Present: Shaw J. and De Sampayo A. J. 1915.

JAYAWARDENE *v.* SILVA.

466—D. C. Galle, 11,511.

Emphyteusis—Acquisition of servitude by prescription.

A servitude of emphyteusis may be acquired by prescription.

H, by deed dated 1836, delivered over the land in question to S and A, to be cultivated by them and their descendants in perpertuity, on condition that one-third of the produce should be rendered to the proprietor. The plaintiffs, claiming to be successors in title to H, brought this action for declaration of title against the defendants, who are the heirs of A. The deed of 1836, not having been registered under the provisions of Ordinance No. 6 of 1866, was not admitted in evidence.

Held, that it was open to the defendants to establish their title to the servitude of emphyteusis by prescription.

THE facts are set out in the judgment of the District Judge (P. E. Pieris, Esq.):—

The right claimed by the defendants has been already discussed by the Supreme Court in its judgment in appeal. Briefly it is this. In 1836 the original owner of the land made an arrangement with Daniel and Aberan, by which the two latter were to cultivate the land in dispute and render a third of the crop to the landowner, retaining two-thirds for themselves. It seems Daniel and Aberan divided the land into two, and ever since 1836 they and their representatives have cultivated the land and yielded a third of the crop to the landowner, who is now represented by the plaintiffs. The defendants are the representatives of Aberan. They claim that they are entitled to continue to cultivate the field, on the condition of yielding a third of the crop to the landowner, whether the latter is willing or not. The question is whether the defendants have acquired such a right by prescription.

It has been pointed out by the Supreme Court that the interest created under a certain deed which is inadmissible in evidence is in the nature of emphyteusis. It has been urged that what the defendants now claim is of the nature of emphyteusis. That proposition can hardly be accepted without demur. As *Voet* points out, the *emphyteuta canonem solvit non proportionatum quantitati fructuum . . . remissionem canonis ob sterilitatem aliunde damnum particulare petere nequit* (*6, 3, 2*). That description would not apply here. But assuming the proposition to be correct, does it hold the defendants? Under the Roman-Dutch law an emphyteusis could be acquired *per longi temporis præscriptionem*, *Voet 6, 3, 4*. But to-day the only means of acquiring title by prescription is by satisfying the conditions laid down by our Prescription Ordinance. In section 2 it lays down: "The expression 'immovable

1915.

Jayawardene v. Silva

property' shall be taken to include all shares and interest in such property, and all rights, easements, and servitudes thereunto belonging or appertaining."

Since 1836 the defendants and their predecessors have cultivated a portion of the field, and yielded a third of the crop to the predecessors of the plaintiffs. Does that satisfy the conditions laid down in section 3 of the Ordinance? I cannot see how such possession can be described as in any way "adverse." It may be that the action brought by Daniel in 1862, which is mentioned in the appeal judgment, marks a point of time from which the representatives of Daniel can claim an adverse possession. But that will not help the representatives of Aberan, whose possession had nothing to do with that of Daniel.

I hold that the defendants have failed to establish that they have obtained a title by prescription to the interest which they claim.

As to damages, the defendants having been in possession with the consent of the plaintiffs' vendors, were entitled to reasonable notice before they were called upon to surrender the land. I think a year's notice would be reasonable. I give judgment for plaintiff as prayed for, with Rs. 25 damages, and costs.

Elliott, for the appellants.

Bawa, K.C. (with him *A. St. V. Jayewardene*), for the respondents.

Cur. adv. vult.

February 4, 1915. SHAW J.—

This case raises a point of some interest, namely, whether a right of prescription can be obtained under the Prescription Ordinance, 1871, to a servitude of emphyteusis or usufruct in the land of another at a quit rent.

The plaintiffs are the legal owners of a piece of land called Hathunekumbure, deriving their title from one Gallage Hendrick, who was the owner of the land in the year 1836, and the action is brought by them to recover 24 kurunies of the land from the defendants, who are in possession.

The defendants are the heirs of one Pathiranage Aberan, and claim that they are entitled to a hereditary usufruct of the land in dispute, paying one-third of the produce thereof to the legal owners.

The case as originally put forward by the defendants was that Gallage Hendrick, by deed dated December 24, 1836, delivered over the land to two persons, Daniel de Silva and Patheranage Aberan, to be cultivated by them and their descendants in perpetuity, on condition that one-third of the produce should be rendered to the proprietor, and that they, as the descendants of Aberan, were entitled to remain in possession of his portion of land as against the plaintiffs, rendering to them one-third of the produce.

