1946 *Present :* **Keuneman S.P.J. and Canekeratne J.**

ABEYESINGHE *et al.*, Appellants, *and* ABEYESINGHE, Respondent.

2 Inty.—D. C. Negombo, 13,066.

Partition action—Cannot be brought in respect of portion of the proper corpus—Prescription between co-owners.

Action cannot be brought to partition a corpus which in itself is an undivided portion of a larger common land.

When a co-owner who has erected a new building on the common land remains in possession of that building such possession does not necessarily mature into a prescriptive title to the building and the soil on which it stands as against the remaining co-owners.

The mere fact of execution, by co-owners, of deeds dealing with specific or divided portions of a common land does not *per se* establish that there was an arrangement arrived at by the co-owners to divide the land in such a manner that title was to be affected.

APPEAL from a judgment of the District Judge of Negombo.

L. A. Rajapakse, K.C. (with him *Kingsley Herat* and *Dharmakirti Peiris*), for the defendants, appellants.

N. Nadarajah, K.C. (with him *J. A. Obeyesekere*), for the plaintiff, respondent.

Cur. adv. vult.

November 8, 1946. KEUNEMAN S.P.J.—

This is a partition action brought by the plaintiff in respect of premises depicted in Plan No. 127 of 1944 (marked X) made by L. H. Croos Dabrera, Licensed Surveyor, of the extent of 23.25 perches. The main contest of the defendants was that this was only an undivided portion of a larger extent of 3 roods 38 perches depicted in Plan No. 156 of 1944 (marked Y) made by the same Surveyor, and that plaintiff's action was misconceived and unmaintainable. In the latter plan (marked Y) the land of which the plaintiff sought partition is the central block marked A thereon, but the plan shows other portions of land both on the west and on the east of Lot A.

It is not in contest now that the original land was that depicted in Plan Y, and that the original owner was J. P. S. Wijesinghe. This land was known as the Kotugoda Walauwa, the building standing in the centre of the land. J. P. S. Wijesinghe on his death left three children, Abraham, Francis, and Johanna, who became entitled each to an undivided one-third of the land.

William Charles Amarasekera, a son of Johanna, became the owner of her one-third share by deed P2 of 1895 from his mother, and added an eastern wing to the original Walauwa and remained in possession of the eastern wing. By P3 of 1895 William Charles Amarasekera conveyed the undivided one-third share of the whole land to Albert, one of the children of Abraham, who by P4 of 1902 conveyed the same share to Jane who was a child of Abraham and the widow of William Charles Amarasekera. Jane by P5 of 1934 conveyed to Angelina who was her

adopted daughter. That deed described the premises conveyed as the eastern portion of the land and as containing in extent 266 feet in length from north to south and 61 feet in width from east to west. Engelina by P6 of 1935 conveyed to the plaintiff, with the same description.

Plaintiff further contended that the share of Francis, the one-third owner, passed to Albert the son of Abraham, but no deed was produced in support. Albert added a west wing to the original Walauwa and possessed the west wing and died about 1910. After his death his widow and some of the children purported to convey by the deeds P7, P8 and P9 of the years 1923, 1923 and 1928, but these deeds are not very clear as to the corpus or the extent of the land sold. Some of the deeds refer to lots depicted on Plan 1094 of the 17th February 1924, made by H. S. Perera, but that plan has not been produced and I am not able to find that the deeds relate to a defined western block of the original land. The deeds were in favour of Aldon Abeyasinghe who is said to be a brother of the plaintiff. By P10 of 1928 Shelton (who appears to be the same as Aldon) is said to have acquired another share. Shelton conveyed by P11 of 1929 to the plaintiff the whole of a divided portion of the land, the extent given being " about one and a half acres". The eastern boundary is given as " the other portion of the Walauwa ".

The claim of the plaintiff is that by prescription the eastern and the western blocks have passed absolutely to him, and that the only portion of the land now remaining is the central block depicted in Plan X already referred to.

