[In Review.]

1907.
March 27.

Present : Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

ORLOFF *et al. v.* GREBE *et al.*

D. C., Kandy, 14,759.

Prescription—Possession with consent—Adverse possession—Overt act—Ordinance No. 22 of 1871.

Where a person enters into occupation of property belonging to another with the latter's consent and permission, he cannot acquire title by prescription to such property, unless he gets rid of the character in which he commenced to occupy by doing some overt act showing an intention to possess adversely to the owner.

Judgment of the Privy Council in *Naguda Marikar v. Mohammadu* (1) followed.

HEARING in review of the judgment of the Supreme Court in appeal, dated 13th October, 1904, preparatory to an appeal to His Majesty in Council.

Elliott, for the defendants, appellants.

Bawa, for the plaintiffs, respondents.

Cur. adv. vult.

27th March, 1907. Wendt J.—

This is a hearing in review, preparatory to defendants appealing to His Majesty against the judgment of this Court pronounced by my brother Middleton and myself on 13th October, 1904. We dismissed defendant's original appeal and affirmed the judgment of the District Court of Kandy, which was in favour of the plaintiffs as prayed.

The plaintiffs are the executors of the late Edward Theodosius Gerlits, who died on 13th August 1877, leaving a last will dated 28th June of the same year, and they seek to recover from the defendants, who are man and wife, the house No. 47, Trincomalee street, Kandy. On the pleadings it is admitted (save as to a difference of extent to which I shall presently refer) that Gerlits became owner of the house by purchase on the conveyance dated 1859 pleaded by the plaintiffs. The defendants, however, deny that he died possessed of it, and say that his three sisters and the second defendant (the daughter of one of the sisters) had by possession adverse to him acquired a prescriptive title to it. They next say that if the testator died possessed of the property, his "heirs-at-law" were his three sisters and the children of a deceased sister; that the first

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defendant, having been married in community of estate to one of those children (now deceased) became entitled to an undivided one thirty-second share of the property in question; and that the second defendant, a daughter of one of the three sisters, Mrs. Frederica Perera, is entitled by inheritance from her mother to one-fourth share thereof. Lastly, the defendants say that they and Mrs. Perera had had prescriptive possession as against the plaintiffs until the mother's death in 1900, and that thereafter the defendants have continued in such possession up to date, and they accordingly claim a title under the Prescription Ordinance.

The last will, after directing the payment of debts and funeral and other expenses, proceeded as follows (clause 2):—

"I give and bequeath to my dearly beloved sister Frederica, now the wife of Mr. J. H. Perera, to my unmarried sisters Anesta Gerlits, Margaret Cecilia Gerlits, and to my niece Selina Ashbourne; all the issues, rents, and profits arising from my real and personal property situate at Kandy, Nuwara Eliya, and Badulla, or wheresoever situate, and all the interest and dividends arising and accruing from the moneys now laid out at interest on the mortgage of real property situate at Kandy and at Badulla in equal shares and proportions, and I direct that the same be paid to them by my executors during the term of their natural life, and after the death of any one or either or all of the said legatees I direct that the share of the rents and interest aforesaid of the legatee so dying should be distributed among the widows, orphans, and really deserving destitute people of the Burgher community according to the discretion and judgment of my executors hereinafter named."

The 4th clause directed that the testator's houses and lands situated in Kandy should not be sold at any time, but gave the executors leave to sell other lands, and in that event directed that the proceeds, with the other moneys of the estate, be held in trust and invested, and the interest and dividends arising therefrom be applied as provided for in clause 2. The 5th clause forbade the executors to incumber the real property, and directed that the expenses of keeping and maintaining such property in good and proper repair and order be paid from the funds of the estate, the executors however taking care "that such expenses be not incurred at once if they will materially diminish the life interest of my aforesaid sisters and niece." The 6th clause prohibited the legatees from mortgaging or alienating "their life interest in this my estate" or drawing the same in anticipation.

It is common ground that for several years before the testator's death his three sisters named in his will (the eldest being a widow and the other two, Anesta and Margaret, being unmarried) lived in the house in question rent free, and they continued to live therein till their respective deaths. Anesta and Margaret died in 1885, and Mrs. Perera on 14th January, 1900; the fourth legatee, Selina

Ashbourne, the only one now surviving, is the wife of R. O. Estrop. She is one of the daughters of Adelaide, a sister of the testator's who had predeceased him. The plaintiffs allege that the sisters' occupation was by the leave and license of Gerlits, who out of love and affection for them (they being destitute of means of their own) permitted them to live in the house free of rent. The defendants, who are unable to throw any light on the circumstances attending the sisters' entry, say that their occupation was adverse to any claim on the testator's part. It is proved that Gerlits, who was himself unmarried and was a fairly wealthy man, was a proctor practising at Badulla, whence he visited Kandy every year at Christmas to see his sisters and relatives. On those occasions (the last of which was in the year before his death) he stayed in this house. He told the first plaintiff Mr. Sproule (a fellow practitioner and very old friend) that he wished his sisters always to live in the house free of rent. The title deed remained always in Gerlits' possession, and is produced now by the plaintiffs. Considering the sisters' entire dependence on the testator, the probabilities are strongly in favour of plaintiffs' contention, that their occupation of the house was by his permission and not in assertion of any independent right. The possession presumably follows the title, and there is an entire absence of proof of any overt act of the sisters which would characterize their living in the house as adverse to the ownership of their brother. I think therefore that the learned District Judge was right in deciding that Gerlits died possessed of the property in question.

