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MAUNG AUNG TUN v. MAUNG SAN NYUN.

BROWN, J.

think be held that the plaintiff did not insist on partition at the time, and allowed the property to be managed as a whole for the joint benefit of the co-owners. There was no wrongful possession and no question of mesne profits prior to February 1925 arises. The suit was instituted in June 1925 and it does not appear that any claim was made from U Po before then. The plaintiff has made no claim in this suit for mesne profits subsequent to the institution of the suit.

I set aside the decrees of the lower Courts, and pass a decree directing that the land be partitioned and the plaintiff-appellant be given possession of a one-third portion thereof. The claim as to mesne profits prior to the institution of the suit is dismissed.

The defendants Maung San Nyun and U Po will pay the appellant his costs throughout on his claim for partition and possession only.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1927

June 14.

MAUNG SHWE AN AND ONE *v.* MAUNG TOK PYU AND ONE.*

Limitation Act (IX of 1908), Sched. I, Arts. 123, 144—Co-heir's suit for a share in the corpus of an inheritance governed by Article 123—Suit for distribution of estate, where one person holds property for benefit of all the heirs by consent, governed by Article 142 or 144.

Held, that the appropriate article for suits, instituted by co-heirs for a share in the corpus of an inheritance is Article 123, of the Limitation Act. But where a person holds the property with the consent, express or implied, of all the heirs on behalf of them all, then a suit for distribution of such an estate is governed by Article 142 or 144 of the Limitation Act.

The descendants of a person by his former wife had a right to claim partition of his estate as his heirs against his second wife and her children on that person's

* Civil Second Appeal No. 373 of 1926.

death. They did not do so and allowed the estate to remain in the hands of the second wife for more than thirteen years and she, as the evidence showed, did not recognise the rights of the descendants and did not hold the estate jointly for herself and the descendants.

Held, that Article 123 of the Limitation Act applied and their claim was barred by limitation.

Maung Po Kin v. *Maung Shwe Bya*, 1 Ran. 405 ; *Ma Tok and nine* v. *Ma Yin and seven*, 3 Ran. 77 ; *Tun Tha* v. *Ma Thit*, 9 L.B.R. 56—*referred to.*

Ko Ko—for Appellants.

Loo Ni—for Respondents.

BROWN, J.—The plaintiff-respondents Maung Tok Pyu and Ma Me Ma, are the grandchildren of one U Kadoot, deceased by his first wife Ma Gya U. Their parents are dead. Ma Gya U died many years ago and U Kadoot then married one Ma Su. By Ma Su he had three children and he died about 25 years before the present suit was brought. The respondents filed a suit for partition of his estate. They joined as defendants, Ma Su and her children or grandchildren and others who are or have been in possession of the estate property. The suit was contested by Maung Po Sein a son of Ma Su and by other defendants. The trial Court gave the plaintiffs a decree and Ma Su, Maung Po Sein and the present two appellants appealed to the District Court but were unsuccessful. The original defendants who are descendants of Ma Su have not appealed in this Court, this appeal having been filed by Maung Shwe An and Ma Zin, who are in possession of a major part of the property, a piece of paddy land. The main objection taken to the suit in the lower Courts was that the suit was barred by limitation. Both the lower Courts have found in favour of the plaintiffs on this point, but, unfortunately, neither Court seems to have appreciated fully what the law of limitation on the point is.

1927

MAUNG SHWE AN AND ONE v. MAUNG TOK PYU AND ONE.

BROWN, J.

It was held in the case of *Maung Po Kin* v. *Maung Shwe Bya* (1), that the appropriate article for suits instituted by co-heirs for a share in the corpus of an inheritance was Article 123 of the Limitation Act. This was based on a previous decision by their Lordships of the Privy Council in the case of *Tun Tha* v. *Ma Thit* (2), and the ruling has been followed in the case of *Ma Tok and nine* v. *Ma Yin and seven* (3). It may therefore be taken as settled law that ordinarily such a suit as the present is governed by the provisions of Article 123 of the Limitation Act.

As pointed out by Lentaigne, J., in *Maung Po Kin's* case, however, there is an exception in a case where the co-heirs including the plaintiff claiming a share have gone into possession and the plaintiff is subsequently ousted and refused his share. Similarly, if the heirs agreed amongst themselves that one of the heirs should hold the whole estate on behalf of them all, they might then sue for a distribution of the estate and claim that the provisions of Article 142 or 144 of the Limitation Act applied. But, unless it can be shown that whoever holds the property is holding it with the consent, express or implied of all the heirs on behalf of them all then the article applicable is Article 123. The Court below have found that the defendants did not establish the 12 years' adverse possession of the land ; but they assumed that the article applicable was Article 144. If Article 123 is applicable then it is quite clear that the suit has long been barred by limitation. The question for decision, therefore, is whether after the death of U Kadoot the land has been held by Ma Su or anyone else jointly on behalf of all the heirs recognising their claims as heirs. The descendants of U Kadoot by his former wife undoubtedly had a right to claim partition

(1) (1923) 1 Ran. 405. (2) (1916) 9 L.B.R. 56.
(3) (1925) 3 Ran. 77.

as heirs of U Kadoot against Ma Su and the surviving children by her on U Kadoot's death,

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On the evidence his Lordship held that Ma Su did not hold the property jointly on her own behalf and on that of the plaintiffs. U Kadoot's children by his former wife could have sued for partition of the estate on U Kadoot's death. But it was also open to them to allow the estate to remain undivided in the hands of Ma Su and to sue for their share of the estate as vested in Ma Su on her death. But the evidence did not show that Ma Su recognised the vested rights of the plaintiffs in the land. Article 123 applied and the period of 12 years allowed expired some 13 years before the suit was brought. His Lordship set aside the decree of the lower Courts and dismissed the suit with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

AUNGBANZAYA CO., LTD.

v.

C.R.M.A. CHETTYAR FIRM.*

Companies Act (VII of 1913), *s.* 109—*Non-registration of mortgage by Company, effect of—Security void against liquidator or creditor, but not against the Company.*

A mortgage created by a Company registered under the Companies Act on its landed property if not registered with the Registrar as required by law is void only as against the liquidator and any creditor of the Company, but cannot be repudiated on that ground by the Company itself while it is a going concern. The section makes void the security and not the debt, and that too only against the liquidator and the creditor, not the Company-grantor.

In re Monolithic Building Co., Tacon v. *The Company*, [1915] 1 Ch.Div. 643—*followed.*

Kirkwood—for Appellants.

Aiyangar—for Respondents.

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* Civil Miscellaneous Application No. 43 of 1927.