1951 *Present :* **Rose C.J. and Gratiaen J.**

S. K. CHELLIAH Appellant, and M. WIJENATHAN *et al.* Respondents

S. C. 372—D. C. Colombo, 4,596L

*Prescription—Administration of estates—Immovable property—Time of vesting of title in heirs—*Actio rei vindicatio *brought by administrator—Legal position of administrator in such action—Civil Procedure Code, ss. 472, 519, 539, 540, 740—Prescription Ordinance, ss. 3, 13.*

When a person dies intestate, the title to his immovable property is transmitted automatically to his heirs. For the purpose, therefore, of reckoning prescriptive possession in an action brought by the administrator under Section 472 of the Civil Procedure Code for the recovery of such immovable property from a trespasser, the administrator is deemed to represent the heirs of the intestate, and the date of appointment of the administrator is immaterial. Where the heirs, during the period when the defendant claims to have acquired prescriptive title to the property, were subject to one of the disabilities contemplated in Section 13 of the Prescription Ordinance, the administrator can plead the benefit of that disability on their behalf.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, K.C., with *P. Navaratnarajah* and *E. R. S. R. Coomaraswamy*, for the plaintiff appellant.

N. K. Choksy, K.C., with *C. Renganathan*, for the defendants respondents.

Cur. adv. vult.

December 7, 1951. GRATIAEN J.—

Learned Counsel who appeared before us were agreed that, for the purposes of this appeal, the following findings of fact recorded by the learned District Judge may be assumed to be correct :—

A. R. A. Arumugam Chettiar, Junior, who was the adopted son of A. R. A. Arumugam Chettiar, Senior, died on 20th July, 1931. In March, 1931, he had become, by virtue of a notarial conveyance P1 executed in his favour, the owner of a property called Caledonia Estate which is more fully described in the schedule to the plaint. After his death, the widow of Arumugam Chettiar, Senior, obtained from the same transferors a notarial document D34, dated 22nd November, 1932, purporting to operate as a deed which rectified P1 by describing her as the real transferee of the property. D34 did not, however, defeat the title which had previously passed to Arumugam Chettiar, Junior, and which, upon his death, had been transmitted to his intestate heirs. Nevertheless, the widow went into possession of the property on 23rd November, 1932. On 1st February, 1939, she conveyed her alleged interests in the property by the deed D35 to the 2nd defendant who in turn purported to convey the property to the 1st defendant by D36 of 21st July, 1942.

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The plaintiff is the administrator in Ceylon of the estate of Arumugam Chettiar, Junior. The appointment took place only in July 1944—13 years after Arumugam Chettiar, Junior, had died. In that capacity he instituted the present action on 16th July, 1946, claiming a declaration against the 1st defendant that Caledonia estate belonged to the deceased's estate. He also claimed damages for wrongful possession of the property, and asked that the 1st defendant be ejected therefrom.

Upon the facts recited by me the learned District Judge was clearly right in holding that the plaintiff must succeed unless the 1st defendant and those under whom she claimed had, at the time when the action commenced, prescribed to the land. On the issues relating to prescription the learned Judge held in her favour and the only question argued before us was whether this decision was justified in law. Here again Counsel were agreed that the learned Judge's findings of fact, in so far as they are material to the issues of prescription, should be accepted as substantially correct. It will therefore be convenient if at this stage I summarise these findings :—

Before D36 was executed, the 1st defendant and her predecessors-in-title had enjoyed uninterrupted possession of the property since 23rd November, 1932—i.e. from a date some four months after the death of Arumugam Chettiar. There can be no doubt, therefore, that the 1st defendant was *prima facie* entitled to the benefit of Section 3 of the Prescription Ordinance. So much is conceded by Mr. H. V. Perera, but he has contended that in the circumstances of the present case the 1st defendant cannot claim the benefit of Section 3 because all the intestate heirs of Arumugam Chettiar, Junior's estate (with the possible exception of his brother Socklingam Chettiar whose special position will be considered by me at a later stage) were admittedly " absent beyond the seas " in India ever since 23rd November, 1932, on which date, according to the learned Judge's findings, the 1st defendant's predecessor commenced to possess the property adversely. In that state of things, Mr. Perera contends, the provisions of Section 13 of the Prescription Ordinance operated to prevent the acquisition of prescriptive title against these heirs on whose behalf and for whose benefit the plaintiff now claims the property.

The intestate heirs of Arumugam Chettiar's estate are his widow Kannammai Achi, his brothers Socklingam and Ramasamy, his sisters Nagamai Achi and Valimmai Achi, and his mother Sithal Achi. It has been conceded that, according to the law of Ceylon which is applicable, the deceased's title to the property was transmitted upon his death to these heirs in the following shares :—

$\frac{1}{2}$ to his widow ;
1/16 to each brother and sister ;
$\frac{1}{4}$ to his mother.

Leaving out of consideration the case of the brother Socklingam, it is admitted that none of the other heirs had visited Ceylon at any time material to the issue of prescription. I have come to the conclusion that, upon these facts, the learned Judge was wrong in taking the view that the 1st defendant had acquired prescriptive title to the property.

