"It is too late to rectify the stamp duty now. The petition must "be dismissed."

Plaintiffs preferred this second appeal.

R. Subramania Ayyar for appellants.

Ramasubba Ayyar and *P. Subramania Ayyar* for respondent No. 1.

Tiruvenkatachariar for respondent No. 5.

Anandacharlu for respondent No. 6.

JUDGMENT.—Objection is taken to the maintenance of this appeal as being made against an order in respect of which no appeal is allowed by the Code of Civil Procedure. The appeal could only be justified on the ground that the order of the District Judge amounted to a decree within the meaning of the code. But as the District Judge had no appeal before him, it is impossible to say that he passed a decree. It must be assumed, and indeed it is not disputed, that the Judge was right in determining the amount of the fee chargeable, and it follows that the memorandum of appeal not being properly stamped, was of no validity whatever (section 28, Court Fees Act). Consequently there having been no appeal and no appellate decree, there can be no second appeal.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

ITTAPPAN (DEFENDANT), APPELLANT,

v.

MANAVIKRAMA (PLAINTIFF), RESPONDENT.*

1897. November 8, 10 to 12, 15 to 19, 22, 23. December 17.

Limitation Act—Act XV of 1877, sched. II, arts. 142, 144—Suit for partition between co-owners—Possession of tenants—Adverse possession—Civil Procedure Code—Act XIV of 1882, s. 43—Cause of action.

The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the Zamorin and refused by the defendant. In some instances the tenants in

* Appeals Nos. 133 and 129 to 132 of 1894.

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occupation represented the family, a member of which was at one time admitted by the Zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the Zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it was not shown that the Zamorin had any notice of such attempted usurpation on the part of the defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the Zamorin. It appeared further that the Zamorin had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civil Procedure Code, section 43:

Held, (1) that Limitation Act, schedule II, article 144 and not article 142 was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the Zamorin had not been determined, and that in the second class, there had been no ouster of the Zamorin, and that consequently the suit was not barred by limitation.

(2) that the suit was not barred by Civil Procedure Code, section 43, by reason of the previous suits.

APPEALS against the decree of V. P. DeRozario, Subordinate Judge of Palghat, in Original Suit No. 41 of 1887.

The plaintiff, the Zamorin of Calicut, sued for an allotment to him by partition of a moiety of the properties described in the schedule attached to the plaint, which were alleged to belong to his stanom and to the stanom of the defendant, the Kuthiravattath Nayar, in equal undivided shares, and to be in possession of tenants. The plaintiff stated that the cause of action arose in 1057 (1881–82) when his demand for partition was not complied with by the defendant. The defendant contended that the plaintiff's present suit was barred under Civil Procedure Code, section 43, as the claim in this suit was not included in former suits brought by the plaintiff and by his predecessor. One of these suits was Original Suit No. 360 of 1869, which was brought by the Zamorin in the Munsif's Court at Temelprom to recover with arrears of rent, a moiety of twelve items of land from a tenant, to whose deceased father the plaintiff's predecessor had let such moiety. In the plaint non-payment of rent by the tenant and non-acceptance of a renewal by him were alleged, and the plaintiff added that he was not willing to allow the lands to remain in the possession of the tenant. In that suit the present defendant was joined as defendant. The Munsif passed a decree for the payment of the arrears of rent, but disallowed the prayer for possession of

a divided moiety. This latter prayer was allowed by the Civil Judge on appeal and his decision was confirmed by the High Court (exhibit D). It was contended that that suit was virtually a suit for partition of a portion of the property alleged to have been held by the plaintiff on the same right as the property in the present suit, that his cause of action in that suit and his cause of action in the present suit were the same, viz., his right to obtain partition. The other suits relied upon by defendant as constituting a bar under section 43 to the present suit were of the same description as Original Suit No. 360 of 1869. The tenants in occupation sided with the defendant having, for many years, recognised him as their landlord. Some of them represented persons let into possession as kanomdars by the Zamorin, and others had been let in by the defendant. It was contended that the suit was barred by limitation. The Subordinate Judge passed a decree for the plaintiff in respect of part of the property in question.

The defendant preferred this appeal.

