1915.

Present: Wood Renton C.J. and Shaw J.

PATHUMMA *v.* SINNA LEBBE *et al.*

101—D. C. Matara, 6,209.

Prescriptive possession—Interruption by minority of heir.

When prescriptive possession has once commenced to run against the owner of land it will not be interrupted by his death and minority of his heirs.

THIS was a partition action in which the plaintiff and the 11th defendant claimed the land sought to be partitioned as purchasers at a Fiscal's sale in execution against the original plaintiff and defendants. The owner of the land was Kungi Bawa. The original plaintiff was his widow, and the original defendants were his children and their husbands and the guardian of five other minor children of Kungi Bawa by his second wife. On the occasion of the marriage of his daughter, the 1st defendant to the 2nd, Kungi Bawa executed a *kadutam* dealing with half of the land in dispute, dated December 5, 1899, in her favour. On the marriage of another daughter, the 3rd defendant to the 4th, he executed in her favour a second *kadutam*, dated December 3, 1906, dealing with the other half. The plaintiff and the 11th defendant claimed the entire property by virtue of their purchase at the Fiscal's sale. The 6th to the 10th defendants were minors at the date when each of the *kadutams* was executed. At the trial, and for the purposes of this appeal, the plaintiff and the 11th defendant limited their claim to the one-eighth share conveyed by Kungi Bawa under the *kadutam* of December 5, 1899; the daughter to whom that share was conveyed was Pattumanatchia. The ground of the waiver was that there had not been sufficient time to acquire title by prescription to the other half share passing under the *kadutam* of December 3, 1906. The learned District Judge held that the *kadutam* of December 5, 1899, was merely an unexecuted promise to convey, and not a conveyance in itself; and further, that prescription would not begin to run against the minors until they had attained majority. The plaintiff and the 11th defendant appealed against these findings.

Arulanandam (with him *A. St. V. Jayewardene*), for plaintiff and 11th defendant, appellants.—The District Judge is wrong in holding that the *kadutam* granted by Kungi Bawa to his daughter, the 1st defendant, operated as a promise to transfer the land at some future date. It was an out-and-out grant. There is evidence that the 1st defendant and her husband entered into possession on the execution of the *kadutam*, and that they lived on the land in

disp e. Therefore prescription in favour of the 1st defendant bega to run during the lifetime of Kungi Bawa. The subsequent mino ty of the heirs will not interrupt the running of prescriptions. (See *innatamby v. Vairavy.*[1]) *Sinnatamby v. Vairavy* [1] was followed by Mencraiff A.C.J. in *Sinnatamby v. Meera Levvai.*[2]

The District Judge has failed to observe the important distinction between the facts of the present case and that reported in *Koch's Reports* at pages 61 and 62, where the *kadutam* was executed, not by the original owner, but by the eldest son of the original owner. At the time the prescription claimed began to run, the persons who claimed adversely later were minors. Counsel also cited *Walter Pereira 804 and 805.*

J. S. Jayewardene, for respondents.—Section 15 of the Prescription Ordinance. No. 22 of 1871, deals with disabilities affecting claims other than those for lands, and is purposely differently worded from section 14, which relates to landed property. Counsel adopted the observations of Pereira J. at page 805 of his book.

Sinnatamby v. Vairavy[1] was decided on the older Prescription Ordinance, and is no authority now. Counsel cited *2 Ch. D. 233* and *62 L. T. Reports 796.*

A. St. V. Jayewardene, in reply.—The English cases cited are more in favour of our contention.

Cur. adv. vult.

June 7, 1915. Wood Renton C.J.—

[His Lordship set out the facts, and continued]:—

The language of the *kadutam*, of which we have merely a translation before us, does not, in my opinion, support the view of the District Judge that it was only an executory agreement. It contains no reference to any future instrument of transfer. It is an out-and-out conveyance of the lands dealt with, and although, of course, it could not pass title, it formed a good starting point for adverse possession.

The second point involved in the appeal is, however, more difficult. The evidence shows that adverse possession under the deed commenced during Kungi Bawa's lifetime. Was it liable to be interrupted after his death by the minority of some of his heirs?

