a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment. If there is a conviction, the other counts can remain on the file and need not necessarily be dealt with unless this court should for any reason quash the conviction and order the others to be tried. But it is undesirable that as many counts as were tried together in this case should be tried together".

It should also be borne in mind that in a case concerning the falsification of accounts, the evidence as to omissions or false entries not the subject-matter of a count may be admissible as tending to show system and to negative the defence of mistake; such omissions or false entries might be included without being the subject-matter of a count. In citing the passage from the judgment in Hudson's case we do not of course wish to fix a specific maximum for the number of counts in any particular information. But in the present case we consider that the trial proceeded on more counts than were necessary.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]
(October 30, 1954)

ENVER MEHMET CHAKARTO OF KATO POLEMIDHIA,
Appellant,

v.

HUSSEIN IZZET LIONO OF KATO POLEMIDHIA,
Respondent.

(*Civil Appeal No.* 4106)

Land—Prescription—Adverse possession by one co-owner against another co-owner.

The defendant-respondent was in possession of the land in dispute for about 9 years prior to 1943 without any registered title. In that year he bought a 4/20th share thereby becoming part owner with other persons who were not in possession and who were strangers to the respondent.

Prior to 1946 when the Immovable Property (Tenure, Registration and Valuation) Law came into operation, the land was "*arazi mirié*"; the period of prescription as contained in Article 20 of the Ottoman Land Code was 10 years. The respondent therefore required one year's possession after becoming co-owner in 1943 to complete 10 years possession.

Upon appeal,

Held: Where two co-owners have not derived their title from the former owner by inheritance but each are purchasers and strangers, the consent of the co-owner out of possession cannot be presumed, and therefore the possession of the co-owner who is cultivating the land is adverse to the other co-owner.

Appeal dismissed.

Appeal by plaintiff from the judgment of the District Court of Limassol (Action No. 1390/53).

K. C. Talarides for the appellant.

Ismail Avni for the respondent.

The judgment of the Court was delivered by:

HALLINAN, C.J.: The land the subject-matter of the dispute in this case belonged to a woman called Kulfere who died about 30 years ago, that is to say about 1924. On her death the respondent's father at a public auction bought a 7/20th share in the land, one Christofides bought a 4/20th share and one Michaelides bought an 8/20th share. The remaining 1/20th share devolved by inheritance upon Kulfere's daughter Tihar Abas. Michaelides sold his interest to one Pavlides who in turn sold it to the appellant in 1950. The appellant also bought the share of Tihar Abas. On the other hand the respondent bought Christofides' share in 1943 and bought his father's share in 1950. The result of these transactions is that the respondent has a registered title to 11/20ths of the land in dispute and the appellant a registered title to the remainder. The respondent claims that he has acquired a prescriptive right to the whole property. The evidence as to possession is meagre. The appellant relied purely on his title-deeds, but from the testimony of the respondent and his witnesses there is sufficient evidence to support the finding that the respondent's father left the land in about 1934 and at about the same time the respondent bought a share in some adjoining land and took possession not only of his father's share but of the whole area in dispute. He has continued in possession up to the date of action brought.

The main question which falls for decision on this appeal is whether a co-owner of land held in common can be said to be in adverse possession as against the other co-owners. But before considering this question it is convenient to dispose of two points argued on behalf of the appellant.

The respondent, in reply to a question in cross-examination, admitted that in 1938 he was sent to prison for 30 months for an assault made with a clasp knife. It is submitted for the appellant that his imprisonment constituted an interruption of his possession so that it stopped the prescriptive period from running. The respondent was never asked who, if anyone, cultivated the land in his possession during the period of his imprisonment. It would be reasonable to assume that when a farmer is sent to prison his family or somebody appointed by him would carry on the cultivation of the land he occupied. We are unable to deduce

from a single question put to him in cross-examination that the respondent by his family or agents vacated the land in dispute while he was in prison. In the absence of evidence to the contrary it is reasonable to assume that the land was not vacated by him.

