short a question of fact, whenever long-continued exclusive possession is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that *that separate and exclusive possession had become adverse at some date* more than ten years before action was brought ". The words I have parenthesised indicate that this presumption is available in connection with the mode (*b*) of proving an adverse or independent title which I have elicited from the judgment in *Corea's* case, namely in order to establish that although the entry had been *qua* co-owner, the possession had commenced at some later time to be upon an assertion of an adverse title. No such presumption would be available to counter the principle

[1] *(1918) 21 N. L. R. 12.*

that a co-owner is presumed to *enter* by virtue of his lawful title. The presumption referred to by Bertram C.J. has since been usually referred to as the presumption of ouster.

The argument for the appellants has been that this presumption of ouster, applies in their case, that it is just and reasonable that the possession of the 13th defendant, having been exclusive and of long duration, should be regarded as having become adverse at some time after 1916. Let me first repeat the language employed by Bertram C.J. :—" It is open to a Court from lapse of time *in conjunction with the circumstances of the case* . . . . . "; " whenever long-continued possession is proved to have existed, whether it is not just and reasonable *in all the circumstances of the case* . . . . ." Long-continued possession (for nearly 40 years) was established indisputably in the case of *Tillekeratne v. Bastian* [1] but that was not all—Each of the three Judges thought it necessary, as indeed Bertram C.J's language rendered it necessary, to refer to circumstances, quite distinct from the mere duration of possession, which induced them to apply the presumption :—

" Though Babappu was the legitimate son of Allis, *he was not accorded this status by the family* " ;

"It is a very significant fact that Tillekeratne, who purported to have acquired his (Babappu's) share in 1893, became insolvent in 1897, *and did not include this land in the schedule of his assets.*"

" It would moreover be *contrary to equity that a person possessing a doubtful status* in a family, who has lived apart from it for a generation in another locality *should be permitted* through the medium of a sale to a speculative purchaser to revive his obsolete pretensions, and *to assist those claiming through that purchaser to invade the family inheritances.*"

(per Bertram, C.J.)

" Although he (Babappu) purported to sell to Tillekeratne in 1893, his vendee never possessed, nor was the land included in the inventory of his estate on his death in 1901, and *his* (the vendee's) *heirs made no attempt to assert any right until 1916.* "

(per Shaw, J.)

" Babappu appears not to have been really recognized as a legitimate son of Allis by the rest otf he family. *He must have known that he was being intentionally excluded from possession.* "

" 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. "

(per de Sampayo, J.)

There were thus in that case several proved circumstances rendering it reasonable to presume that the possessor's title had become adverse to that of their co-owner : the co-owner's status in the family was doubtful and had not been accorded to him : valuable minerals had been appropriated for the sole benefit of the possessors : the co-owner must have known that he was being intentionally excluded from possession : the actual claimant was a vendee from the co-owner, but this vendee had himself neither possessed nor claimed his share for over ten years. Were not these cogent circumstances from which to infer that the possession had become adverse at some time ?

The passages which I have cited from the judgments in *Tillekeratne v. Bastian* were *preceded* by certain observations which fell from Bertram C.J (at pages 20 and 21) :—

> " It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners ; that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. "

Read out of their context, these observations may tend to support the view that adversity may be presumed from mere long-continued and exclusive possession. They emphasise the absurdity and artificiality which might prevail if there were no " counter-presumption ", but they do not constitute an enunciation of the principles governing the application of that presumption. They are only a preface or preamble, so to say, to the enunciation of principles which is to follow and which is contained in the passages I have earlier cited, and cannot be regarded as altering or extending the principles as so enunciated.

In *Hamidu Lebbe v. Ganitha*[1], one of two brothers had been in exclusive possession for nearly forty years. They had quarrelled, and the excluded brother had left the ancestral village. Dalton J., relying on the decision in *Tillekeratne v. Bastian*, was much inclined to presume from these circumstances that this brother must unsuccessfully have preferred a claim to his share, and that the possession would thereafter have been adverse. He felt, however, that the Privy Council decisions in *Corea's* case and in *Brito v. Muttunayagam*[2] (where a father had possessed his

[1] *(1925) 27 N. L. R. 33.*

[2] *(1918) 20 N. L. R. 327.*

widow's share after a quarrel with his children) did not permit him to presume adverse possession. Ennis J. observed that " *some definite facts would have to be proved* " from which one could infer a change in the character of the possessor's intention with regard to the holding of the land. If the quarrel and the departure of the co-owner from the village did not constitute sufficiently definite facts from which this inference could be drawn, would it ever be reasonable to draw that inference where all that is proved (as is so in the present case) is long-continued possession ?