Sundara Ayyar and *Subramania Sastri* for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Desikachariar* and *Govinda Menon* for respondent.

SHEPHARD, J.—The first point taken in the argument of this appeal is that raised by the third issue. It appears from the evidence, and indeed is in a measure admitted in the plaint itself, that before this suit was launched several suits were brought by the plaintiff or his predecessor against the defendant or his predecessor, in some of which suits decrees were obtained by the Zamorin for the partition of the particular parcels comprised in such suits. In each of these suits the tenant, who, as the plaint states and is admitted, held half under the Zamorin and half under the Nair, was joined as a party. So far as regards the tenant, the plaint made such allegations and asked for such relief as would be made and asked for against any tenant holding under a *jenmi*, while as regards the Nair, the plaint asked for partition, so that in the result the tenant might be left in undisturbed possession of the moiety allotted to the Nair. Independently of these suits there was another suit brought against the Nair alone in which a division of the *devasvom* property was sought for. That suit was dismissed on the ground that such property was not partible.

In these circumstances we are asked to hold that section 43 of the Civil Procedure Code applies and that the plaintiff, having in

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his former suits omitted to sue in respect of the property now in question, is precluded from maintaining the present suit for partition of that property. Stated in the abstract, the question may be said to be whether one of two tenants in common, having sued for partition of part of the property so held by them, is at liberty to bring a separate suit for the remainder of the property. Now it is quite clear that, in applying section 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit (*Pittapur Raja* v. *Suriya Rau*(1), *Mussummat Chand Kour* v. *Partab Singh*(2), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(3)) and that by the term cause of action must be understood all the circumstances alleged by the plaintiff to exist which, if proved or admitted, will entitle him to the relief prayed for (*Mussummat Chand Kour* v. *Partab Singh*(2), *Read* v. *Brown*(4)). The class of cases to which section 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen the plaintiff must make his whole claim once for all in one suit. For instance, a plaintiff, who complaints of wrongful detention or misappropriation of his securities, cannot, after recovering the securities or some of them in one action, afterwards sue to recover the remainder, or damages for the detention of them (*Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(3), *Serrao* v. *Noel*(5)). There being one single cause of action and the plaintiff having had "an "opportunity in the former suit of recovering what he seeks to "recover in the second, the former recovery is a bar to the latter "action." The rule of law embodied in section 43 operates not to give the defendant a ground of exception to the first suit, but, by prohibiting a second suit, indirectly to compel the plaintiff to include his whole demand in the first suit. There are, however, cases in which the nature of the right is such that independently of section 43, the plaintiff is prohibited from severing his claim. For example, a mortgagor cannot redeem part of the mortgaged property on payment of a proportionate part of the mortgage debt. It is the right of the mortgagee to retain the whole security for any part of the debt. If the mortgagor chose to relinquish a part

(1) I.L.R., 8 Mad., 520. (2) L.R., 15 I.A., 156. (3) 11 M.I.A., 551, at p. 605.
(4) L.R., 22 Q.B.D., 128. (5) L.R., 15 Q.B.D., 549.

of the mortgaged property and sought to recover the remainder on payment of the whole debt, the mortgagee would have no reason to complain and he would, under section 43, have a complete answer to a second suit brought to recover the omitted part (see *Ukha* v. *Daga*(1). But it is another question whether, when a prayer for partial redemption has been granted or refused, the mortgagor can institute another suit. If the prayer were refused, that is, if the mortgagee insisted on his right to have the whole mortgage redeemed once for all, I conceive that the dismissal of the first suit would clearly be no bar to the institution of a second and properly-framed suit. The case of *Kakaji Ranoji* v. *Bapuji Madhavrav*(2) is an authority, if any is needed, on this point. Would it make any difference if the prayer for partial redemption were granted, with the result that the mortgagee was allowed to remain in possession of part of the property as security for the unpaid portion of the debt? The difference is one not recognized in section 43 and therefore if there is any distinction to be drawn the reason for it must be sought elsewhere. In the case above cited the plaintiff, a member of an undivided family, had first demanded a share of a particular portion of the family property. That suit had been dismissed on the ground that it was not properly framed. The plaintiff then sued to have the whole property brought together and divided. It was observed by Melvill, J., with reference to the argument that this suit was barred by section 7 of the Code of 1859, that "so far from these two being "the same cause of action, they present all the difference which is "expressed by saying that the one is a cause of action and the other "is no cause of action." This observation, it appears to me, would have been none the less true if the first suit instead of being dismissed had been decreed in the plaintiff's favour. The cause of action as alleged in the plaint cannot be altered by the result of the suit. Nor can it possibly be held that a decree for partial redemption or partial partition estops the plaintiff from claiming redemption or partition of the rest of the property or from alleging that it is held by the defendant as mortgagee or tenant in common. If there is any estoppel in the matter, it is rather against the defendant than against the plaintiff. In the present case it appears to me that the right put forward in the former suits is