As regards the prescription by defendants against the executors, the District Judge believes that the defendants, as the daughter and son-in-law of Mrs. Perera, went to live with her, with her permission, and that no overt act has been proved whereby they manifested an intention of occupying the house as their own, until after her death and within two years of the institution of this action. The District Judge finds that from 1878 until 1899 Mr. Sproule, the second plaintiff as the working executor, repaired and kept the house in order sometimes at the request of one of the sisters, at other times at the request of the first defendant. There is an obvious slip of the pen in certain passages of the judgment, where Benjamin Grebe is spoken of as second defendant. He annually whitewashed the house, and since 1884 (when he came to reside in Kandy) visited it in order to ascertain the nature and extent of the repairs needed, for the execution of which he had estimates submitted which he sanctioned and paid for. The quarterly Municipal taxes assessed upon the property were paid by the second plaintiff from 1878 to 1899, and during all that time the house was entered in the Municipal books as the property of Gerlits or his estate, and it still remains so entered. The defendants never paid any of the taxes. They sought to avoid the assertion of title which is to be inferred from these acts of the second plaintiff, by suggesting that he merely expended the

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moneys as the agent of Mrs. Perera, and deducted his disbursements out of her share of the rents, &c., payable under the will. This is entirely negatived by the testimony of Mr. Sproule and by the evidence of his accounts, and it has to be borne in mind that the will required the executors to maintain and keep the property in order. Mr. Sproule in truth, actuated by the affection he bore the memory of his friend, the testator, discharged his duties as executor in the most generous and liberal spirit towards Mrs. Perera and her sisters, and it is impossible to resist the conclusion that that lady would have given no countenance whatever to the claim of prescription put forward after her death by her daughter and son-in-law. On some material points there is a conflict of evidence between Mr. Sproule and the first defendant, and the District Judge unhesitatingly prefers the testimony of Mr. Sproule. There is no reason whatever for thinking he was wrong in so doing. This disposes of defendants' claim to have prescribed against the legal representatives of Gerlits. On this part of the case I need only add a few words as to the case of *Jain Carim v. Rahim Dholl* (1), upon which appellants relied as recognizing a possession similar to that of Gerlits' sisters as being a prescriptive possession under the Ordinance. The difference in the facts distinguishes that case from this. There Burnside C.J. said that, although the occupation of Saibo Umma began by the sufferance of the owner, she had by exercising independent acts of ownership, such as repairing the house at her own expense, converted her permissive occupation into an adverse possession, and that beyond doubt the owner had regularly recognized her separate possession. There are, however, expressions in the judgments both of the Chief Justice and of Lawrie J. which at first sight lend colour to the contention that, if for ten years the possessor has not paid rent or produce, or performed service or duty to the owner, nor done any other act from which an acknowledgment of the owner's title would fairly and naturally be inferred, such possessor has acquired a prescriptive right. But that view has been repeatedly held to be erroneous in not taking account of the origin of the occupation or enjoyment by the person claiming such right. It can only be true where at the commencement of the ten years the parties are at arm's length and independent of each other. So far back as in the year 1887 this Court laid down in *Coloeterie Goeroenanselage v. Don Christian Arachchy* (2), that " a possessor is always presumed to hold in his own right, and as proprietor, until the contrary be demonstrated; the contrary being once established and it being shown that the possession commenced by virtue of some other title, such as that of tenant or planter, then the possessor is to be presumed to have continued to hold on the same terms, until he distinctly proves that his title has changed."

(1) (1892) 2 *C. L. R.* 118. (2) *Morgan's Digest* 169.

Lawrie J. (2 *C. L. R., p.* 120) attributes this summary of the law to Rough C.J., but the report shows that it was due to Jeremie J., the other member of the Court.

That this is the correct view is proved by the decision of the Judicial Committee of the Privy Council in *Naguda Marikar v. Mohammadu* (1). See also the decision of this Court in *Maduwanwala v. Ekneligoda* (2). In the case now before us, the persons in occupation and enjoyment, even if they did no act acknowledging Gerlits' title, never got rid of the character in which they commenced to occupy and enjoy the house, and never put themselves in a position to possess adversely to the true owner.

