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UDUMA LEBBE *v.* SEYADU ALI.

D. C., Kurunegala, No. 857.

Recovery by an heir of property of an intestate's estate without administration—Ceylon Civil Procedure Code, s. 547.

Section 547 of the Civil Procedure Code does not apply to cases in which the plaintiff, after the death of the late owner, got into peaceful possession of the deceased's property, whether movable or immovable, and where the cause of action is the dispossession of the plaintiff of property lawfully in his possession, and not the wrongful detention by the defendant of the deceased's property of which the plaintiff never had possession.

Semble, per WITHERS, J., that section 547 does not prohibit an heir from asking merely for a declaration of title to his ancestor's lands.

THE facts of the case appear in the judgment of WITHERS, J.

Sampayo, for appellant.

Wendt, A. S.-G., for respondent.

Cur. adv. vult.

25th June, 1897. LAWRIE, A.C.J.—

The 547th section of the Code seems to me to apply only to the recovery of property to which the plaintiff alleges right as the heir of a deceased.

No action for the recovery of any part of an estate worth Rs. 1,000 can be maintained until grant of probate or letters of administration have been issued to some person (not necessarily the plaintiff).

The section seems to me not to apply to cases in which the plaintiff, after the death of the late owner, got into peaceful possession of the deceased's property, whether movable or immovable, and where the cause of action is the dispossession of the plaintiff of property lawfully in his possession, and not the recovery of property which he never possessed at all.

In the present case the plaintiffs were the surviving husband and the children (some of them minors) of a Moorish woman, who, the plaintiffs allege, died seized and possessed of a land.

I think it is clear that the plaintiffs did not get possession of the land and were not dispossessed of it. When the next cultivating season after the death of the Moorish woman came round, the defendants were the first to come forward to plough, asserting a title superior to that of the deceased.

In the same way the defendants were the first to take steps to pluck the nuts, and they intimated to the plaintiffs that they would resist any interference.

In the circumstances, my opinion is that the plaintiffs cannot maintain this action because letters of administration have not been issued to a legal representative.

I do not recommend a declaration of the plaintiff's title. I do not say it would be beyond the Court's power, but might it not embarrass the administrator, who doubtless will be appointed, to find that prior to his appointment in an action to which he necessarily was no party the question of the legal title to the land had been decided ? What would be the effect of such a declaration on the right of the administrator to sell the land for the debts of the deceased ? What if other claims were made by the Mohammedan relatives ?

I think it is safer to dismiss this action as instituted in circumstances under which the 547th section enacts an action cannot be maintained.

WITHERS, J.—

The plaintiffs seek to recover in this action two gardens and a field from the defendants, who they allege took forcible possession of the same from the plaintiff some five months before the institution of these proceedings, denying the plaintiffs' right thereto.

The defendants, it is further alleged, have continued to remain in unlawful possession of the premises, and the plaintiffs ask that the defendants may be ejected, and that they themselves may be restored to possession of the lands so withheld from them. It is averred in the plaint that these lands form part of the estate of the late Marino Natchia *alias* Pitchcha Umma, who died about a year before this action, intestate, leaving the plaintiffs her sole next of kin.

The plaintiffs also aver that on the death of their ancestor they entered into possession of her estate, including the lands in dispute.

They further plead that at the date of the alleged dispossession by the defendants they and the said Natchia before them were for ten years in such adverse and uninterrupted possession of the premises as to entitle them on that account to a decree in their favour in terms of section 3 of Ordinance No. 22 of 1871.

They therefore ask for a declaration of title to these premises as well as for the other relief mentioned. Again, to meet any objection that might be raised under section 547 of the Civil Procedure Code, the plaintiffs aver that the estate of the late Natchia was worth less than Rs. 1,000 in value.

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The question of value of Natchia's estate was one of the issues tried and determined. On this issue judgment was given against the plaintiffs, and the District Judge dismissed their action, feeling compelled to do so by the provisions of section 547 just referred to. The question of title was also tried and determined, and on this issue the Judge pronounced in plaintiffs' favour. The provisions of section 547 of the Civil Procedure Code have not, as far as I am aware, been judicially construed. So we must now consider that section. Section 547 enacts :—

> No action shall be maintainable for the recovery of any property, movable or immovable, in Ceylon, belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon, where such estate or effects amount to or exceed in value the sum of one thousand rupees, unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executor or administrator of such testator or intestate : and in the event of any such property being transferred without such probate or administration being so first taken out, every transferor and transferee of such property shall be guilty of an offence and liable to a fine not exceeding one thousand rupees ; and in addition to any fine imposed under the provisions of this section it shall be lawful for the Crown to recover from such transferor and transferee, or either of them, such sum as would have been payable to defray the cost of such stamps as would by law have been necessary to be affixed to any such probate or letters of administration. And the amount so recoverable shall be a first charge on the estate or effects of such testator or intestate in Ceylon, or any part of such estate or effects, and may be recovered by action accordingly.

