1958 *Present :* **Basnayake, C.J., and Pulle, J.**

GUNAWARDENE, Appellant, *and* SAMARAKOON *et al.*, Respondents

S. C. 12 Inty.—D. C. Tangalle, P. 60.

Co-owners—Adverse possession—Ouster—Prescription.

Where a co-owner sought to establish title by prescription by proving that he was in possession of the common property for thirty-five years—

Held, that possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.

APPEAL from a judgment of the District Court, Tangalle.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for 6th Defendant-Appellant.

H. V. Perera, Q.C., with *M. L. S. Jayasekera* and *Miss Maureen Seneviratne*, for 1st and 2nd Plaintiffs-Respondents and for 1st to 5th and 7th to 11th Defendants-Respondents.

Cur. adv. vult.

December 19, 1958. BASNAYAKE, C.J.—

The plaintiffs sought to obtain a decree for the partition of a land described in the plaint as Debarawewakele. The plaint was later amended and in the amended plaint the land was called Debarawewakele *alias* Kohombagaha Kumbura situated at Debarawewa in Tissamaharama in extent 9 acres 1 rood and 36 perches. The 6th defendant denied that the land was ever known as Kohombagaha Kumbura and asked that he be declared entitled to the entire land by virtue of his undisturbed, uninterrupted and exclusive possession for a period of over thirty years. The learned District Judge has decreed a partition as prayed for by the plaintiffs ; but declared the 6th defendant (hereinafter referred to as the appellant) entitled to compensation for the cost of planting a portion of the land and compensation for the buildings erected thereon. This appeal is against that order.

Shortly the facts are as follows :—Naikaluge Don Bastian Gunawardena (hereinafter referred to as Bastian) who died in May 1918 aged about 90 became the owner of a land described as Debarawewakele in extent 9 acres 1 rood and 36 perches on a Crown grant 6D1 of 30th August 1897 in favour of himself and Charles Francis Sudiriku Jayawickrema. The appellant claims that on 6D2 of 26th May 1896 Bastian succeeded to the interests of Jayawickrema in the land is dispute. That deed conveys to Bastian, Jayawickrema's share in a number of lands held by them

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jointly on a Crown grant of 26th April 1895 (the date 26th May 1895 in the translation is incorrect) and other lands possessed by them without a grant. It is not disputed that the land in question comes under the latter category.

Besides being a land owner Bastian was a successful business-man carrying on business at Tissamaharama and Hambantota. At the time of his death he had three daughters and three sons. They were Sopinona, Nikkonona, Don Andris, Don Pedris, Henderick or Henry Dias, and Punchinona. Some years before his death he appears to have returned to his native village of Ahangama leaving the management of his lands in the hands of his second son the appellant. In May, 1915, three years before his death he gave a power of attorney (P9) to his third son Henderick or Henry Dias the 7th defendant in this case (hereinafter referred to as Henderick) to manage all his property both movable and immovable in the Hambantota District. Bastian was, shortly before his death, at the instance of the appellant, adjudged to be of unsound mind. He left a home-made will executed before five witnesses which was also successfully impugned by the appellant on the ground of unsoundness of mind of his father. All his children except the appellant and Henderick were dead at the time of the institution of this action. The 1st plaintiff is a daughter of Don Andris, Bastian's eldest son, and the 2nd plaintiff is her husband. The 1st, 2nd, 3rd, and 4th defendants are children of the daughter Nikkonona, the 5th is the widow of Don Andris, and the 8th, 9th, 10th and 11th defendants are children of the daughter Punchinona. The 4th defendant, a son of Nikkonona, transferred by deed P5 of 10th October 1949, executed after the institution of this action, to the 1st plaintiff the portion of the land to be allotted to him in the final decree.

The appellant on his own showing was managing the lands of the deceased till May 1915 when the deceased gave a power of attorney in favour of his younger brother Henderick. Thereafter he appears to have continued to look after Bastian's lands on behalf of Henderick. His evidence on this point is however contradictory. At one time he says he continued to look after the properties of his father under Henderick, at another he says he gave up managing the fields upon Henderick's appointment as attorney. The appellant claims that the land in dispute was gifted to him orally by Bastian when he visited him with his bride in 1916. He also says that his father gave him on that occasion the title deeds 6D1 and 6D2. He states: "The land in question was gifted to me orally on two title deeds. The two title deeds were given to me by my brother. The deeds were handed to my father by my brother and he gave them to me." Now his brother Henderick does not support his story of an oral gift of the land and delivery of the title deeds.