(1) I.L.R., 7 Bom., 182. (2) 8 Bom. H.C.R. (App. C.J.), 205.

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different from that put forward in the present suit, and that therefore there is no identity of causes of action. The right on the part of a tenant in common to have each field separately divided between himself and his co-tenant is one thing: the right to claim a partition of all the fields held by them as tenants in common is another thing. There has no doubt been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort. To hold that that circumstance prohibits a general suit for partition would lead to the remarkable conclusion that the tenancy in common in respect of the yet undivided lands must continue indissoluble except by consent of the parties or perhaps by suit instituted by the Nair. As far as the Zamorin is concerned, he must for ever be in the position of a tenant in common who has no right to partition. Similarly in the analogous case of mortgagor and mortgagee, the latter, it is supposed, may continue to hold part of the land under the mortgage, while the former is debarred from bringing any further action. In both cases the explanation is the same. It cannot be said that the causes of action are identical when the one plaint omits matters which the defendant is entitled to have included and the other is not open to that exception.

These reasons are sufficient, without any discussion of the circumstances of the different suits that have been brought by the Zamorin, for holding that the present suit is not barred by the provisions of section 43. I would only add that I do not think the cases relied on by the Advocate-General in which a member of an undivided family has been permitted to sue his co-parcener and a purchaser from the latter for partition of the property purchased, can be called in aid in the present case. In that class of cases it may be said that the plaintiff, adopting the alienation and seeking to have the purchaser's right defined, consents to a separation of the particular property from the rest of the family estate. The circumstances in the present case are entirely different.

The other point urged with regard to several of the parcels of land comprised in the suit was that of limitation. It was contended that, in the circumstances of this case, the suit fell within article 142 of the schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till some time within twelve years of the institution of the suit. The answer to this, in my opinion, is that

it must not be assumed that the plaintiff has been dispossessed so as to render article 142 applicable to his case. The defendant's possession must *primâ facie* be referred to the title in virtue of which it may have been lawfully enjoyed. At the outset his possession was that of a tenant in common, not inconsistent with the title of the plaintiff, and therefore it lies upon him to show that his possession has assumed another character and has become inconsistent with the plaintiff's title. There being no article especially applicable to the case of tenants in common, article 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now as between tenants in common mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession (*Watson and Company* v. *Ramchund Dutt*(1). The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases there must be something amounting to ouster of the person against whom adverse possession is claimed (*Culley* v. *Doe d. Taylerson*(2)). An ouster can be presumed to have taken place only when non-participation of the profits has lasted for a considerable time and other circumstances concur. In the present case the actual enjoyment of all the holdings has been in the hands of tenants and not in those of the Nair, and in all the instances in which any question of limitation arises it has been proved that the Zamorin took part in admitting the original tenant. There are two classes of cases which need consideration. There are the cases in which it appears that the present tenant represents the family, a member of which at one time was admitted by the Zamorin and attorned to him. And there are the cases in which the present tenant is shown to have been admitted by the Nair on paying off the former tenant who has been admitted by the Zamorin. There is evidence in all these cases that the Nair intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it is not shown that the Zamorin had any notice of this attempted usurpation on the part of the Nair. In the first class of cases where the present

(1) I.L.R., 18 Calc., 10. (2) 11 A. & E., 1008.