It was further submitted that since the appellant was a *bona fide* purchaser without notice of the unregistered prescriptive title of the respondent, the appellant's registered title must prevail over the prescriptive title of the respondent. This is a kind of quasi estoppel which is supported by the authority of *Michael and others* v. *Nikoli and others*, VIII Cyprus Law Reports, 113; but it has been held in a recent case, Civil Appeal No. 4012 decided on the 20th June, 1953, that a party cannot rely on this type of defence if he fails to make reasonable enquiries as to his vendor's title. This matter was not pleaded by the appellant in his defence to the counter-claim. Had it been so pleaded the question of whether the appellant had made adequate enquiries might have been the subject of evidence. As the matter was not made an issue at the trial we cannot allow it to be taken on appeal.

Counsel for the appellant submitted that sections 3 and 8 of Cap. 231 were retrospective in effect. Now, if section 8 has retrospective effect, then no title to land can be declared by these Courts to have been acquired against the registered owner even though the prescriptive period was completed before the law came into operation. We are clearly of opinion that this section was not intended to have retrospective effect.

The object of counsel in submitting that the effect of section 3 of Cap. 231 should be retrospective is bound up with the question of what law should be applied to this case in deciding whether the possession of the respondent was adverse to his co-owner the appellant. The question arises in this way: The evidence is that the respondent was in possession for some nine years before he became a co-owner in 1943, by buying Christofides' 4/20th share; but if it is assumed that the prescriptive period continued to run after he became a co-owner, then he would have been more than ten years in possession when the Immovable Property (Tenure, Registration and Valuation) Law (Cap. 231) came into operation on the 1st September, 1946. Counsel for the appellant has submitted that since the passing of that law, under section 3, the categories of land under the Ottoman Law have been abolished and therefore that English common law applied. At common law, before its alteration by section 12 of the Real Property Limitation Act, 1833, the possession of one co-owner against another would only have been adverse if there had been actual ouster, and there had been no such ouster in this case.

It is not, in our view, necessary to consider this argument in detail; it is sufficient for us to say that where a person claims a prescriptive right to land, even if that land is registered in another's name, and the claimant shows that he has been in possession for the full prescriptive period before the enactment of Cap. 231, then, in our view, under the first proviso to section 9 of that Law the proper law to be applied is the Ottoman Law.

The trial Court considered that the provisions of the Mejelle were applicable and, relying on Article 1075, the learned trial Judge held that a co-owner's possession was in such circumstances adverse, and that therefore the prescriptive right would continue to run against the co-owners not in possession. We have had the assistance of Mr. Justice Zekia on this question, and he has referred us to the Commentaries of Ali Haidar on the Mejelle, 2nd edition, Volume 3, page 266, from which it is clear that the article on which the trial Court relied applies only to the category known as "*mulk*", whereas the property in the present case is "*arazi mirié*". This, however, does not further the appellant's case. *Arazi mirié* did not give, as *mulk* did, an absolute title to property, but only a usufruct subject to the paramount title of the State; and the State, which received taxes from *arazi mirié*, tended to protect those in possession who would keep the land in cultivation. The period of prescription for *arazi mirié*, as provided in Article 20 of the Ottoman Land Code, is ten years, whereas the period of prescription for *mulk* as provided in the Mejelle under Article 1660 is fifteen years. Article 23 of the Ottoman Land Code provides:

> "A person who takes land from the possessor under a lease or loan acquires no permanent right over the land by reason of the length of time for which he cultivates and possesses it, so long as he acknowledges himself a lessee or borrower".

In his Commentary on the Ottoman Land Code, Jemaleddin, at page 190, when discussing Article 23 says that if brothers are co-owners of land by inheritance and one only is in possession, such possession will not be deemed adverse as against the brothers who are not in possession because the brother in possession is presumed to be there with their consent. From Article 23 and Jemaleddin's Commentary it can reasonably be inferred that where two co-owners have not derived their title from the former owner by inheritance but each are purchasers and strangers, the consent of the co-owner out of possession cannot be presumed, and therefore the possession of the co-owner who is cultivating the land is adverse to the other co-owner.

For these reasons we consider that the respondent's possession, even when he became a co-owner in 1943, continued to be adverse to the title of the appellant.

This appeal must therefore be dismissed with costs.