1947 *Present :* **Jayetileke and Canekeratne JJ.**

FERNANDO, Appellant, *and* WIJESOORIYA *et al.*, Respondents.

S. C. 123—D. C. Kandy, 799.

Prescription—Action for declaration of title to land—Dismissal of action—Whether interruption of possession—Prescription Ordinance.

The appellant entered into possession of a certain block of land under a deed in 1926. When he brought an action for declaration of title to a small portion (lot B) of that land, about 1½ acres in extent, in 1933, the plaintiff-respondent denied the appellant's right to this portion and

claimed in reconvention title to a block 9 acres in extent which included for B. The appellant's action was dismissed *simpliciter*. The appellant continued in possession *inter alia* of lot B till the institution of this action in 1942.

Held, that the dismissal of the previous action was not an interruption of possession and that the appellant had acquired a prescriptive title to lot B.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera, K.C. (with him *E. B. Wikramanayake* and *H. W. Jayewardene*), for the ninth defendant, appellant.

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*), for the plaintiff, respondent.

Cyril E. S. Perera (with him *Vernon Wijetunge*), for the first defendant, respondent.

H. W. Thambiah (with him *L. G. Weeramantry*), for the third, fourth, and sixth defendants, respondents.

L. G. Weeramantry, for the seventh defendant, respondent.

Cur. adv. vult.

July 1, 1947. CANEKERATNE J.—

This is an appeal by the ninth defendant from a judgment ordering a partition of a land called Waljambugahamulahena among the repondents, the plaintiff and the first to the eighth defendants. The land to be partitioned is shown in plan No. 32/42; it is correctly described, according to the Judge, in title plan No. 51,686.

The Crown appears to have conveyed to Don Andris de Silva, Notary Public, by a grant dated July 19, 1867, an allotment of land in extent 9 acres, excluding a path 8 links wide; title plan 51,686 was annexed to his grant. A copy of this title plan, D 8, and an exhibit D 8A, a schedule from T. P. Register were produced by the respondents. D 8A gives in one column the number of the title plan—51,686, and in the opposite column, the name of the purchaser—D. Andris de Silva.

The appellant contends that D. Andris de Silva, later known as D. A. de Silva Wickramasinghe Karunaratne, who owned various allotments of land contiguous to one another consolidated all these lands and dealt with them as one estate called Rikillagasgoda estate. He mortgaged the estate including the tract of land described in his title plan to two Chettiars. At the sale in execution under the mortgage decree the estate was purchased by D. A. de Perera Appuhamy, the primary mortgagee of the estate who obtained Fiscal's transfer No. 9,047 dated February 5, 1879—a deed, as the Judge states, not produced at the hearing. D. A. de Perera Appuhamy transferred the estate by deed No. 525 of October 27, 1886 (9D) to G. Angohamy, the wife of G. V. Singho Appu.

The respondents' case is that on the death of D. Andris de Silva Wickramasinghe Karunaratne, one Wijeykoon Nona and Karunaratna Nona, his daughters, transferred the land called Waljambugahamulahena,

3 acres ad 14 perches in extent, which they held and possessed by right of inheritance from their father, to G. V. Singho Appu by deed No. 11131 of July 16, 1883 (P 5). G. V. Singho Appu died leaving a daughter Caronchihamy by his first wife, G. Angohamy his second wife, the plaintiff and the second defendant his children by his second wife. Angohamy married again and the third to the eigth defendant-respondents are the children of Angohamy. Caronchihamy sold her interests in this land to the first defendant.

Caronchihamy obtained judgment against Angohamy as administratrix of her father's estate, and in execution of the decree the estate called Rikillagasgoda estate was sold by the Fiscal to the appellant by Fiscal's transfer No. 21,601 of December 15, 1926 (9 D3); to the Fiscal's transfer is attached a sketch 9 D4—this sketch shows the extent as 110 A. 2 R. 28 P., a certified copy issued by C. L. Barsenbach, has been produced marked 9 D1. As the judge states—" According to this sketch, the land shown in title plan No. 51,686 is within it; it is thus clear that the land shown in the title plan 51,686 falls within the sketch attached to the Fiscal's transfer on which the ninth defendant based his title ".

At the trial there were 11 issues, or points in dispute, framed but only three need be considered now.

(1) Did G. V. Singho Appu by deed No. 11,131 dated July 16, 1883, become entitled to the land called Waljambugahamulahena? The Judge held that Singho Appu became entitled to the land called Walgahamulahena of 3 A. 0 R. 14 P. He and his successors in title later acquired title by prescription to the entire land called Waljambugahamulahena of 9 acres.

(2) Is the judgment and decree in D. C., Kandy, case No. 44,545 *res judicata* between the plaintiff and the defendants 1 to 8 on the one hand and the ninth defendant on the other ?

(3) Prescriptive rights of parties.

The Judge decided both these issues in favour of the respondents.

