Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

1906. *October* 11.

KULANTHAVELU *v.* KANDERPERUMAL *et al.*

D. C., Batticaloa, 2,559.

Claim by administrator for mesne profits—Prescription—Grant of letters—Relation back of title of administrator—Collation—Division of inheritance—Statute 3 *and* 4 *Will. IV.*, c. 27—*Ordinance No.* 22 *of* 1871.

Held, that an administrator is entitled to sue for rents and profits of the estate taken by a third party before grant of letters of administration to him; and that such action is prescribed in three years from the date of the grant of administration.

Held, also, that section 6 of 3 and 4 Will. IV., c. 27, is not law in Ceylon

LASCELLES A.C.J.—It is well settled that for certain purposes the title of the administrator relates back to the death of the intestate, so as to enable him to maintain actions such as trespass or trover in respect of goods of the intestate taken before the grant of letters.

MIDDLETON J.—No right of action accrues to an administrator till he has taken out letters of administration, and the Statute of Limitation only begins to run against him from the date of the grant of such letters.

Held, also, that where there has been no administration or division of the estate an heir, who has received advancement by dower or otherwise, cannot be excluded from the inheritance.

LASCELLES A.C.J.—The obligation to "collate" arises only on a division of the estate.

APPEAL from a judgment of the District Judge of Batticaloa.

The facts and arguments sufficiently appear in the judgments.

Sampayo, K.C. (with him *Balasingham*), for the defendants, appellants.

Bawa (with him *Wadsworth*), for the plaintiff, respondent.

Cur. adv. vult.

11th October, 1906. LASCELLES A.C.J.—

The plaintiff, who is the administrator of the estate of one Kathiravelupillai, has obtained judgment against the defendants for Rs. 1,662.19 representing the rents and profits of certain lands of the intestate occupied by the defendants

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From this judgment the defendants now appeal on several grounds.

First, it is said that judgment should not have been entered against the second defendant. The foundation of the claim is the action of the first defendant in taking the produce of the lands of the estate without accounting to the beneficiaries. There is no presumption that first defendant's wife participated in the produce taken by her husband, and I think the action, so far as it relates to her, has no foundation and should have been dismissed. The next point raised by the appellant is that part at any rate of the claim is prescribed.

The material dates are the following. On 7th September, 1895, the intestate died, and the first defendant took possession of his lands the following November. On 3rd July, 1901, the plaintiff took out letters of administration, and on 1st July, 1904, this action was instituted.

Leaving out of consideration the provisions of section 6 of the Real Property Limitation Act (3 and 4 Will. IV., c. 27), which this Court has already decided are not in force in Ceylon, it is clear that the cause of action accrued when the plaintiff took out letters. In *Cary v. Stephenson* (1) the claim was for money belonging to the estate received after the intestate's death by the defendant. The defendant pleaded *non assumpsit intra sex annos*. The Court was of opinion that the statute would be no bar, because the plaintiff's title began by taking out letters of administration (*vide* also *Murray v. East India Company*) (2).

It is thus clear that in this case the period of limitation began to run on the date when plaintiff took out letters, namely, on 3rd July, 1901. But, it is urged by the appellant, if the plaintiff's cause of action accrued only in July, 1901, he cannot sue for debts to the estate which became due before that date. This argument of course is fallacious. It is well settled that for certain purposes the title of the administrator relates back to the death of the intestate so as to enable him to maintain actions such as trespass or trover for the goods of the intestate taken by the defendant before the grant of letters [*vide* cases cited in *Williams on Executors*, page 253 (9th edit.)]. On these authorities I think it is clear that the administrator is entitled to sue for rents and profits of the estate taken before grant of administration to him.

Having regard to the substance of the action I think that it falls within the class of action named in section 8 of Ordinance No. 22 of 1871, and that the District Judge was right in holding that no part of the claim is prescribed.

(1) 2 *Salkeld* 420.

(2) 5 *B. & Ald.* 215.

The next point which arises is whether the intestate, Kathiravelupillai, was entitled to seven forty-eighths or to one-sixth of the lands which are the subject-matter of the action. The matter stands thus. The intestate's father, Kanderperumal, left four children and a widow. If the shares of all the children are taken into account the intestate's share in the events which have happened will be seven forty-eighths. But the plaintiff contends that, inasmuch as two of Kanderperumal's daughters received dower without bringing the amount into collation, their share must be excluded from the computation. On this footing the plaintiff contends that the intestate's share is one-sixth and not seven forty-eighths. The District Judge has adopted this view. I can find no authority for the proposition that where there has been no administration or division of the estate, an heir, who has received advancement by dower or otherwise, is to be excluded from the inheritance. It is clear that the obligation to "collate" arises only on a division of the estate (*Voet* 36, 6, 9). And the provisions in section 10 of the same title with regard to compelling heirs to make collation are inconsistent with the view that an heir who fails to collate must be presumed to have received the advance in satisfaction of his share in the inheritance. In my opinion the share of the intestate in the estate of Kanderperumal must be taken to be seven forty-eighths and not one-sixth, and any question which may arise with reference to the portion of the daughters who have received advancement must be considered hereafter. I am not prepared, on the evidence before me, to interfere with the finding of the Court as to the value of the produce of the estate taken by the defendant.

In the result the judgment must be set aside and the case remitted to the District Judge to enter up judgment, dismissing the action so far as it relates to the second defendant, and to give judgment in favour of the plaintiff on the footing that he was entitled, as the administrator of the estate of Kathiravelupillai, to seven forty-eighths of the estate of Kanderperumal. The second defendant is entitled to her costs of this appeal. As the first defendant has only partially succeeded, he will only be allowed the advocate's fees in appeal.

MIDDLETON J.—

I agree. The second defendant cannot by implication, because she is an heiress of the estate of Kathiravelupillai, be deemed to have participated in the acts of her husband which form the cause of this action, and there is no proof that she did so.

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From the English cases mentioned in *Williams on Executors* (10th edition, *p.* 468), it appears that no right of action accrues to an administrator till he has sued out letters of administration, and that the Statute of Limitations only begins to run against him from the date of the granting of the letters of administration. Further that for particular purposes, such as for trespass or trover for the goods of the intestate taken by one before the letters granted unto him, the administrator may have his action.

Here the intestate died on the 7th September, 1895, the letters were granted on the 3rd July, 1901, and the defendants are alleged to have taken forcible possession of the rents and profits of Kathiravelupillai's estate from November, 1895, and this action was brought on 1st July, 1904.

I think therefore that the claim which appears to come under section 8 of Ordinance No. 22 of 1871 is not barred by that Ordinance, which would only run against the administrator here from the date of his letters, *i.e.*, 3rd July, 1901.

Voet 36, 6, 9, says "*facienda collatio tempore divisionis*," and it would not be possible in an action of this kind to make an equitable adjustment, as no issue has been settled as to which of the heirs, and to what extent, they had received advancement.

I think, therefore, that the share of Kathiravelupillai must be calculated at seven forty-eighths.

The District Judge's calculations as to the value of the produce have not been seriously attacked or affected by the attack, and I see no reason to interfere with them.

The judgment in my opinion must be varied in the sense indicated by my Lord.

As appellants have only partly succeeded, I would give appellants their advocate's fees only on appeal.