There have been numerous subsequent decisions of this Court which have denied to co-owners in exclusive possession a decree under section 3 of the Prescription Ordinance, but it is sufficient for present purposes to summarize their effect by reference to some of them. Exclusive possession for many years, coupled with the execution by the possessor of deeds inconsistent with the title of his co-owners, is insufficient in the absence of evidence that the co-owners knew of and acquiesced in the execution of the deeds. This proposition was accepted as settled law in *Umma Ham v. Koch*[1] which followed earlier decisions to the same effect :—*Caresem v. Ahamadu*[2] and *Sideris v. Simon*[3]. The preparation of a Plan indicating that the possessor regarded himself as exclusively entitled to a specific portion of the common land and purporting to allot another specific portion to his co-owners, coupled with dealings by the possessor with his portion on the basis of sole ownership, does not justify a presumption of ouster in the absence of evidence that the co-owners acquiesced in the preparation of the plan of partition :—*Githohamy v. Karanagoda*[4]. It is significant that, in these and other cases, there was almost invariably reliance, even by unsuccessful possessors, *upon some circumstance additional to the mere fact of long and undisturbed and uninterrupted possession,* and that proof of some such additional circumstance has been regarded in our Courts as a *sine qua non* where a co-owner sought to invoke the presumption of ouster.

I am aware of one decision only which is seemingly contrary to the *cursus curiae* as just stated. There is language in the judgment of Canekeratne J. in *Subramaniam v. Sivaraja et al.*[5] to indicate that the taking of profits exclusively and continuously for a very long period, and the acquiescence of co-tenants in the possessor's omission to account, would justify the presumption of an ouster. But there is no reference in the judgment to any earlier decision relative to prescription by co-owners, and the facts as stated in the judgment show that there had been no proof that the person in possession claimed title from the same source as did her adversaries. On the contrary the claims of title were mutually exclusive. I cannot regard this case as providing a relevant precedent, but even if it does there is at least one ground upon which it should be distinguished. While the possessor's name had continuously appeared in the assessment Register of the Sanitary Board as the owner of the property, and she alone had paid the rates, the alleged co-tenants had in some years placed their names also on the Register. The fact that they

[1] *(1946) 47 N. L. R. 107.*
[2] *(1923) 5 C. L. Rec. 170.*
[3] *(1945) 46 N. L. R. 273.*
[4] *(1954) 56 N. L. R. 250.*
[5] *(1945) 46 N. L. R. 540.*

did so but nevertheless did not receive any of the profits from the possessor might have justified the inference that they had staked a claim to their share in the profits and had been rebuffed by the possessor. Even in that case therefore the possessor, if she was properly regarded as a co-owner, did rely upon a circumstance additional to the fact of long possession, as a ground on which the presumption of ouster might be drawn.

That line of decisions, one of the more recent being *Fernando v. Podi Nona* [1], which recognize the principle that, where a stranger obtains a transfer of the entire land from one co-owner, his possession commences as adverse, is not relevant to the present discussion. "The possession of a stranger in itself indicates that his possession is adverse":—Leach C. J. in *Pillai v. Rawther* [2]. When the title upon which the stranger enters into possession, though in law defective, is based upon a transfer to him of the entire land, it is nevertheless a title adverse, inasmuch as it constitutes a denial of the rights of others. What such a stranger proves is an *entry* by a title adverse—the mode (*a*) of proof which I have elicited from the judgment in *Corea's* case, and not the mode (*b*) (i.e. of change in the character of the possession) which is required of a person who enters *qua* co-owner. Those decisions therefore throw no light on the question I am now considering.

The judgment in the case of *Rajapakse v. Hendrick Singho* [3], though delivered on June 22, 1959, was not referred to during the argument of the present appeal, and I was unaware of it when the preceding part of this judgment was prepared. The facts in that case were, briefly, as follows :—The original owner had conveyed an undivided portion of the land to T by deeds executed in 1919 and 1920 : T in 1921 transferred an undivided 11/19 share to his grandson, who in turn sold the undivided interests in 1927 to G: the plaintiff purchased the interests of G in May 1953 and instituted a partition action in August of the same year. The defendants, who were descendants of the original owner and thus entitled to the shares outstanding after the transfers of 1919 and 1920, claimed that they had exclusively possessed the entire land from 1922 and had divided the produce among themselves and to the exclusion of the plaintiff's predecessors in title. The grandson of T, who had been a predecessor of the plaintiff and had been the owner of the undivided interests for about six years, admitted at the trial that neither he nor his successor G had ever occupied the land, and that the defendants had lived on the land and enjoyed the produce to the exclusion of himself and G. It was held on these facts that there was overwhelming evidence upon which ouster could be presumed.

