1948 *Present :* **Basnayake J.**

PERERA *et al.*, Appellants, *and* THOMAS SINNO *et al.*, Respondents.

S. C. 13—C. R. Panadure, 10,843.

Co-owners—Tattumaru possession—Adverse possession while arrangement lasts—Prescription against co-owners—Rights of co-owners to property—Must all be parties to action ?

Where a person exercises at agreed intervals of time not only his rights of possession but also the rights of possession of others by virtue of a customary arrangement among the co-owners, such possession can never, while the arrangement lasts, afford a basis on which prescriptive rights can be acquired as against the parties to the arrangement.

Held, further : The respective rights of co-owners to a land can be properly determined only in proceedings to which all of them are parties.

APPEAL from a judgment of the Commissioner of Requests, Panadure.

M. D. H. Jayawardene, for the plaintiffs, appellants.

H. A. Koattegoda, for the defendants, respondents.

Cur. adv. vult.

April 27, 1948. BASNAYAKE J.—

The two plaintiffs-appellants (hereinafter referred to as the plaintiffs) instituted this action on October 19, 1944, against the four defendants-respondents (hereinafter referred to as the defendants), asking that they be declared entitled to 1/30 + 1/8 of 3/60 shares of a paddy field called Galpotte Kumbura of five bushels paddy sowing extent. The defendants admit that the second plaintiff is entitled to 1/8 of 3/60 shares in the field but dispute his claim to 1/30 share and ask that his action as respects that share be dismissed.

The history of the devolution of title to the paddy field in question so far as is material to the decision of the present dispute is as follows: One Salmon Perera was entitled to an undivided half share. He died leaving five children Malhamy, Bunja Appu, Geeris, Elenis, and Nonahamy. Malhamy died leaving three children, Noris, Nonoh ay and Jomis. Jomis sold 1/30 share to Noris and Nonohamy on deed No. 24,209 of August 8, 1910. Noris died leaving eight children one of whom is the second plaintiff. Nonohamy died leaving four children Don Siman, Babu Singho, James, and Dona Susana Hamine. Don Siman died leaving two children, Carolis and Nonnohamy. These two by deed No. 13,730 of March 7, 1944 (hereinafter referred to as P 2) sold their shares to the plaintiffs. The defendants resist the plaintiffs' right to the share claimed by virtue of this deed. The first defendant Vithanage Don Thomas, described in the plaint as Vithanage Thomas Sinno, bases his claim on deed No. 2,533 of October 3, 1927 (hereinafter referred to as D 1) executed by the aforementioned Babu Singho and James by which they conveyed an undivided 1/10 share of a field called Galakumbura of four bushels paddy sowing extent to Vitanage Don Charlis, Vitanage Don Thomas, and Vitanage Don Sedoris. Of the vendees mentioned in D 1 only the second named Vitanage Don Thomas is a party to these proceedings. The third defendant appears to have been added as a party as he along with the first defendant according to the plaintiffs actually cultivated the share of the first defendant's vendors Babu Singho and James before the sale in 1927. The second defendant is the wife of the first and the fourth is the mother of the third. It is not clear why they have been made parties to this action, and I cannot help feeling that the allegation in the answer that they have been wrongly and maliciously added is not entirely ill-founded. The first defendant does not assert that Babu Singho and James were entitled to 1/10 share but claims that since 1927 he has possessed the 1/10 that was conveyed to him. Clearly Babu Singho and James were not entitled to sell more than their share and even if they purported to do so the first defendant did not by virtue of D1 become entitled to more than their share. On the question of sale by co-owners of their interests in property owned in common, Voet says[1] :

> " If he sold the portions belonging to the others together with his own, he would not prejudice them in any way, nor pass their shares to the purchasers without their consent, although he and they were co-owners of all the estate and property of each other. "

[1] *Voet Bk. 10. 3. 7, Sampson's Translation, p. 392.*

The act of possession on which the claim is based is that this field which is cultivated in tattumaru was cultivated by the first defendant once in 1935 and next in 1944. He is supported by one D. S. Kotalawala, a Vel Vidane. Tattumaru is thus defined in Codrington's Glossary [1] :

> " Possession of a land cultivated or enjoyed by the joint owners in turns ; thus, if a field belongs to three families in tattumaru possession, each family will cultivate the whole field every third year ; if it were held in common, each family would take one-third of the produce every year. The rotation of the members of the family among themselves is called karamáruwa. "

The procedure adopted in respect of this particular field is that the owner of an undivided 1/30 share cultivates 1/3 of the field once in ten years. Though the first defendant claims an undivided 1/10 share the evidence is that his turn for cultivation after his purchase came first in 1935 and next in 1944.