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occupant of the land can be identified in point of law with the tenant who was at one time admitted by the Zamorin, it is clear that the Zamorin has not lost his right of action against him, unless it appears that the tenancy has been determined. If the tenant were sued and relied upon article 142 of the Limitation Act, it would lie upon him to prove that the tenancy had been determined more than twelve years before the date of the suit. This would be so even if the holding of the tenant had been reduced to that of a tenant by sufferance (*Adimulam* v. *Pir Ravuthan*(1)), and such a designation would certainly not be appropriate to tenants of the Zamorin who, whether or not there was a *kanom*, were at any rate entitled to compensation for improvements before they could be ejected. The only possible way in which it could be suggested that the tenancy had been determined, would be by forfeiture consequent on the tenant's implied denial of the landlord's right. But the landlord is not bound to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy at will such conduct might afford evidence of the determination of the tenancy. (See *Doe d. Graves* v. *Wells*(2), where it appears that the dicta of Lord Redesdale in *Hovenden* v. *Lord Annesley*(3) were not adopted.) Here it is not even proved that the landlord was apprised of the tenant's conduct.

Holding with regard to the first class of cases that the tenancy is not proved to have been determined, I think it follows that the Nair's possession was not adverse, for it was only by ousting the tenant or putting an end to the tenancy that the Nair could acquire adverse possession. In the other class of cases there is the circumstance that the present tenant is one who has been admitted by the Nair alone in supersession of the tenant who had attorned to the Zamorin. In these cases the original tenancy was lawfully determined and the present tenant has never attorned to the Zamorin. Nevertheless, I think it is impossible to hold that the Zamorin has suffered anything in the nature of an ouster. If there had been no tenancy in common and the present tenant had simply taken

(1) I.L.R., 8 Mad., 424. (2) 10 A. & E., 427, at p. 434.
(3) 2 Sch. & Lef., 625.

over possession from the original tenant, there could be no question of adverse possession. The fact that the Nair took part in the transaction and took an acknowledgment from the new tenant cannot by itself alter the nature of the Nair's possession. The admission by the Nair of a new tenant was not *per se* inconsistent with the rights of his tenant in common. It is not necessary to consider the question which would arise if knowledge of the action of the Nair in concert with the tenants had been brought home to the Zamorin. No circumstances have been proved from which such knowledge could be inferred.

For these reasons I think that the plea of limitation fails in both the abovementioned classes of cases.

SUBRAMANIA AYYAR, J.—Of the several suits referred to in support of the contention that the present claim is barred under section 43 of the Code of Civil Procedure, all, excepting the one which related to certain *devaswom* lands, are more or less similar in their character and may be considered together. Those suits were based on demises of some parcels of land out of the whole property held by the plaintiff, the Zamorin, and the defendant, the Nayar, as co-owners. In them not only the tenants, who held under the demises and against whom part of the relief was claimed, were made defendants, but also the co-owner, and a division by metes and bounds of the parcels to which the demises related was sought. Though the frame of these suits is ambiguous, yet the suits, in so far as the co-owner was concerned, cannot but be treated as suits for partition of the parcels then in dispute. Now the question is whether the cause of action in any of those suits is identical with that in the present suit. It is impossible to doubt that the claim for partition in each of those suits was on the footing that the plaintiff was entitled to a partition confined to the particular parcels comprised in the demises to the tenants who were impleaded in each suit. This view of the Zamorin's right is of course wrong. But strangely enough, not only both the co-owners and their advisers but even the Courts, that had to deal with the suits, continued up to at least 1877 to act as if a claim for such partial partition was sustainable in law. Unquestionably the cause of action thus relied on in each of those suits is different from that in the present suit since the latter is based upon a right which, unlike that alleged in the previous suits, the Zamorin undoubtedly has, to a general and complete partition of the entire property held by him and the

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defendant. *Kakaji Ranoji* v. *Bapuji Madhavrav*(1) is an authority in point, and *Ukha* v. *Daga*(2) is distinguishable on the ground that there the two suits were on the same right which the plaintiff alleged gave him a title to a share of what had been left undivided at a private partial partition.

Next as to the suit about the *devasvom* lands also the conclusion must be the same. In it the plaintiff sought as one of the two trustees of the *devasvom* a partition of the lands forming the endowments of the institution. That was the right alleged though in law he had no such right. How then can that claim bar a suit in respect of the absolutely different right on which the present claim rests and which undoubtedly the plaintiff has? Clearly therefore it must be held that none of the suits relied on bars the present claim under section 43.