The plaintiff in that case claimed under T, *who was a purchaser* and not an heir of the original owner, and the plaintiff's predecessors were strangers to the family of the original owner. It is reasonable to assume that when a stranger purchases undivided interests in land, he does so as an investment and with the object of enjoying his due share of the fruits. If having purchased such an interest, a stranger does not assert his right to possession, but instead acquiesces in the exclusive appropriation

[1] *(1954) 56 N. L. R. 491.* [2] *I. L. R. 23 Bomb. 137.*

[3] *(1959) 61 N. L. R. 32.*

of the entire produce by the members of the family of the original owner, it may be reasonable to presume from his unusual conduct that he either acknowledged the exclusive rights of the family or else failed in an effort to assert his own rights. Indeed this same feature, namely that the rights of the family were challenged only after a long period of acquiescence on the part of a stranger-purchaser, was one of the circumstances which induced this Court in *Tillekeratne v. Bastian* to presume that there had been an ouster. If the *ratio decidendi* of the decision in *Rajapakse v. Hendrick Singho* is that acquiescence, on the part of a purchaser of an undivided interest, in the exclusive possession of the entire land and the appropriation of its profits by the other co-owners, is a circumstance from which the adversity of the possession of the other co-owners can be inferred, then that decision may be in consonance with the *dicta* of Bertram C.J. and Ennis J. to which I have earlier referred. If that be the basis of the decision, it is easily distinguishable from the present case, where the title has throughout remained vested in the members of the same family.

Before concluding this judgment, it may be useful to add one observation concerning the presumption of ouster. Some of the presumptions mentioned in the Evidence Ordinance are arbitrary, in the sense that a Court is permitted to presume the existence of facts, even though it may be uncertain that the facts did indeed exist. The presumption of legitimacy is a good example of such an arbitrary presumption : a Court may be compelled to regard the child of a wife as legitimate despite the availability of evidence, whether direct or in the form of admissions, which can establish illegitimacy. The presumptions as to the regularity of official acts and the " course of business " are also examples, though less pointed, of something akin to a " rule of thumb ". In my view, however, the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tend to show, firstly the probability of an ouster, and secondly the difficulty or impossibility of adducing proof of the ouster. If the circumstances justify the opinion that possession must have become adverse at some time, a Judge is not in reality presuming an ouster : he rather gives effect to his opinion despite the absence of the proof of ouster which a co-owner would ordinarily be required to adduce. This aspect of the matter was touched upon by Bertram C. J. in *Tillekeratne v. Bastian* (at page 18).

The principle as stated in judgments of Bertram C. J. in *Tillekeratne v. Bastian* and of Ennis J. in *Hamidu v. Ganitha* [1], that the inference of ouster can only be drawn in favour of a co-owner upon proof of circumstances additional to mere long possession, has been consistently recognized and strictly applied. To draw that inference from mere duration of possession would be to disregard the very terms in which they stated the principle, and to ignore the requirement of an " adverse or independent title " prescribed in section 3. Moreover, if exclusive possession alone is to suffice, after what period will it be just and reasonable to presume ouster ? There being nothing in the section to the contrary, a particular Judge may well be inclined to presume ouster from possession

[1] *(1925) 27 N. L. R. 33.*

for a period of ten years : but if another Judge declines to do so unless the period is much longer, can it be said that one Judge is right and the other wrong ? Will not such a situation be reminiscent of the days when the principles of Equity were said to vary with the length of the Chancellor's toe ? The proposition we are invited to uphold is not only contrary to settled law ; it contains no criterion by the application of which consistency of judicial decisions can be reasonably expected.

Our Courts have constantly recognized the rule that undisturbed and uninterrupted possession by a co-owner does not suffice to entitle him to a decree unless there is proof of the ouster of the other co-owners. The decision in *Tillekeratne v. Bastian* recognized an exception to that rule and permits adversity of possession to be presumed in the presence of circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period. If the true effect of the exception is that the fact of such possession *simpliciter* established a title "adverse or independent", what need is there for a co-owner to prove ouster and what scope remains for the operation of the rule ? What need for a co-owner to prove anything more than is required of a trespasser ?

I would hold for the reasons stated that the 13th defendant was entitled only to the one-third share which accrues to him under the deed which created the *fideicommissum*, and that he did not acquire any title by prescription to any other share. The judgment of the District Judge has therefore to be affirmed, subject to the correction of one error therein. As stated in the judgment, it is only the fifth *fideicommissary* heir who holds the property free of the *fideicommissum*. It was common ground at the hearing of the appeal that none of the parties are of the fifth generation. Accordingly, the *fideicommissum* attaches to all the shares allotted in the judgment and to the proceeds of sale, except to the 1/9 share referred to by my brother de Silva. I agree with the order proposed by him.

Appeal dismissed, subject to the correction of one error.