Action No. 44,545 was one instituted on November 22, 1933, by the appellant against the plaintiff-respondent. The appellant pleaded that he was the owner of the land called Rikillagasgodawatta about 100 acres in extent, depicted in the sketch plan filed with the plaint, under Fiscal's transfer No. 21,601 dated December 15, 1926, and that the defendant (plaintiff in the present action) has been, since the date of purchase, in the wrongful and forcible possession of the encroachment marked 1, about 1½ acres in extent in the sketch plan. He prayed for declaration of title to this portion. Answer was filed by the defendant on February 28, 1934. He prayed for the dismissal of the action and for a declaration that defendant and one Caronchihamy (here-in-before mentioned) and one Caroline Abeysekere (the first added defendant) be declared entitled to the land Rikillagasgoda of nine acres, that plaintiff be ejected therefrom and for damages against the plaintiff. The action was heard on December 4, 1935. A plan made by Surveyor Schokman dated July 9, 1935, was produced, plan marked X in the case. It purports to be a true copy from plan made by C. L. Barsenbach, dated December 5, 1928—

it is stated to be a copy of plan of T. P. 51,686 (portion of Rikilligasgoda estate of Mr. Fernando's). The portion marked 1 of the sketch plan filed with the plaint corresponds to lot A in plan X.

Fifteen issues were framed at the hearing. One issue (No. 6) is: prescriptive rights of parties. Another (No. 7) is damages. A third (No. 12) is: Did the plaintiff take wrongful possession of lot B in plan X after 1927 ?

The Judge held that the plaintiff failed to prove that the land conveyed to D. Andris de Silva Wickramasinghe Karunaratne by the Crown passed to D. A. de Perera Appuhamy on deed No. 9,047 ; he dismissed the action finding against the plaintiff also on the question of prescriptive title. He states: "Plaintiff asks me to presume on the facts disclosed in plaintiff's chain of deeds that the 9 acres shown in plan X are taken in by these deeds. In my view it would be presumption so to hold on the facts disclosed by an examination of these deeds . . . . I have no hesitation in holding that the evidence is insufficient to justify a finding that plaintiff's deeds P 1, P 3 and P 4 conveyed paper title to the 9 acres depicted in plan X . . . . Has the defendant paper title ? . . . . As I understand the defence, D 1 refers to the nine acres, and that the reference to 3 A. 0 R. 14 P. is a mistake for nine acres. This is absurd and cannot be entertained for a moment . . We have the defendant's own evidence . . . where he places the nine acres away from Jambugahamulawatta . . . . On the defendant's deeds too it is impossible to locate these nine acres . . . . The defendants and not the plaintiff have prescriptive title". The answer to issue No. 7 (damages) was Nil and issue No. 12 was "yes".

The appellant contended at the argument that he had proved his title to the entirety of the land in dispute, that the decision in the earlier action was not *res judicata*, and that in any case he had acquired a prescriptive title to lot 1, including the house B. The respondents supported the judgment of the trial Judge; it was also contended by them that the house B, the post office, stood on the portion of land in respect of which an order of dismissal was entered by the Judge.

It was agreed that the record of the proceedings in case No. 44,545 be sent for and the plan filed therein be examined. If one turns to the plan X filed in action No. 44,545 it will be seen that lot A corresponds to lot 3 in plan 32/42; the house marked 2 in plan X corresponds to the house marked C in plan 32/42, lot A 1 is a portion of lot B in plan X and lot B corresponds to lot 1 in plan 32/42. It is clear that the house B was not included in the portion of land which was the subject matter of the plaintiff's claim in that action.

The statutory rules relating to *res judicata* are contained in sections 34, 207 of the Code of Civil Procedure (Ch. 2 C. L. E.) ; these rules are not exhaustive and the principles of the English law on the subject appear to form part of the law in Ceylon.

Mr. Thambiah contended that the judgment in the action also must be examined in considering the question of *res judicata*. He referred in this connection to Caspersz on Estoppel p. 77 (3rd. Ed.) where it is stated that the decree is not the test of *res judicata*. Caspersz p. 49 states—The rule in this country appears to be that, although the decree in a

former suit operates as *res judicata*, the decree is to be construed with reference to the pleadings, and the record, in order to see what was in issue. The judgment must also be looked at to see what was in issue in the suit or what has been heard and determined, because the decree only states the relief granted or other determination of the suit. Even the acts of the parties immediately after the decree are very important to fix the meaning of indefinite terms in the decree.

The rule of *res judicata* applies in two classes of cases, in one of which a subsequent action is wholly barred by the decision in a former action by reason of the subject matter of the two actions being the same, and in the other the trial of one issue in a subsequent action is barred by adjudication upon the same issue in a former action, though the subject matter of the two actions is different—*Dingiri Menika v. Punchi Mahatmaya* [1].

In action No. 44,545 the appellant tried to get possession of lot 3 in plan 32/42 and the portion of land below the ela, including the house C. He failed in that action against the plaintiff respondent and the first and second defendant-respondents. He cannot bring a second action for this tract of land even though he has found new material for re-litigating his claim. That action was finally decided between these parties. There is no pretence that the appellant had possession of this tract of land at any time between 1927 and 1942 and his right thereto is extinguished. The plaintiff and the first and second respondents have recognized the third to eighth respondents as co-owners of this tract and given them a share. It is not necessary to discuss whether the decision is *res judicata* as against those respondents.