As to the next point taken, viz., limitation, the article applicable is clearly not 142 as was contended for the defendant, but 144. And the question is whether the defendant has held adverse possession for the statutory period in all or any of the cases in which the plea was urged. The facts material so far as that question is concerned are these. The plaintiff and the defendant are co-owners standing in the relation of tenants in common. Some parcels of land have been held by tenants who originally came into possession under demises or *kanom* mortgages granted by the predecessors of the plaintiff in respect of their undivided share, or privies of those who so entered into possession or parties to whom the property was, at the instance of the defendant or his predecessors, subsequently handed over by the Zamorin's tenants. These persons attorned to the defendant's predecessors or the defendant himself and paid rent accordingly. From this the defendant contends that though he has not held direct and actual possession, yet the possession held through these tenants is sufficient to render the possession adverse as against the plaintiff. In dealing with a case such as this some of the special rules governing the matter of adverse possession with reference to persons standing in the relation of landlord and tenant, of mortgagor and mortgagee and of tenants in common, have to be borne in mind. And what are these rules?

First, as to landlord and tenant.—Now a tenant's possession, unlike that of a stranger, is, in its inception, in subserviency to and

(1) 8 Bom. H.C.R. (App. C.J.), 205. (2) I.L.R., 7 Bom., 182.

consistent with the landlord's title, and as, during the existence of the tenancy, the tenant is bound to protect the interest of the landlord, the latter has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, "the statute does not begin to operate until the possession before "consistent with the title of the real owner becomes tortious and "wrongful by the disloyal acts of the tenant, which must be open, "continued and notorious so as to preclude all doubt as to the "character of the holding or the want of knowledge on the part of "the owner." (See *Zellar* v. *Eckhart*(1) cited in Angell on Limitation, sixth edition, page 458.) It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place during the currency of a definite term, then the tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists and the possession is, in law, possession under the lease. But the moment the term comes to its natural termination by effluxion of time the disloyal tenant's possession becomes adverse. The Advocate-General in his argument went further. He contended that even after the expiry of the term the character of the possession remains unaltered so long as either the landlord or the tenant does not, by express notice to the other, put an end to the tenancy. Now, the expiry of the term by effluxion of time coupled with the continuing denial by the tenant that his holding was under the landlord's title, renders impossible the arising between the parties of even a tenancy by sufferance. What tenancy can there be then between the parties which requires to be put an end to by express notice? None. And it follows, as already stated, that the possession in such a case becomes on the expiry of the term *ipso facto* absolutely wrongful—wrongful with respect to both the parties concerned. For that would indeed be an anomalous possession which, as to the rights of

(1) 4 How. (U.S.), 289, at p. 296.

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one party, was adverse, and as to the other fiduciary; and if as a consequence of a disclaimer with the knowledge of the landlord and the setting up of a title in himself, the tenant forfeits his possession as tenant and the other benefits incident to the character of a tenant, he ought to be entitled to the advantage which would result from his known adverse possession (see *Willison* v. *Watkins*(1) cited in Angell on Limitation). And the same observations apply to the case of a tenant from year to year who denies his landlord's title. For such denial is in itself, as all the Judges pointed out in *Doe d. Graves* v. *Wells*(2) evidence of the cessation of the tenancy. And hence it is that in such a case the tenant is liable to be ejected without notice to quit. The contention of the Advocate-General is therefore opposed to principle and unsupported by authority. And the decisions in Indian cases on the point imply that the rule of law as to it is as stated above. If, instead of claiming title in himself, the tenant attorns and pays rent to or hands the property over to a third party who claims against the landlord, it follows, from what has been stated above, that the possession of the third party is adverse to the original owner provided the owner has knowledge of the facts; subject of course, if the tenancy be for a definite term, to the observations made above in dealing with the case of a tenant setting up title in himself.