The appellants argued that the will had disposed of the rents and profits alone of the house in question; that therefore Gerlits had died intestate in respect of the dominium which had accordingly devolved *ab intestato* in equol shares on the surviving sisters and the children of the deceased sister; that the first defendant had therefore become owner of one thirty-second share by his first marriage with one of those children, and that his present wife, the second defendant, had also now inherited a share from Mrs. Perera. This contention is intended to lead up to the argument that the executors cannot eject the heirs in possession, to which I shall presently refer. In my opinion Gerlits did not die intestate as alleged. His will says that the houses in Kandy shall not be sold at any time, and at any rate as respects them he intended that the income from them should be devoted in perpetuity after the death of all the legatees, to the charitable purpose defined in the 2nd clause. That provision is inconsistent with a vesting of the dominium in the next of kin immediately upon the testator's death. I think the dominium is vested in the executors. If that provision is void in law, it could only be so declared in an action properly constituted for that purpose, and we cannot discuss that question as a defence to the claim of the executors.

Besides, assuming Gerlits did die intestate to the extent alleged, the probate vests his whole estate in the executors, even although the distribution may have to be by the rules of succession *ab intestato;* and the executors are entitled to vindicate the property from persons who, like the defendants, deny their testator's title. The contention to which I alluded just now, viz., as to the inability of the plaintiffs as executors to recover the property from any person entitled as heir to a distributive share of the estate, was not fully argued before us in review, but counsel stated the general proposition that, after the lapse of an unreasonable time, an executor or administrator before he could recover judgment in ejectment against the heirs, claiming to be in possession as such, must show that the property in question is required for purposes of due administration

(1) (1903) 7 *N. L. R.* 91. (2) (1898) 3 *N. L. R.* 213.

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of the estate. No cases were specifically cited, and counsel admitted that he had not found one in which persons who denied the testator's title had succeeded in keeping possession. The cases which gave support to the view thus put forward are old cases, decided before the law was as clearly understood or settled as it is now. That law is the English Law of Executors and Administrators, and it affords no ground for the claim of the defendants.

There is only one other point I need advert to, viz., the contention that the executors are at most entitled to recover only 7.67 perches of land (that being the extent mentioned in the conveyance to Gerlits), whereas the premises now comprise 9.358 perches. The conveyance was of the ground and buildings within specific boundaries, the ground being practically covered by the house. True, it is described as containing 7.67 perches according to the annexed figure and survey, but that is matter of description merely and does not control the conveyance. It was not a conveyance of a portion out of a larger corpus. From the time of the conveyance to the present the ground has been occupied by the house, and there is nothing to suggest that Gerlits did not enter into possession of the whole extent in claim. Nor is there anything which indicates that his sisters or the defendants entered upon 7.67 perches extent under Gerlits, and upon the remainder in assertion of an independent right. There is nothing to indicate on which side the boundary has been pushed forward, if it has been pushed forward at all. The defendants occupied the property as a whole, and they must hold it or surrender it as a whole.

The value of the mesne profits as the measure of damages was not contested before us. For the reasons I have given, I am of opinion that we should affirm our judgment under review and leave the defendants to proceed with their appeal to His Majesty. The defendants will pay the respondents their costs of the hearing in review.

MIDDLETON J.—

This was a hearing in review previous to appeal to the Privy Council from a judgment delivered by me and concurred in by my brother Wendt.

The defendants' Counsel, Mr. Browne, on the original appeal in opening, endeavoured to support their case on the ground of prescription, but in reply Mr. Walter Pereira declined to rely on that ground, and we have now again been addressed on the point of prescription, which has been strongly urged by Mr. Elliott.

In my judgment, as I believe, I stated on the former argument there was no evidence of adverse possession to enable the defendants to support a title by prescription.

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As regards the point that defendants are entitled to succeed as regards the difference between the area in the plaintiff's title deed and the actual area of the property in question, what the defendants occupied were the premises known as 47, Trincomalee street, Kandy, within the boundaries given in the title deed.

The fact that those premises have a somewhat larger area within the boundaries than the area specified in the deed does not thereby entitle the defendants to claim; they have acquired a title by prescription by adverse possession as regards that difference.

The nature of the defendants' occupation applied to the whole premises which the plaintiffs might claim under their title deed. The portion in excess of the area in the title deed, if there was in fact such a portion, has not been shown to be a separate divided portion capable of separate exclusive occupation, and I would hold that the argument as to the want of adverse possession applies equally strongly to such portion.

It was objected to my judgment that I had put forward Selina's rights as a reason for the view that I took in holding that the *corpus* including this house vested in the executors.

I ought perhaps to have gone further, and suggested that the executors would not be able to carry out the terms of the will as regards the poor Burgher community if deprived of the rents and profits of the house in question.

I see no reason to alter the view I took in my former judgment, and would dismiss this appeal with costs.

HUTCHINSON C.J.—I agree.

Judgment in appeal confirmed.