The position of the appellant in the previous action was that he was in possession of lot 1 ; the evidence of the plaintiff confirms this, he said lot B and A 1 are possessed by plaintiff today, he pathetically added at the end, he (*i.e.*, the plaintiff) forcibly took it (see 1 D7). Although the plaintiff preferred a claim in reconvention to this lot the Judge omitted to give him the relief he claimed. It would be impossible to hold that the plaintiff-respondent was declared entitled to this lot.

As there was an examination of the title of the appellant to the allotment of land in extent 9 acres and the Judge came to a view adverse to the appellant on this question, it may be contended that he is precluded from trying to establish in this action that the title which D. Andris de Silva Wickramasinghe Karunaratne acquired by the Crown grant passed to him. It is not necessary to express an opinion on that point, but assuming it to be correct it would not necessarily conclude the rights of the parties in this case. The question of prescription has now to be discussed.

The appellant, as the Judge finds, got into possession of the rest of the land purchased by him in 1926 or 1927. He holds that, notwithstanding the decision in the previous action which was entered on April 8, 1936, the ninth defendant continued to be in possession of lot 1 and the house B on lot 1. The evidence fully justifies the view that the appellant has been in possession of this lot from about the end of 1926 or from 1927. The view taken by the Judge was that the ninth defendant-appellant

[1] *(1910) 13 N. L. R. 59.*

was in forcible or wrongful possession of lot B and that his wrongful possession got disturbed by the decree in action No. 44,545 entered on April 8, 1936, and that as the ninth defendant was added as a party only on June 30, 1943—though the present action was filed on February 24, 1942—he cannot avail himself of his possession since the date of that decree as against the plaintiff and the first and second defendants. He referred to the case of *Wimalasekera v. Dingirimahatmaya* [1], and held that that decision was an interruption of the ninth defendant's possession even against the persons who were not parties to the previous action.

The whole law of prescription is to be found in Ordinance No. 22 of 1871 (Ch. 55 of C. L. E.). It is not necessary to prove that the possessor had some title to the land at the time of entry; the requirement known by the Roman law as *justus titulus* or *justa causa* need not be proved in Ceylon—*Cadija Umma v. Don Manis* [2]. A man may come in by rightful possession, and yet hold over adversely without a title; and, if he does, such holding over, under circumstances, would be equivalent to an actual ouster—*Doe v. Prosser* [3].

There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention there can be no pretence of an adverse possession. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title—his possession may be on behalf of the claimant or may be the possession of the claimant (p. 396 of 40 N. L. R.) or from the conduct of the party's possession an acknowledgment of a right existing in the claimant could fairly and naturally be inferred. To prevent the operation of the statute, a parol acknowledgment of the adverse possession by the person in possession must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient—Angel on Limitation p. 388.

The appellant entered into possession of Rikillagasgoda estate and, therefore, of lot 1 in 1926 or 1927 under a deed; his possession from 1927 till the decision of the old action was under colour of title; he continued thereafter in actual and exclusive possession of the premises with the intention of keeping all other persons out of the land.

Another essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity; and whether a possession is "undisturbed and uninterrupted" depends much upon the circumstances. If the continuity of possession is broken before the expiration of the period of time limited by the statute, the seisin of the true owner is restored; in such a case to gain a title under the statute

[1] *(1937) 39 N. L. R. 25.*
[2] *(1938) P. C. 40 N. L. R. 392.*
[3] *Cowp. 217.*

a new adverse possession for the time limited must be had. Where there is a contest as regards the title to a land if the claim of the parties is brought before a Court for its decision and there is an assumption that meanwhile the party occupying shall remain in possession, the running of the statute in favour of the defendant is suspended ; otherwise a bar will all the while be running which the plaintiff could by no means avert. If the plaintiff fails in his action there has been no break in the continuity of possession of the defendant. If the plaintiff succeeds the continuity of possession of the one who was keeping the rightful owner out of his possession is broken ; the result of the finding of the Court is to restore the seisin of the plaintiff. In *Wimalasekere v. Dingirimahatmaya* (*supra*), the plaintiff instituted an action against the defendants in 1925 for declaration of title to a portion of land, lot 6 ; there was no prayer for possession ; on January 25, 1928, he was declared entitled to this lot. He filed another action in 1934 seeking a declaration of title in respect of lot 6, possession thereof and the ejectment of the defendants. The defendants' plea that they had acquired a title by prescription found favour with the trial Judge but in appeal this view was not upheld. The actual decision that there was an interruption of the defendants' possession appears to be right. It may, perhaps, become necessary hereafter to examine some of the dicta contained in the judgment. That decision does not support the inference drawn by the Judge in the present case.

The appeal of the ninth defendant as regards lot 1, including the house marked B on the plan (32/42) is allowed ; the judgment of the District Court as regards lot 3 and the house marked C, is affirmed. The appellant has succeeded to a great extent in appeal and is entitled to the costs of appeal. Each party will bear his own costs in the District Court.

JAYETILEKE J.—I agree.

Appeal allowed.