Passing now to the case of mortgagor and mortgagee, mere denial by a mortgagee in possession or by the representative of the mortgagee in possession of the mortgagor's right to redeem is of itself not sufficient to convert such possession into adverse possession (*Mussad* v. *The Collector of Malabar*(3)). Now there can be no doubt that if the interest of the mortgagee alone is assailed by a third party, that of the mortgagor is not thereby affected. But where the mortgagor has made over possession of the mortgaged property to the mortgagee and while he is so out of actual possession, the former's interest is invaded, Turner, C.J., and Muttusami Ayyar, J., in *Ammu* v. *Ramakishna Sastri*(4) treat such invasion as an ouster. Innes and Muttusami Ayyar, JJ., however, in *Chathu* v. *Aku*(5) speak of the right to redeem as a mere right of action; though there are observations in the course of the same judgment

(1) 3 Peters (U.S.), 51, at p. 53.
(2) 10 A. & E., 427 at p. 435.
(3) I.L.R., 10 Mad., 189.
(4) I.L.R., 2 Mad., 226, at p. 229.
(5) I.L.R., 7 Mad., 26, at p. 28.

which show that if the party claiming in antagonism to the mortgagor had taken and held possession of the mortgaged property itself for twelve years, such possession would bar the mortgagor as was held in *Ammu* v. *Ramakishna Sastri*(1). Compare *Moidin* v. *Oothumanganni*(2). This last conclusion is in conflict with the opinion expressed by Telang, J., in *Chinto* v. *Janki*(3). The reason for that opinion is stated by the learned Judge thus: "The mort-"gagor having once put the mortgagee in possession ordinarily "has no right to the possession himself until the mortgage is paid "off. The mere fact of the mortgagee's letting the property go "out of his possession cannot give the mortgagor such a right "before payment. And the party in possession, though he may be "a trespasser, would ordinarily be able to defend an action of "ejectment at the suit of the mortgagor by setting up *jus tertii.*" And notwithstanding *Puttappa* v. *Timmaji*(4), it would be seen from the later case of *Vinayak Janardan* v. *Mainai*(5) that the above opinion of Telang, J., commended itself as sound to Sargent, C.J., and Candy, J. In this state of the authorities, if I may express my own inclination, I would with deference say that Justice Telang's view appears to be the better view. If, however, that adopted in *Ammu* v. *Ramakishna Sastri*(1) be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it (*Mussad* v. *The Collector of Malabar*(6)).

Lastly as to the case of tenants in common, the special characteristic of their right is united possession. Each has a present right to enter upon the whole land and upon every part of it and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits, the other has, apart from statute, no remedy against the former whilst the tenancy in common continues unless he was put out of possession when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate (*Henderson* v. *Eason*(7)); see also *Watson and Company* v. *Ramchund Dutt*(8);

(1) I.L.R., 2 Mad., 226, at p. 229.
(2) I.L.R., 11 Mad., 416.
(3) I.L.R., 18 Bom., 51, at p. 58.
(4) I.L.R., 14 Bom., 176.
(5) I.L.R., 19 Bom., 138.
(6) I.L.R., 10 Mad., 189.
(7) 17 Q.B., 701, at p. 718.
(8) I.L.R., 18 Calc., 10.

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and *Lachmeswar Singh* v. *Manowar Hossein*(1). Consequently, sole occupation by one tenant in common is *prima facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Such being the rules applicable to a case like the present, how does the matter stand upon the facts here? It may be shortly observed that the possession relied on by the defendant amounts at the highest to nothing more than sole occupation by one of two tenants in common. In none of the instances, in which limitation is pleaded, express disclaimer of the co-owner's right and notice thereof to him are either alleged or established and the facts relied on as proof of adverse possession seem only to show what has been termed "silent possession." And when regard is had to the position of the parties, to the fact that the parcels of land as to which adverse possession is set up are so few compared with the large number of isolated parcels admitted to have been held jointly and to the nature of the demises under which the disputed parcels were or are held by the actual occupants thereof, it is impossible to come to the conclusion that what are relied on as supporting the contention in question constitute such open and notorious acts of exclusive ownership as, in law, are necessary to warrant the inference that one tenant in common has been ousted by the other. The plea of limitation must therefore be held to fail in all the instances in which it was urged.

I concur in the conclusion arrived at by my learned colleague.

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(1) I.L.R., 19 Calc., 253.