1906.
*June 5.*

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

SEGOE MOHIDEEN *v.* ISMAIL LEBBE MARICAR.

*D. C., Colombo,* 21,973.

*Heir* ab intestato, *possession by—Appointment of administrator—Prescription—Sale by administrator—Title—" Adverse possession "—Ordinance No. 22 of* 1871, *s.* 3.

*Held,* that possession by heirs succeeding *ab intestato* is, always, a possession subject to the title of a legal representative, if one should be appointed; but that it is competent for an heir, after the appointment of an administrator, by overt acts to change the character of his possession into an " adverse " one.

*Held,* also, that the onus is on the heir, in such a case, to prove when, and how, his subordinate and derivative possession became converted into an " adverse " one; and that the mere enjoyment of the rents and profits, or the erection of buildings, or the making of other improvements, would not amount to proof of such " adverse " possession, as such acts are not inconsistent with possession as an heir only.

ACTION *rei vindicatio.*

One Casie Lebbe, being owner of the premises in dispute, died intestate on 12th June, 1892. Administration was granted to his estate in August, 1904, in case No. 1,884, D. C., Colombo; the administrator sold the property by public auction in February, 1905, and it was purchased by the plaintiff, who obtained a conveyance dated 2nd May, 1905. The plaintiff sought to vindicate the premises from the defendants, who were in possession. The first defendant, admitting that Casie Lebbe was the owner and that he died intestate, alleged that he was his sole heir, and that as such he has been in possession since 1892, and had acquired title by prescription.

The other defendants claimed to be tenants of the first defendant.

The question whether the first defendant was the sole heir of Casie Lebbe was raised in the testamentary proceedings, and the Judge had held that the first defendant was not the sole heir, and that one Avoo Lebbe was also one of the heirs of the deceased.

The District Judge (F. R. Dias, Esq.) gave judgment for the first defendant, holding that he had acquired title by prescription. The plaintiff appealed.

*Dornhorst, K.C.,* and *Walter Pereira, K.C.* (with them *Samarawickreme*), for the plaintiff, appellant.

*H. J. C. Pereira* (with him *F. M. de Saram*), for the defendants, respondents.

*Cur. adv. vult.*

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5th June, 1906. WENDT J.—

This is an action to vindicate a small plot of land with the buildings thereon, bearing assessment No. 8, Dean's passage, in the town of Colombo. Admittedly, one Casie Lebbe Marikar died possessed of this land. He died on 12th June, 1892. The plaintiff's title is based on a sale by his administrator in February, 1905, followed by a conveyance dated 2nd May, 1905. The first defendant, who is Casie Lebbe's brother, claims title by prescription, and, in the alternative, asks for compensation for improvements, asserting that all the buildings were erected by him. The other defendants are his tenants. The learned District Judge has dismissed the action, and the question is, whether first defendant has made out his prescriptive title.

Casie Lebbe left, besides the property in question, an interest in another parcel of land bearing No. 20, which adjoins it. He died intestate and unmarried, survived by the first defendant and one Avoo Lebbe, who claimed to be his brother, but whom first defendant alleges to have been only the adopted son of their father. No application was made for administration of Casie Lebbe's estate. Defendant states that he entered into possession of No. 8 as his heir, and that he regarded himself as sole heir. In fact, however, the estate became divided between him and Avoo Lebbe, defendant having exclusive enjoyment of No. 8 and Avoo Lebbe of No. 20. In the testamentary proceedings the question whether Avoo Lebbe was a brother—and, therefore, an heir—of Casie Lebbe was tried between his representative and defendant and determined against the defendant, who appealed unsuccessfully against that determination. In my opinion it is no longer open to defendant to contest that question.

Now, it is true that in actions brought by the heirs of an intestate to vindicate his property, inherited by them from third parties, claiming adversely to the deceased owner, the plaintiffs have been held entitled to rely on prescriptive possession by them in order to avoid the objection to their title based on want of probate or administration. But that is not prescription against the legal representative of the deceased, but (in effect) by such representative against strangers. The possession by heirs succeeding *ab intestato* is always a possession subject to the title of a legal representative, if one should be appointed. It may perhaps be possible for an heir, after an administrator is appointed, by overt acts to change the character of his possession into one that could properly be described as "adverse," within the meaning of our Prescription Ordinance but the onus will distinctly lie on such heir to show when, and how, his original subordinate and derivative possession became converted into possession *ut dominus*. Mere enjoyment of the rents and

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profits will not suffice, nor will the erection of buildings and making of other improvements, for none of these acts is inconsistent with possession as an heir only. It is even doubtful that defendant made any such improvement earlier than ten years prior to action brought, for he stated, when examined as a witness in the testamentary proceedings on 12th September, 1903, that he built " four or five years ago, " say, in 1898 or 1899.

Consider the consequences of giving first defendant a prescriptive title as against his administrator. A man dies leaving a valuable estate, which thereupon owes a large sum to the Crown as duty. That is not paid, but his two brothers as heirs divide the lands between them and enter into possession. After ten years an application is made for administration, which is opposed by the brothers, as defendant opposed it here, but the grant is made. In order to pay the Crown duty and the costs of the administration, the administrator obtains the leave of the Court to sell the lands. Whichever land he may put his hands upon, one of the brothers will say: " I have acquired a prescriptive title to this, " and what is admittedly a charge upon the whole estate would go unsatisfied. Besides, there may conceivably be unpaid debts of the deceased. How are they to be discharged ? And here it suggests itself that if defendant's contention be sound, it formed a good objection to any grant of administration at all. " Administration is unnecessary (he should have said), because there is nothing to administer. No doubt deceased left an estate, but that has now disappeared by my acquisition of prescriptive title, and you cannot disturb that title. " If that view be right, the defence is not open now, the order for administration having been made in the presence of the defendant and being binding on him.

I think that the defence of prescriptive title in the first defendant fails, and that the case should go back to the District Judge to ascertain whether any, and if so what, compensation is due to him for improvements. The plaintiff will have the costs of appeal, and the District Court costs will abide the event.

LASCELLES A.C.J.—

I have come to the same conclusion as my brother. The first defendant was a party to the testamentary proceedings, and he cannot now be allowed to deny that Avoo Lebbe was his brother and co-heir.

On Casie Lebbe's death the first defendant and Avoo Lebbe each entered upon separate portions of the estate. Their possession was as heirs, and was not inconsistent with the title of the administrator, who represented all the heirs.

In my opinion the question of adverse possession does not arise.

*Appeal allowed.*