The grounds on which I differ from the learned Judge will be sufficiently indicated in the reasons which follow.

It is now settled law that on the death of an intestate the title to his immovable property situated in Ceylon is on his death transmitted automatically to his heirs. Such title is subordinated only to—

(1) the right of the administrator, subject to the limitations expressed in his grant—*Appuhamy v. Silva* [1]— to sell such property for the payment of debts, funeral and testamentary expenses.

(2) the right of an unsatisfied creditor in certain circumstances to proceed against the property for the recovery of his claim.

These principles were finally established by a Full Bench of this Court in *Silva v. Silva* [2] and spasmodic attempts to challenge its authority have met with little encouragement and no success for a period of over 40 years.

An administrator's powers in relation to the intestate's immovable property are derived from and can only be ascertained by reference to the terms of the letters of administration issued to him. *Sorlentina v. de Kretser* [3]. If, therefore, no express letters (*vide* Sections 519 and 539 of the Civil Procedure Code) be imposed on his authority by the Court which appoints him, he is vested with general " powers of administration " over " every portion of the deceased's estate, movable and immovable " (Section 540). The terms of the grant in favour of the appellant in this action have been taken over from Form No. 87 recommended in the First Schedule to the Code. If the language of this grant be examined and summarised, it becomes apparent that the authority of the appellant, *qua* administrator, extended to all the well-recognised " powers of administration ", namely; (1) the recovery and collection of the assets of the estate (2) payment of debts, expenses &c., and, finally, (3) payment and distribution, in terms of a decree under Section 740 of the Code, among the heirs of any balance lying in his hands after the judicial settlement of his account.

The present action is concerned only with the exercise by the appellant of the first of the " powers " enumerated by me—namely, the recovery of immovable property from the possession of an alleged trespasser. It is now common ground that, unless the 1st respondent had acquired prescriptive title to the property at the time when the action commenced, it belonged absolutely to the intestate at the time of his death and was therefore an asset of the estate which the appellant was authorised and indeed under a duty to recover for the benefit of the heirs.

The form of action prescribed by the Civil Procedure Code in proceedings of this kind is laid down in Section 472 which provides as follows :—

> " In all actions concerning property vested in . . . an administrator, when the contention is between the persons beneficially interested in such property and a third person, the . . . administrator shall represent persons so interested ; and it shall not ordinarily be necessary to make them parties to the action. But the Court may, if it thinks fit, order them, or any of them, to be made such parties."

[1] *(1915) 18 N. L. R. 497.* [2] *(1907) 10 N. L. R. 234.*
[3] *(1927) 29 N. L. R. 174.*

There can be no doubt that *movable* property belonging to an intestate's estate is " vested ", in the strict sense of the term, in an administrator. *Kulendoeveloe v. Kandeperumal* [1]. But in what sense does Section 472 describe *immovable* property which forms an asset of the intestate's estate as being " vested " in the administrator ? The answer has been given in the judgment of Soertsz J., with whom de Kretser J. agreed, in *De Silva v. Rambukpotta* [2]. The administrator is, for the purpose of the litigation, the representative in law of each of the lawful heirs of the intestate ; and, the issues arising for determination relate to the competing claims to ownership of the heirs on the one hand and the alleged trespasser on the other. The land is regarded as " vested " in the administrator in a strictly limited sense—so as to enable him, in his representative capacity, to recover from a third party what is claimed to be an asset of the intestate's estate. Interpreted in this way, the language of Section 472 is perfectly consistent with the principle laid down in *Silva v. Silva* (supra) which was, indeed, decided *after* the Section had come into operation. Section 472 does not purport to introduce substantive law but merely prescribes a convenient procedure for actions of the kind which we are now concerned with. Once the administrator's status has been established at the trial, the only matter for investigation is the *title of the heirs* which he claims to be superior to that of the opposing party. It is possible in this way to reconcile the substantive law clarified by the Full Bench in *Silva v. Silva* (supra) with the procedural law prescribed in Section 472 of the Civil Procedure Code. If this be the true position, the scope of Sections 3 and 13 of the Prescription Ordinance seems to me to present no special difficulties. Under Section 3, uninterrupted adverse possession by a defendant (and those under whom he claims) of immovable property for the requisite period defeats a claim to the property by or on behalf of the person or persons who had legal title to the property. Section 13 provides an exception to this general rule. If, at the time when the adverse possession by the defendant (and those under whom he claims) first commenced, the true owner was under some special disability such as minority or absence beyond the seas, the starting-point for calculating the period of 10 years' prescription under Section 3 is postponed until the date on which such disability has been removed. As an alternative, the proviso to Section 13 recognises adverse possession for 30 years as sufficient to defeat the title of the owners notwithstanding any disability of the kind enumerated.