We shall be better able to construe this section when we bear in mind the state of the law regarding the administration of intestate estates which obtained at the time when the Procedure Code came into operation, *e.g.*, August, 1890. Estates of small value, ultimately fixed I think at Rs. 500, could be administered by the heirs-at-law without letters of administration. Next of kin to an intestate estate of whatever value could bring an action against third parties in possession claiming an adverse title for the purpose of obtaining a declaration of title to specific immovable property. The surviving parent, where the parents were married in community of estate, could dispose of the common estate in order to discharge debts incurred while the marriage subsisted. In such a case the next of kin of the deceased parent dying intestate could not recover property so sold from the purchaser. I am not aware that in such cases the value of the deceased parent's estate was material one way or the other. This section henceforth makes the transfer of any part of an estate, movable or immovable, where the estate or effects amount to Rs. 1,000 or more, without letters or probate an offence rendering the offender liable to a fine not exceeding Rs. 1,000 and in addition the Crown may recover from such transferor or transferee the amount of

duty which letter or probate for the administration of the entire estate involves. Now, the recovery of any property, movable or immovable, signifies that some one detains it if it is tangible, or is bound to make good some demand if it is intangible.

The 35th section of the same Code marks the distinction between an action for the recovery of immovable property and one to obtain a declaration of title to immovable property, for it enacts that in neither action shall any other claim but those specified in that section be joined unless with leave of Court. It was urged by Mr. Sampayo that as the plaintiffs were in possession of the three lands at the date of ouster they were suing in their own right, and not as part of their ancestor's estate. The plaintiffs no doubt pray for a decree under Ordinance No. 22 of 1871, but the continuity of possession between ancestor and next of kin depends on their right of succession as next of kin, and I think it would be an evasion of the Ordinance to allow them to recover the lands on the ground of the united possession. If this was purely a possessory action I think much might be said in plaintiffs' favour, but I would rather not determine that question till the case arises. In my opinion the plaintiffs were not in possession of these properties at the time the defendants asserted their claims with threats of using force if they were interrupted.

Then Mr. Sampayo asked us for a judgment declaring plaintiffs entitled to these three lands if we were not prepared to eject the defendants and give possession to the plaintiffs.

Mr. Wendt, for the respondent, objected to this, on the ground, I understood him to say, that it would be tantamount to a splitting of actions and an evasion of section 34 of the Code, which enacts that " every action shall include the whole of the claim which the " plaintiff is entitled to make in respect of the cause of action, " and if he omit to sue in respect of any portion of his claim he shall " not afterwards sue in respect of the portion omitted." But if section 547 prohibits the plaintiffs from recovering these lands and does not prohibit them from asking for a declaration of title, then section 34 does not apply. Take this case : An heir-at-law is entitled to succeed to certain immovable property, if it all belongs to his immediate ancestor. The whole property is worth Rs. 1,500. A part of that property is of doubtful title. He can afford to take out letters if the whole property belongs to his ancestor's estate, but he cannot afford to pay the duty and risk the expenses of litigating about the doubtful title. Why should he not, if the circumstances of the case permit it, bring an action to settle the question of the disputed title ? If he succeeds he will be in a much better position to borrow money, if he has not

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sufficient in hand to pay for the duty attaching to letters of administration of the entire estate.

As at present advised I see no objection to give the plaintiffs a judgment declaring them entitled to the premises. Of course we must be careful not to assist plaintiffs in evading any enactment for the benefit of the revenue, and it might be that we ought to attach such a condition to our judgment as will prevent the plaintiffs having these lands delivered up to them without taking out letters for the administration of Natchia's estate.

Since writing the above draft I have had the advantage of reading the draft of the Acting Chief Justice's opinion. I am content to make the order which he advises. It is a pity that more than the question of value of the estate was tried at a time. The issue on the question of title has been fought for nothing.