The appellant further claims that he entered into possession and began to possess the land by virtue of the oral gift from 1916 till the date of action to the exclusion of all others. He relies on the following items of evidence to establish his claim—

(*a*) his possession of the title deeds 6D1 and 6D2,

(*b*) the non inclusion of a land called Debarawewakele of 9 acres 1 rood and 36 perches in the inventory filed by the administratrix of the estate of Bastian (6D8),

(*c*) the application by him on 2nd October 1929 (6D12) to the Assistant Government Agent, Hambantota, for exemption of the land in question and some other lands from water rates and the reply of the Assistant Government Agent of 30th June 1930 (6D13),

(*d*) the receipt for irrigation rates paid by him in 1925 in respect of this land (6D15),

(*e*) the receipt dated 5th April 1946 granted by Appusinno on settlement of his dues for planting the north-eastern portion of the land of about 2 acres (6D21),

(*f*) the receipt of Uparis Sinno dated 22nd February 1945 (6D22) for payment of compensation due to his deceased father Babunhamy for planting about one acre of the land and building a temporary house,

(*g*) the inventory filed in his mother's testamentary case in December 1923 (6D23) to show that Debarawewakele as described in 6D1 is not included therein,

(*h*) the recitals in the deed of gift of 3rd January 1947 (6D25) executed by him in favour of his only son who died unmarried and intestate,

(*i*) his own oral evidence and the evidence of his witnesses Appusinno who planted about 2 acres of the land in dispute and Uparis Sinno, the son of Babunhamy who planted about one acre of that land, the ex-headman Jayasuriya, and the vel vidane Ratnasara.

The above witnesses supported the appellant's claim that Debarawewakele was never known as Kohombagaha Kumbura. The vel vidane spoke of a Kohombagaha Kumbura about 2 miles away from the land in dispute. This evidence was produced to meet the plaintiffs' case that the land in dispute was also known as Kohombagaha Kumbura and was included in the inventory filed in Bastian's testamentary case.

The plaintiffs relied on the following evidence :—

(*a*) the 2nd plaintiff's evidence,

(*b*) the evidence of Henderick,

(*c*) the evidence of the 4th defendant,

(*d*) the evidence of a cultivator called Saris who cultivated the land,

(*e*) the fact that a number of other lands of Bastian had been partitioned ; but not Kohombagaha Kumbura,

(*f*) the fact that in the specification prepared under section 42 (1) of the Irrigation Ordinance No. 45 of 1917 (now repealed by Ordinance No. 32 of 1946) Bastian's heirs are mentioned as the owners of the land in dispute and not the appellant,

(*g*) the receipt 6D15 produced by the appellant.

On two important questions of fact the learned District Judge has come to findings adverse to the appellant. He accepts the 2nd plaintiff's evidence that the land sought to be partitioned, together with a portion of land in extent 3 acres 2 roods and 35 perches to the east of the land in suit, was also known as Kohombagaha Kumbura, and that these two lots are the identical land shown as item 10 in the inventory filed in Bastian's testamentary case P7. He rejects the appellant's evidence that the land was gifted to him orally and that he began to possess it as his own as from 1916. He holds that the evidence tends to show that the appellant possessed the land after Bastian's death, but that he did so on behalf of the other co-owners.

There is evidence to support the learned Judge's findings of fact and we see no reason to disturb them. His mode of approach to some topics was not without some justification criticised by learned counsel for the appellant, but in fairness to the trial Judge the correctness of his findings must be tested in the light of the evidence taken as a whole and with due regard to the probabilities of the respective cases set up by the opposing parties. For example it was a matter of legitimate comment that the appellant did not, either at the time of the alleged gift, or some time before his father's death, obtain a notarial conveyance of the land in question.

The appellant's story of an oral gift is not supported by Henderick the only other person living who on his own showing was present at the time of the gift. The learned Judge was therefore right in approaching the appellant's evidence as to the gift and delivery of deeds with caution. Where the only person who could prove a fact has a strong motive for asserting it, his evidence must be received with greater caution than that of a disinterested witness, and every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his uncorroborated testimony; *Harnes and another v. Hinkson* [1]. It is also well understood that when a witness makes a statement against the interests of a person who has died so long ago his evidence must be received with caution especially as it is to his advantage to give such evidence. *Borchards v. Naidoo's Estate* [2]; *Muththal Achy v. Murugappa Chettiar* [3]. Besides in the case of a co-owner the possession of the title deeds of the land owned in common does not have the same significance as the possession of the title deeds of a land by a stranger because co-owners have all an equal right to the custody of the title deeds relating to the common property. As to possession there is evidence to show that the appellant's possession was not of the description contemplated in section 3 of the Prescription Ordinance. It is true that the learned District Judge finds that the appellant possessed the land for thirty-five years. But any presumption of adverse possession arising from long possession is negatived by the evidence tendered on behalf of the plaintiffs which the learned Judge has accepted.