In a very large majority of actions in our Courts for vindication of title to immovable property, the claimant is required to sue in his own name in order to assert his rights. But there are some forms of action where the assertion of a claimant's rights must be made on his behalf by some other person suing in a representative capacity. Section 472 introduces such an exception. It seems to me that, in proceedings of this special kind, the " disability " contemplated by Section 13 of the Prescription Ordinance is clearly the disability of the true claimant and not that of the person who represents him in the proceedings. To take a contrary

[1] *(1905) 9 N. L. R. 350 and (1906) 9 N. L. R. 353*

[2] *(1939) 41 N. L. R. 37.*

view is to introduce unreality to the scheme of the Ordinance and to defeat its true purpose. The Legislature could not have intended, for instance, that the rights of a third party who has adversely possessed immovable property for over ten years against an intestate heir during a period when the heir suffered none of the disabilities enumerated in Section 13, could be defeated merely because an administrator of the intestate's estate had been appointed at a much later date. This may possibly be the position with regard to claims for movables which are in the strict sense of the term " vested " in the administrator and not in the heirs. *Kulendoeveloe v. Kandeperuma* (supra). With regard to immovable property, however, the position relating to title and ownership is different, and it seems to me that in these cases " the right of a person to sue " contemplates not only the right of a claimant suing on his own behalf to vindicate his title but also the right of a claimant *on whose behalf* some other person institutes the action for the purpose of vindicating the claimant's title.

It is apparent that if, in a case of this kind, the administrator and not the intestate heir is to be regarded as the person vested with legal title to the property and against whom prescriptive title is capable of being acquired, the 1st defendant would be confronted with an even more serious obstacle. In that event another principle of law would be brought into operation. The so-called " title " of the appellant could not have accrued until letters of administration were issued to him, and—in the absence of any statutory provision in Ceylon for relating such " title " back to the date of the intestate's death for the purposes of prescription,—the 1st defendant would necessarily have failed to prove adverse possession in terms of Section 3 under a title " adverse to or independent of " the *plaintiff's " title "* (*after it accrued in July 1944*) for the requisite period of 10 years. No prescription can run retrospectively against an administrator's " title ". *Kulendoeveloe v. Kandeperumal* (supra). On the interpretation of the law which I prefer to adopt, this complication does not arise.

For the reasons which I have given I would hold that the 1st defendant had not, when the action commenced, acquired prescriptive title so as to defeat the title of the intestate heirs (other than Socklingam) who were admittedly " absent beyond the seas " within the meaning of Section 13 at all times material to the issues of prescription.

Socklingam's case requires special consideration. The plaintiff led evidence which, if true, indicates that this heir, like all the others, had never visited Ceylon. As against this evidence, the 1st defendant called a witness who stated that Socklingam had to his knowledge come to Ceylon from India on one occasion after the death of Arumugam. The witness was unable, however, to fix even approximately the date of this alleged visit, and when he was asked specifically whether the Ceylon estate was being administered at the time, he frankly replied that he " did not know ".

The learned Judge's finding with regard to the conflict of testimony on this part of the case is not very precise—for the reason, no doubt, that it was immaterial to the decision of the case in the view which he

had already taken of the proper interpretation of Section 472 of the Civil Procedure Code and Section 13 of the Prescription Ordinance. The evidence relied on by the 1st defendant with regard to Socklingam's alleged arrival in Ceylon seems to me to be too vague and inconclusive to assist her. She did not dispute the position that all the intestate heirs were normally resident outside Ceylon, and she was content to rely on evidence which, if true, only suggests that Socklingam had visited Ceylon on one occasion on an unspecified date which has not been proved to have occurred between 23rd November, 1932 (when adverse possession commenced) and 16th July, 1946 (when the present action was instituted).

Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has *prima facie* been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years. Applying these principles to the present case, I take the view that the 1st defendant has failed to prove that, after Socklingam's alleged visit to Ceylon, she and her predecessors-in-title had enjoyed the property for ten years before the action was instituted. In the result, the plaintiff, as administrator of Arumugam Chettiar Junior's estate, is entitled to the declaration asked for in respect of the entire property.

There remains for consideration the issue as to damages. The learned District Judge, in answering this issue, held that " the quantum of damages is as at page 23 of the evidence of Chelliah Pillai ". I think that it would be more satisfactory if the record is now returned to the District Court so that, upon an analysis of the evidence of Chelliah Pillai and of any other evidence which the parties may desire to place before the Court, a decree can be entered awarding damages to the plaintiff according to law. For this limited purpose the case may be tried by any Judge who is functioning in the District Court of Colombo.

For the reasons which I have given I would set aside the judgment appealed from and enter judgment in favour of the plaintiff in terms of paragraph (*a*) of the prayer to the plaint, ordering a writ of ejectment in his favour against the 1st defendant. The case must be remitted to the lower Court for the ascertainment of damages payable to the plaintiff as indicated in my judgment. The 1st defendant will pay to the plaintiff his costs both here and in the Court below, but the costs of the further proceedings to be held shall be in the discretion of the trial Judge.

ROSE C.J.—I agree.

Judgment set aside.