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to suits under the Tenancy Act. In view of rules, 9, 16, 17 and 18 of the aforesaid order we are not prepared to say that the report of the commissioner was inadmissible.

The result is that the appeal must fail, and we dismiss it accordingly with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

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June, 28.

Before Mr. Justice Tudball and Mr. Justice Walsh.

JHAMPLU (PETITIONER) *v.* KUTRAMANI AND OTHERS (OPPOSITE PARTIES).*

Evidence—Unregistered deed—Admissibility of deed for collateral purposes—Joint owners—Adverse possession.

One of two brothers, joint owners of certain immovable property, executed a deed of relinquishment in favour of the other. The deed was never registered, but the brother in whose favour it was made remained in possession of the entire property. *Held* that the deed of relinquishment was admissible in evidence to prove the nature of the occupant's possession, and that there was no legal impossibility about one co-owner claiming adverse possession as against the other.

THE facts of this case were as follows :—

One Julphu had two sons, Balku and Jhamplu; they were by different wives. He died leaving property in mauza Banchuri. After his death the names of the two sons were recorded, each as owner of a half share. Balku, however, when a boy went away from the village to live in mauza Debrana, and Jhamplu remained in sole possession of the property. In the year 1901, Balku began to assert his right and he applied to the court for partition of his half share. An amin was deputed to carry out the partition, but he returned his commission unexecuted reporting the fact that the two brothers had come to terms. The suit for partition was withdrawn. About the same time Balku executed a document in favour of Jhamplu, which however was unregistered. It was tantamount to a relinquishment of his rights; but, being unregistered, it did not operate to transfer them, and it was not admissible in evidence to prove such a transfer. In 1911 Balku executed two sale deeds in favour of Kutramani and others purporting to transfer his share in the land to them. The transferees applied for mutation of names some four years

* Civil Miscellaneous No. 150 of 1917.

before the present suit and mutation was ordered in their favour by the Revenue Court. The plaintiff brought the present suit for a declaration that he is the owner of Balku's half share and that the deeds did not affect his title thereto. The court of first instance held in favour of Jhamplu that from 1901, he had held adversely to his brother; that he had held possession to the date of the suit and that the property was his and remained unaffected by the sale deeds in question. It decreed the plaintiff's suit. The court of first appeal, while agreeing as to the facts, held that the deed of relinquishment of 1901 was inadmissible for any purpose whatsoever and that it was impossible for one co-owner to hold adversely to another co-owner. It dismissed the suit entirely. This decision was upheld by the Commissioner on second appeal.

The case was then referred to the High Court by the Local Government under rule 17 of the Kumaun rules of 1894.

Pandit *Brijmohan Vyas* and Munshi *Baleshwari Prasad*, for the petitioner.

Babu *Jogindro Nath Mukerji*, for the opposite parties.

TUDBALL, J:—This is a reference to this Court under rule 17 of the Rules and Orders relating to the Kumaun Division, 1894. The facts of the case are simple. One Julphu had two sons, Balku and Jhamplu; they were by different wives. He died leaving property in mauza Banchuri. After his death the names of the two sons were recorded, each as owner of a half share. Balku, however, when a boy went away from the village to live in mauza Debrana, and Jhamplu remained in sole possession of the property. In the year 1901, Balku began to assert his right, and he applied to the court for partition of his half share. An amin was deputed to carry out the partition, but he returned his commission unexecuted reporting the fact that the two brothers had come to terms. The suit for partition was withdrawn. About the same time Balku executed a document in favour of Jhamplu, which, however, was unregistered. It was tantamount to a relinquishment of his rights; but, being unregistered, it did not operate to transfer them, and it is not admissible in evidence to prove such a transfer. In 1911, Balku executed two sale deeds which are now in dispute in favour of Kutramani and others

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purporting to transfer his half share in the land to them. Kutramani, and others applied for mutation of names some four years before the present suit and mutation was ordered in their favour by the Revenue Court. The plaintiff has brought the present suit for a declaration that he is the owner of Balku's half share and that the deeds did not affect his title thereto. The court of first instance held in favour of Jhamplu that from 1901 Jhamplu had held adversly to his brother; that he had held it up to the date of the suit, and that the property was his and remained unaffected by the sale deeds in question. It decreed the plaintiff's suit. The court of first appeal, while agreeing as to the facts, held that the document, the deed of relinquishment of 1901, was inadmissible for any purpose whatsoever and that it was impossible for one co-owner to hold adversely to another co-owner. It dismissed the suit entirely. This decision was upheld by the Commissioner on second appeal. Paragraph 6 of the reference is as follows :— "The Government is advised that it was open to the plaintiff to produce the sale deed (Ex. 3), the deed of relinquishment, as evidence of the fact that he had for more than twelve years asserted his claim to sole ownership, and that this sale deed coupled with the other evidence on the file is sufficient to prove that the plaintiff has been in adverse possession as against his half brother for more than twelve years. The Government is further advised that, although the burden of proving adverse possession lies on a co-owner, it is not correct to say that a co-owner can never hold adversely to the other co-owner." The case was therefore referred to this Court for favour of opinion as to the correctness of the Commissioner's decision and if it be incorrect, as to what orders should be passed. We fully agree with the opinion of the Local Government. The document in question is clearly admissible in evidence, not for the purpose of proving the transfer but for showing the nature of the plaintiff's possession from the year 1901 onwards: that, coupled with the other evidence in the case, is sufficient to show that the plaintiff has been holding adversely to his brother Balku. It is not correct to say that a co-owner can never hold adversely to the other co-owner. That has never been held by any court. In our opinion the decision of the Commissioner is wrong. The proper

order to be passed in the case is that the decrees of the two appellate courts be set aside and the decree of the court of first instance be restored and that the plaintiff do have his costs in all courts from the defendant, costs in this Court will be certified.

WALSH, J.—I agree in the order proposed, I should not think it necessary to add anything except that we are differing both from the appellate court and from the Commissioner on a point of law as to which we have heard no argument in support of their decision. I am, however, satisfied that the point of law is covered by the decision of the Privy Council in the case of *Mahomed Musa* v. *Aghore Kumar Gangoli* (1). The difficulty which occasionally arises about unregistered documents is this. It is quite true that they are ineffectual to create title or to operate as to the transaction itself which they purport to carry out, but, as the Privy Council held in a somewhat similar case where the acts and conduct of the parties are relied upon in respect of a transaction which is said to be complete, equity will support the transaction clothed imperfectly in those legal forms to which finality attaches, after the bargain has been acted upon. In a case like a mutual exchange acted upon for many years, and proved by the acts and conduct of the parties, I think it is clear law in India as it is certainly clear law in England, that no document of any kind is necessary, and if there happens to be an unregistered document it is nonetheless admissible in evidence as one of the incidents of the events relied upon, although it is ineffective as an instrument of title. Other illustrations may be given. For example, the courts may always look at a draft document in order to see whether as a fact an agreement has been arrived at. Again it has been decided that the courts may look at a document written, "without prejudice," although it would otherwise be inadmissible, in order to see whether negotiations have reached the stage of agreement. I think these principles are perfectly clear, and are decisive of this case.

Order set aside.

(1) (1915) I. L. R., 42 Calc., 801.