The learned Commissioner of Requests has accepted the evidence of the first defendant that he possessed 1/10 share of the field since 1927 and held in his favour relying on the case of *Punchi et al. v. Bandi Menika,* 43 N. L. R. 547. I am afraid I cannot agree with the learned Commissioner. In that case my brother Jayetileke held that when one co-owner sells the entire corpus held in common and the purchaser enters into possession under the conveyance claiming title to the entire corpus, such possession is adverse to the co-tenants of the grantor. The present case is different. Here the first defendant is a co-owner and did not cultivate the land to the exclusion of the other co-owners. In fact, under the arrangement which subsisted among the co-owners, he had at the date of the commencement of these proceedings on his own showing cultivated the extent of land he claims to be entitled to cultivate only twice, the second occasion being the first since the plaintiffs' purchase of the disputed share, and this suit is the sequel to that act. In the case of possession such as we have here, where a person exercises at agreed intervals of time (once in ten years in this case) not only his rights of possession but also the rights of possession of others by virtue of a customary arrangement among the co-owners, I am inclined to the view that such possession can never, while the arrangement subsists, afford a basis on which prescriptive rights may be acquired as against the parties to the arrangement. I think the case of *Meydin Bawa, et al. v. S. Agamadu Lebbe* [2] supports this view. Before a co-owner can claim prescriptive rights to a land owned in common he must prove exclusive possession of the entire land extending over such a long period as to render non-possession by the other co-owners inexplicable, except upon the theory of acquiescence in an adverse claim [3]. There is no such evidence here. The defendant claims that he possessed the undivided 1/30 share claimed by the plaintiff who he admits is a co-owner entitled to an undivided 1/8 of 3/60 of the

[1] *Codrington's Glossary of Native, Foreign, and Anglicized Words, p. 58.*
[2] *(1879) 2 S.C.C. 87.*
[3] *Tillekeratne et al. v. Bastian et al., (1918) 21 N. L. R. 12.*

field. On such possession a prescriptive title cannot be acquired, for as Voet says [4],

> " by the very fact of holding the property in undivided shares with another a person acknowledges an associate ; nor can he acquire by prescription who has held not in his own name alone, but in the name of himself and another. "

The same proposition has been thus stated by the Privy Council in the case of *Cadija Umma v. Don Manis Appu* [5].

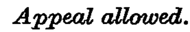
> " Thus in a case where A's possession has been on behalf of B or has been the possession of B (whether by reason of agency or co-ownership) it seems impossible to apply this definition clause as between B and A so as to defeat the rights of B. It cannot be applied to defeat the rights of a person in possession. Under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer is a matter which need not here be examined. Ouster apart, from 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. "

Although I have for the reasons stated above formed the conclusion that the learned Commissioner's decision must be set aside, I find myself unable to grant the plaintiffs their prayer. Admittedly there are several other co-owners of this field who are not parties to this action and the declaration which they seek, even if made in this action, would be ineffective as against those who are not parties. Besides, the respective rights of co-owners to a land can be properly determined only in proceedings to which all of them are parties. It has been so held by this Court in the case of *Uduma Lebbe and another v. Mehidin Lebbe and others*, 2 S.C.C. 148, which was cited with approval by the Full Bench in *Bargarge Juse Pasivoe Appuhamy v. Liana Appu and others*, 7 S.C.C. 190. The observations of Phear C.J. in the earlier case are relevant to this case and bear repetition.

> " In truth, it is very apparent that the questions which the plaintiffs desire to litigate between themselves and the defendant alone in this action are questions which are proper to, and can only be effectively determined in an action for partition. The civil court can seldom, if ever, interfere satisfactorily between joint owners of property in regard to the regulation of their joint enjoyment thereof ; that is matter to be settled and adjusted from time to time by the consent of all the owners. If they cannot manage to agree upon this, the alternative is to divide the property. No doubt recourse may often be usefully had to the court for the determination of any question which has *bona fide* arisen between the owners in regard to the relative proportions of their shares without the court being called upon to deal with the actual possession at all ; but even in that case it is essential that all the co-owners should be before the court. "

[4] *Voet Bk. 10. 2. 33, Sampson's Translation, p. 376.*
[5] *(1938) 40 N. L. R. 392 at 396.*

For the reasons I have discussed above the appeal is allowed but without costs as the plaintiffs have not brought their suit against the proper parties. The plaintiff's action is also dismissed without costs, but with liberty to institute fresh proceedings against the proper parties.



Appeal allowed.