Although De Silva and Aberan entered into possession under the deed of 1836, that deed was never registered under the provisions of Ordinance No. 6 of 1866. The District Court Judge, however, admitted the deed in evidence, for reasons that I need not now go

into, and gave judgment for the defendants, holding that they were entitled under its terms to remain in possession of the land.

From this decision the plaintiffs appealed to this Court, and on the appeal the judgment was set aside, the Court (see judgment, *16 N. L. R. 481*) holding that the deed, being unregistered, was improperly admitted in evidence; but in view of the fact that no issue had been raised whether the defendants had acquired the right claimed by prescription, they accordingly framed an issue: " Have the defendants acquired by long possession a right to possess and take a two-third share of the crops ? " and sent the case back to the District Court for the trial of that issue.

The matter having thus again come before the District Judge, he, on November 20, 1914, entered judgment for the plaintiffs, on the ground that the possession could not be said to be adverse against the plaintiffs and their predecessors in title within the meaning of section 3 of the Prescription Ordinance, 1871; and he also expressed a doubt whether the right claimed in the case amounted to the servitude of emphyteusis under the Roman-Dutch law. It is from this decision that the present appeal is brought.

That the right claimed amounts to the servitude of emphyteusis I see very little reason to doubt. It appears to me to be of no importance whether the quit rent is paid in money or in kind, and I see no reason why it should not be of a varying amount, so long as that amount is capable of being definitely ascertained. It was by no means uncommon at one time in England for a rent to vary with the price of corn, and I see no reason why a rent charge of this nature, when it consists of a definite proportion of the produce of the land, should not vary in its amount according to the productiveness of the land.

There can be no doubt that the servitude of emphyteusis could have been acquired under the Roman-Dutch law prior to the Prescription Ordinance by prescription for a third of a century (see *Pereira 509*); also, in view of the provision contained in section 2 of the Prescription Ordinance, there can be no doubt that such a servitude is " immovable property " within the meaning of that Ordinance. The only difficulty that appears to me to arise is the question whether this servitude can be said to have been in the undisturbed and uninterrupted possession of the defendants " by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act of possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred), " which is required by section 3 of the Prescription Ordinance.

It has been contended in this case that the land having been held by the defendants as tenants from the plaintiffs, the right claimed cannot be said to have been held by a title adverse to or independent

1915.

SHAW J.

Jayawardene v. Silva

of the owner. This seems to me to be somewhat begging the question, for the " immovable property " claimed is the servitude, which may have been possessed and claimed adversely, although there may have been no dispute as to the ownership of the land itself.

Then it is said that the " immovable property, " here the servitude, must be possessed by "a possession unaccompanied by payment of rent or produce, " and that in this case it was accompanied by payment of one-third of the produce of the land.

I think, however, that the words " a possession unaccompanied by payment of rent or produce " are governed by the following words of the section: " from which an acknowledgment of a right existing in another person would fairly and naturally be inferred."

In the present case I consider that apart from the deed of 1836, which is inadmissible in evidence, it is quite obvious, and has been uncontested throughout the case, that the defendants and their predecessors have throughout and for very many years claimed to hold this land in perpetuity at a rent charge under some deed executed by Gallage Hendrick, and therefore that their claim to this servitude has been adverse to the plaintiffs and their predecessors; and the payment of one-third share of the proceeds of the land is not, under the circumstances, a payment from which an acknowledgment of a right existing in the plaintiffs and their predecessors in title to the land unburdened with the servitude, would fairly or reasonably be inferred.

I therefore have come to the conclusion that this servitude is capable of being prescribed for under the Prescription Ordinance, and that the defendants have established their right in the present case. I therefore think that the judgment appealed from is wrong, and should be set aside, and that judgment should be entered for the defendants, with costs of the trial in the District Court and of the two appeals.

DE SAMPAYO A.J.—

In my judgment on the previous appeal I expressed an opinion that the right claimed by the defendants was one in the nature of emphyteusis, and that, apart from the deed which originally created it, the defendants might be able to acquire the same right by prescription. The argument of the point on the present appeal confirms me in that opinion, and I entirely agree with the reasons given by my brother Shaw in his judgment. I think that this appeal should be allowed. As regards costs, the order in the previous judgment was that the costs of that appeal should be costs in the cause. The defendants should therefore have costs of the trials in the District Court and of both the appeals.

Set aside.