Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles Edward Victor Seneviratne Corea v. *Mahatantrigey Iseris Appuhamy and another, from the Supreme Court of the Island of Ceylon; delivered the* 14*th December* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD MERSEY.
LORD ROBSON.

[DELIVERED BY LORD MACNAGHTEN.]

This seems to be a very plain case.

The action out of which the Appeal has arisen was an action for partition of certain lands, part of the estate of one Elias Appuhamy of Galmuruwa, in the district of Chilaw.

Elias died in July 1878. He was never married and he died intestate. His heirs were his brother Iseris and three sisters. Taking by descent the heirs took as tenants in common in accordance with the provisions of Section 18 of the Partition Ordinance of 1863.

Elias came originally from Baddegama, in Galle district, about 120 miles from Chilaw. His father and mother and the rest of his family lived there apparently in somewhat humble circumstances. Elias prospered in Chilaw. After a time he was joined by his brother Iseris, who says that he left home alone when he was 10 years old, though he was probably three or four years older at the time. The two brothers kept a shop or store in Chilaw, in which they seem to

have been jointly interested. But it is admitted that the lands in question in this action were the separate property of Elias.

At the time when Elias died Iseris was in jail under sentence of imprisonment for assault and robbery.

The property being thus left derelict, possession was taken by officials of the District Court. It must be presumed that such possession was taken for the benefit of the persons rightfully entitled.

Iseris came out of jail in December 1878. Thereupon, or soon afterwards, he entered into possession of the intestate's lands. The circumstances under which the officials of the Court relinquished possession in his favour do not appear in evidence. It seems, however, to be immaterial whether there was an order of the Court on the subject, or whether the officials who must have known who Iseris was, and must have been aware of his relationship to the intestate, retired in his favour without any specific directions. The Trial Judge says that they were "ejected" by Iseris, but no statement or suggestion to that effect is to be found in the evidence.

Some time after the death of Elias two of his sisters made their way to Chilaw. They seem to have been kindly treated by Iseris, who gave them small sums of money from time to time, and allowed them to obtain provisions from his shop without payment. Indeed, one of the sisters named Balohamy lived for a long time in a house on Medawatta, which was one of the plots or parcels of land belonging to Elias and part of his estate.

In 1907 Iseris by deed settled the intestate's land on his son, reserving a life estate. This action on the part of Iseris was the talk of the neighbourhood. Balohamy, who was then

the only survivor of the three sisters, became alarmed. Lawyers were consulted. Under their advice Balohamy brought an action for partition against Iseris. The action was confined to Medawatta, on the score, it was said, of expense, in order to save the stamp or fee which would have been payable if the whole estate had been the subject of the action. Then Iseris turned her out of her home. Being without means Balohamy and other co-proprietors in the same interest sold their rights or claims to the Plaintiff Corea, who was Balohamy's legal adviser and advocate. He brought this action against Iseris. Iseris' son was afterwards made a party to the action.

Iseris in his defence claimed the benefit of Ordinance No. 22 of 1871, entitled "an Ordi- "nance to amend the laws regulating the "prescription of actions."

It is not disputed that by that Ordinance, or by an earlier Ordinance of 1834 which was repealed by the Ordinance of 1871, the old law was swept away. The whole law of limitation is now contained in the Ordinance of 1871.

Section 3 enacts that "proof of the undis- "turbed and uninterrupted possession by a "defendant in any action . . . . . of lands "or immovable property by a title adverse to or "independent of that of the claimant or plaintiff "in such action . . . . for 10 years pre- "vious to the bringing of such action shall "entitle the defendant to a decree in his favour "with costs." The section explains what is meant by undisturbed and uninterrupted possession. It is "possession unaccompanied by "payment of rent or produce, or performance of "service or duty, or by any other act by the "possessor from which an acknowledgment of a "right existing in another person would fairly "and naturally be inferred." Then follows an

analogous provision in favour of a plaintiff claiming to be quieted in possession of lands or other immovable property under similar circumstances.

In the present action the Plaintiff Corea offered some evidence tending to prove that Iseris took out administration to Elias. There certainly was a testamentary case in the District Court relating to the intestate's estate. But the record of the case is missing, and it is not clear whether the case was concerned with an application by officials of the Court or with an application by Iseris for administration. The District Judge held that it was not proved that Iseris took out administration to his brother's estate.

The Plaintiff also endeavoured to prove that Iseris had acknowledged the title of his co-proprietors within 10 years of the commencement of the action. On this point, also, the District Judge was against the Plaintiff.

Their Lordships accept the decision of the District Judge on these two points. In their Lordships' opinion they are not material to the real question at issue. 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? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias his heirs had unity of title as well as unity of possession. Then comes the question, Was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or "plunderer." "Whichever it was," says the learned Judge, "so he continued, and acknow-"ledged no title in any one else. He has "acquired a good prescriptive title." It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer."

He was not without his faults. He is described by the learned Judge, who decided in his favour, as "a convicted forger and thief," and "expert "not only in crime and incarceration but also in "perjury." But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the Officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him? Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood, V.C., in *Thomas* v. *Thomas*, 2 K. and I. 83, holds good: "Possession is never considered "adverse if it can be referred to a lawful title."

The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the Trial Judge. They both held that Iseris entered as "sole heir," and that his title has been adverse ever since he entered. They held that he entered as "sole heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? 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. There is no provision in the Ordinance of 1871 analagous to the enactment contained in Section 12 of the Statute of Limitations, 3 & 4 Will. IV. c. 27, which makes the title of persons "entitled as co-parceners "joint tenants or tenants in common" separate

from the date of entry. Before that Act was passed it was a settled rule of law, that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon.

The learned counsel for the Respondent, who argued the case with perfect candour, and said all that could be said on behalf of his client, did not of course question the principle on which Wood, V.C., relied in *Thomas* v. *Thomas*. His submission was that the Court might presume from Iseris' long-continued possession, undisturbed and uninterrupted as it was, that there had been an ouster or something equivalent to ouster. No doubt in former times before the statute of William IV., when the justice of the case seemed to require it, juries were sometimes directed that they might presume an ouster. But in the present case the learned Judge did not make any presumption of that sort. Nor indeed did Iseris before this action was brought attempt to rely on adverse possession. His pretence was that he was sole heir. In the first partition action he swore that he did not know the name of his father or that of his mother. He swore that Balohamy was only a cousin; he knew nothing, he said, about his family except that he was the only brother of Elias. For this audacious statement he was indicted for perjury at the instance of the Judge. He was convicted and sentenced to fine and imprisonment. The Judge who pronounced sentence observed, "It is "clear that he was determined to prove that he "was the sole heir, and strenuously to deny "anything that might count against him." Be that as it may, this is not a case in which the circumstances could justify the presumption of ouster in favour of such a man as Iseris.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, the Judgment of the Supreme Court and the Judgment of the District Judge set aside, with costs in both Courts, and a Decree made for partition of the lands which on the death of Elias passed by descent to his heirs. The Respondents will pay the costs of the Appeal.

In the Privy Council.

CHARLES EDWARD VICTOR SENEVIRATNE COREA

v.

MAHATANTRIGEY ISERIS APPUHAMY AND ANOTHER.

DELIVERED BY LORD MACNAGHTEN.

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