If the matter had been *res integra* there would, in my opinion, have been a great deal to be said in support of the contention of the respondents' counsel, that the difference of the language used in section 14 of the Prescription Ordinance, 1871 (No. 22 of 1871), excludes the application of the rule laid down by the Full Court in *Sinnatamby v. Vairavy*[1] in regard to an action on a bond, that prescription which has already commenced to run in favour of a plaintiff

[1] *(1876) 1 S. C. C. 14.*

[2] *(1902) 6 N. L. R. 50.*

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is not interrupted by the supervening minority of a person who succeeds to the right in dispute. But I am unable to see that, when due allowance has been made for the fact that the Prescription Ordinance, 1871, had to take account of prescriptive and possessory rights under Roman-Dutch law, there is any fundamental difference between section 3 of that Ordinance and section 1 of the English Real Property Limitation Act, 1874 (37 and 38 Vict. c. 57), under which such cases as *Murray v. Watkins*[1] and *Garner v. Wingrove*[2] were decided. I have little doubt that the Legislature to Ceylon intended to follow the law of England with reference to the effect of disabilities upon the limitation of actions, and the weight of judicial authority, from the case of *Muttu v. Menika*[3] down to *Sinnatamby v. Meera Levvai*,[4] descends so unmistakably on this side of the controversy that we should not be justified now in disturbing the settled interpretation of the law upon the ground of a strictly literal construction of section 14 of the Ordinance of 1871. There is nothing contrary to this rule in the decision of Sir John Bonser C.J. and Withers J. in 280—D. C. (Final) Galle, 4,903,[5] in which it would appear that the minority of the heirs was operating as a bar at the very commencement of the adverse possession. I may add that, in my opinion, there is no good reason why any such distinction as the respondents contended for should be established between land actions and any other form of litigation.

I would set aside the decree under appeal and send the case back, in order that decree might be entered up afresh on the basis that the appellants are entitled to the share of the property conveyed by Kungi Bawa to Pattumanatchia. I would leave it open to either side to raise for further inquiry and adjudication any question which this declaration of title may involve. The appellants are entitled to the costs of contest in the District Court and to the costs of this appeal in any event. The costs of any further inquiry and adjudication that may be necessary will be costs in the cause.

SHAW J.—

This case raises a somewhat important point under the Prescription Ordinance, 1871, namely, whether when prescriptive possession has once commenced to run against the owner of land it will be interrupted by his death and the minority of his heirs. The learned District Judge has held that it will be so interrupted, and from his decision the present appeal is brought.

It is well-settled law that in cases other than those relating to land an action will be prescribed when the time of limitation has expired after it has once commenced to run, notwithstanding any

[1] *(1890) 62 L. T. 796.*
[2] *(1905) 2 Chan. 233.*
[3] *(1854) Ram. 1843-1855, 53.*
[4] *(1902) 6 N. L. R. 50.*
[5] *Koch's Reports 61 and 62.*

subsequent disability of a party entitled to sue. See *Sinnatamby v. Vairavy*. [1] This case was decided under the old Prescription Ordinance of 1834, the wording of which was practically the same as section 15 of the Ordinance now in force. It is pointed out by counsel for the respondents, however, that in the Ordinance of 1871 there are two sections relating to disabilities which are differently expressed. Section 15, which relates to actions other than those for lands, speaks of disability " when the right of action shall accrue ", section 14, which deals with disabilities in the case of actions relating to lands, provides that " if at any time when right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, " and it is contended on behalf of the respondent that the Legislature intended the law to be different in the two classes of cases, and that in actions relating to land the disability of a person whose title commences after the period of prescription has commenced to run interrupts the running of the prescription, because at the time when the right of that person to sue first accrued he was under disability.

It is difficult to see why any difference should have been intended by the Legislature in the two classes of cases, but if such a difference is clear from the words used, we are, of course, bound to give effect to it.

I do not think, however, that such a difference is clear, or necessarily follows from the words used. Section 14 of our Ordinance is almost precisely in the same words as section 3 of the English Real Property Limitation Ordinance, 1874; and section 3 of our Ordinance is substantially the same as section 1 of the English Statute. Under the English Statute it has been held in *Murray v. Watkins* [2] and in other cases that when prescription has once commenced to run, the subsequent disability of an infant heir does not interfere with it, and the same was also held to be the law under prior English Statutes relating to the same matter and couched in somewhat similar words.

I am of opinion that the law here on the matter was intended by the Legislature to be the same as the law in England, and that the wording of our Ordinance carries out that intention. The question has several times been before this Court, and in the cases of *Sinnatamby v. Meera Levvai* [3] and 1,690—D. C. Kegalla [4] the law here has been expressly held to be as indicated above. It is true that in the case of *Bawa v. Serahami* [5] Bonser C.J. seems in the course of argument to have expressed a contrary view, but the strong current of decisions has been to the effect that the law here is the same on this subject as it is in England.

I would therefore set aside the decree and make the order indicated by the Chief Justice in his judgment.

Set aside.

[1] *(1876) 1 S. C. C. 14.*
[2] *(1890) 62 L. T. 796.*
[3] *(1902) 6 N. L. R. 50.*
[4] *S. C. C. Mins., July 19, 1904.*
[5] *S. C. C. Mins., March 17, 1899.*