It has been held by the Privy Council in the case of *Corea v. Appuhamy* [4] and *Cadija Umma v. Don Manis* [5] that the possession of one co-owner is

[1] *(1946) W. N. 118 (Privy Council).*
[2] *(1955) 3 S. A. L. R. 78.*
[3] *(1954) 57 N. L. R. 27.*
[4] *(1911) 15 N. L. R. 65.*
[5] *(1938) 40 N. L. R. 392.*

the possession of the other co-owners and that possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The latter proposition is in accordance with the maxim *Nemo sibi causam possessionis mutare potest.* The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place. *Corea v. Appuhamy* and *Cadija Umma v. Don Manis* (*supra*).

The expressions " possession " and " ouster " in the following passage in *Corea's* case which has been adopted in *Cadija Umma's* case need an explanation :

> " His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

These expressions are well known to English law and as the Privy Council was construing a section of the Prescription Ordinance which is in the main based on concepts of law familiar to that system the sense in which they were used is better ascertained by reference to English cases wherein they have been explained. The cases of *Doe v. Prosser* [1] and *Peaceable v. Read* [2] discuss the nature of a co-owner's possession which is the possession of the other co-owners and what ouster and adverse possession are. In the former case Lord Mansfield said :

> " 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 in the same case explains the matter thus :

> " 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. "

On the subject of ouster Lord Mansfield observes :

> " 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

[1] *1 Cow. p. 217, 98 E. R. 1052.* [2] *1 East 569, 102 E. R. 220.*

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."

On this same topic Justice Willes states:

"However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster:"

In the latter case Lord Kenyon C.J. said:

"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 books 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 the case of *Fairclaim v. Shackleton*[1], though one tenant in common alone had received the rent for 26 years no ouster was presumed because the title of the other was admitted.

Blackstone discusses the subject of ouster among co-owners under the title of deforcement. He says in Vol. III, p. 182 (Kerr's 1862, 3rd Edn):

"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 coparceners, 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."

Learned counsel for the respondent stressed the principle laid down by Wood V. C. in *Thomas v. Thomas*[2]—"that possession is never considered adverse if it can be referred to a lawful title". That was a case in which the father of minor children entered upon the estates of his minor children and claimed the benefit of the statute of limitation. It was held that *prima facie* unless there is strong evidence to the contrary his entry must be taken to be on behalf of his infant children and as their natural guardian. When applying the above principle to a given case it is advisable to bear in mind the facts of *Thomas v. Thomas* (*supra*) and the following words of Wood V. C. show with what circumspection he applied it.

". . . . . but considering the right of the father as the natural guardian of the infant Plaintiff, and the practice of this Court in making allowances for maintenance, he having entered and received the rents and profits, and there being no evidence of his not having discharged the obligation imposed upon him of maintaining his children, remembering the fact that they were all under his own charge and were

[1] *5 Burr 2604, 98 E. R. 370.* [2] *(1855) 2 K. & J. 79; 69 E. R. 701 at 703.*

infants, I think that I must reasonably infer that the entry was an entry on their behalf and as their guardian, and was totally different from the case of a mere stranger entering upon property under similar circumstances."

I have quoted at unusual length from the English cases as the reports of those are not available in most provincial libraries and as questions of possession and ouster frequently arise for determination in the provincial Courts.

In the instant case the facts as found by the learned trial Judge do not establish a possession by the appellant by a title independent of and adverse to the other co owners. Nor is there anything in the facts as found by the learned Judge which establishes an ouster or something equivalent to an ouster.

Learned counsel for the appellant strenuously argued that we should reverse the findings of fact of the learned trial Judge. The principles by which an appellate Court should be guided in approaching an appeal on questions of fact are well known and have been stated over and over again. In the instant case we cannot disturb the findings of fact without violating those principles. It is not necessary to refer to the many decisions on the point; but it is sufficient for the purpose of this case to refer to the remarks of Viscount Simon in *Watt* (or *Thomas*) *v. Watt*.[1]

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The appeal is dismissed with costs payable by the appellant.

PULLE, J.—I agree.

Appeal dismissed.

[1] (*1947*) *A. C. 484 at 485–486.*