I may also state that Jane (already mentioned) who was entitled to a third share of Abraham's rights, by P16 of 1935 purported to convey to plaintiff and his brother the 1st defendant one-third of a defined portion of land which may be regarded as the land depicted in Plan X, mentioning as the extent 266 feet in length from north to south and 25 feet in breadth from east to west. In this deed Jane reserved a life interest which she subsequently conveyed by P17 of 1938.

Also Ellen the 3rd defendant-appellant herself by deed P19 of 1939 purported to convey to the 1st defendant a seven-twelfth share of a defined block which can be identified as that depicted in Plan X. The length is given as 266 feet and the breadth as 25 feet.

I may now deal with the issue of prescription. Plaintiff claims that he and his predecessors have prescribed to the eastern and the western blocks of the original land, and that all that remains to be partitioned is the central block, *i.e.* the land in Plan X. It has been established that William Charles Amarasekera built the eastern wing and that Albert built the western wing, and that they and their successors including the plaintiff have been in possession of those wings. On the other hand it is not unusual for one co-owner who has erected a new building on the common land to remain in possession of that building, and he may well have a right to do so. The exercise of that right would not necessarily mature into a prescriptive title to the building and the soil on which it stands as against the remaining co-owners. It is further to be noted that William Charles Amarasekera and Albert who acquired his interest did not purport to deal with a divided eastern block (*vide* P3 and P4) but only with an undivided share, and it was not till 1934 that Jane their successor in her deed P5 asserted such a claim. As regards the

western wing said to have been erected by Albert, I cannot draw any certain inference from the deeds that a claim to this block as a divided block was asserted until plaintiff received his deed in 1929.

It is also true that Jane by P16 of 1935 purported to deal with a divided central block—which may be identified as the lot in Plan X, and the 3rd defendant by P19 of 1939 purported to do the same. The 1st defendant was the grantee under those deeds, and we may assume that when it suited their purpose all the parties in this action adopted the attitude that the original land had been divided into three defined blocks. In fact the 3rd defendant at one stage adopted this view in her answer also.

But I do not think we can decide this case on the deeds in view of the fact that all the co-owners possessed portions of the original land. It has not been established in this case that there was an arrangement arrived at by the co-owners to divide the land in such a manner that title was to be affected, and the difficulty is to discover anything which is the equivalent of ouster.

I may point out that the larger premises in question contained a front and a back compound. As regards the front compound on the north, there is positive evidence that this was never divided up and that it was used in common by all the co-owners. In fact, access to all the houses was obtained by means of a circular drive which extended well to the east and to the west of the land depicted in Plan X. This was admitted by the plaintiff, and the District Judge has held that " it is clear that the drive was possessed in common." He however added that this was for convenience and not because it was the common property of the three sets of owners. In my opinion the District Judge has misunderstood the position. There was no evidence whatever that the front compound was dividedly possessed at any time, and the only evidence was that all along it was possessed in common, and I think this fact goes very far to nullify the contention of the plaintiff that there ever was divided possession of the larger corpus that resulted in the obtaining of a prescriptive title.

As regards the back compound to the south, there was evidence that it was divided into three blocks by fences which were ten years old at least, but it is not clear whether the division was intended to be exclusive or was merely adopted for the purpose of convenience.

A further point of importance is that the co-owners are all members of one family, and very strong evidence of exclusive possession was necessary to establish prescription. Also, action in this case was instituted on the 15th June, 1944. The facts from which we can presume any acknowledgment of the alleged division by the 1st and 3rd defendants were in 1935 and 1939—see deeds P16 and P19—*i.e.*, within the prescriptive period.

On the evidence I do not think it is possible to hold that the plaintiff has prescribed to the eastern and the western blocks of the larger premises. It therefore results that the plaintiff has sought partition of an undivided portion of the proper corpus. This cannot be allowed. I do not think any useful purpose will be served by sending this case back so that the proper corpus may be included. In the circumstances I allow the appeal,

set aside the judgment appealed against, and dismiss the plaintiff's action with costs in both courts ; but I reserve the right to the plaintiff to bring a proper partition or other action relating to the correct corpus.

CANEKERATNE J.—I agree. *Appeal allowed.*