GUNARATNE *v.* PERERA HAMINE.

1903.
July 6.

D. C., Kurunegala, 1,828.

Administration—Civil Procedure Code, s. 547—Title to land through deceased intestate—Duty of court to direct administration to be taken before suit proceeds further.

Whenever it appears, in the course of a case which a Court is trying, that administration to the estate of a deceased person, through whom the parties claim title, is necessary, it is the duty of the Court to see that the provisions of section 547 are complied with before the litigation proceeds any further.

The inconvenience and difficulty of insisting upon the administration of old estates are obviated by the enactment of the Prescription Ordinance, which enables a person who has had over ten years' possession to protect himself by means of the provisions of section 3.

ACTION for declaration of title to certain land and for ejectment of the first defendant therefrom.

It was alleged that the plaintiff obtained judgment against the second defendant upon a deed of sale signed by him in favour of

1903. *July 6.*

the plaintiff, and that when the plaintiff took out a writ of possession the first defendant, who was the wife of the second defendant, wrongfully refused to give possession to the plaintiff.

The defendants pleaded that the properties belonged originally to the second defendant's grandmother, and that she gifted them in 1870 to the parents of the second defendant and the second defendant himself; that the second defendant became entitled to the lands by right of inheritance from his parents; that the second defendant did not execute a deed of sale in favour of the plaintiff; that the plaintiff obtained a decree in his favour in suit No. 1,556 by fraud and duress; and that long before the alleged deed of sale to the plaintiff the second defendant had, by deed of gift dated 22nd September, 1886, conveyed all his interest in the said land to the first defendant; and that Punchi Menika, the mother of the second defendant, died about the year 1880 leaving an estate above the value of Rs. 1,000, to which no administration had been taken out, and therefore the plaintiff was not entitled to maintain the present action.

The District Judge, Mr. G. A. Baumgartner, held that the action was maintainable because it was admitted by both sides that the full title to the lands was vested in Dingiri Banda (the second defendant), and it did not matter whether it all came to him by inheritance from his mother, or whether only one-third of it came in that way and the other two-thirds from his grandmother and father respectively. He said:

"Counsel for the defence dangled before the Court as a tempting subject for inquiry the question whether the action could be maintained without administration to the estate of Dingiri Banda's mother, and he cited the remarks of Chief Justice Bonser at *4 N. L. R. 208*, to the effect that, if the attention of the District Judge is drawn to the fact of no administration having been taken out, it would be his duty to see that administration was taken. But that referred to the estate from which conflicting claims diverged. The plaintiff claimed by inheritance from her mother, who was married in community. The defendant made conflicting claims on the property of the same community. It was plainly necessary for plaintiff to show that title had legally passed to her through her mother, that is to say, that her mother's estate had been legally administered.

"In another case cited at *5 N. L. R. 16*, Chief Justice Bonser used the words: 'If a person desires to prove title to property, and finds it necessary to deduce a title to that property either from or through a former owner who has died intestate, he must prove one of two things,' &c.

"In my opinion the words 'finds it necessary' imply that the title to be deduced is one that is contested by the other side.

"There is no necessity to establish anything anterior to the point at which title is admitted. There can be no necessity, as between the parties, to go behind that. If the Court saw reason to suppose the estate of Dingiri Banda's mother was a large one which ought to have been administered, it is no doubt its right and duty to see that administration is taken, but any proceedings taken with that object would be outside the scope of the present action."

The defendants appealed. The case came on for argument on 6th July, 1903.

H. A. Jayawardene (with *Wadsworth*), for appellant.

Dornhorst, K. C. (with *H. J. C. Pereira*), for respondents.

6th July, 1903. LAYARD, C.J.—

It is common ground in this case that the title to the lands in question vested in Dingiri Banda, and both parties claim under Dingiri Banda.

It is admitted that no administration was ever taken out to the estate of Punchi Menika, who died intestate. The District Judge has held that, as both parties claim through Punchi Menika, and as it is admitted that the lands vested in Dingiri Banda, there was no necessity to take out administration to the estate of Punchi Menika. This Court has repeatedly held that, in view of the provisions of section 547 of the Civil Procedure Code, no action is maintainable for the recovery of any property belonging to or included in the estate and effects of any person dying testate or intestate in or out of the Island, if such estate or effects amount to or exceed in value the sum of Rs. 1,000, unless grant of probate or letters of administration have been issued to some person or persons as executor or administrator of such testator or intestate.

That section is imperative, and before a plaintiff can maintain an action for the recovery of any property in Ceylon he must comply with the provisions of that section.

In this case, if the plaintiff establishes that Punchi Menika's estate was under the value of Rs. 1,000, the plaintiff will bring himself within the exception mentioned in that section, and be entitled to proceed on in the action. In the event of the plaintiff failing to establish that Punchi Menika's estate does not exceed in value the sum of Rs. 1,000, administration will have to be taken out to her estate before the plaintiff is allowed to proceed with this action.

1903. *July 6.* LAYARD, C.J.

It may be that the plaintiff has established a prescriptive title to the land claimed in the plaint, and in that view I suggested to the respondent's counsel that, if they were prepared to proceed to trial resting their claim merely on the prescriptive title, it would not be necessary for the respondents to establish either that Punchi Menika's estate did not exceed the sum of Rs. 1,000, or, in the event of their failing to do so, to apply for letters of administration of Punchi Menika's estate.

The judgment of the District Judge must be set aside, and the case is remitted to the District Court to be proceeded with.

The appellant is entitled to the costs of this appeal.

WENDT J.—

I am of the same opinion. No doubt, by our Common Law, administration by an official appointed by the Court was not necessary, any more than it was necessary that every decedent should leave a will and an executor to carry it out. But very many years ago this Court ruled that the English Law of Executors and Administrators had been impliedly introduced into the Colony by the Legislature, and the Judicial Committee of the Privy Council recognized the prevalence of that law in this Island. Owing, however, to the difference of principle between the Common Law and this graft of the English Law, there was for some years, as might have been expected, a little uncertainty in applying the principles which this Court had enunciated, and a somewhat vague exception was made in favour of what were denominated "small estates." Here, again, there were diverse rulings, not always reconcilable with each other, as to what value of property should constitute a "small estate," but even so the principle was recognized that where the estate was not small probate or letters of administration could not be dispensed with. Then came the Civil Procedure Code of 1889, which, in exact terms, defined a small estate to be one which did not exceed Rs. 1,000 in value, and section 547 in unmistakable language rendered an action not maintainable without due administration for the recovery of any property included in an intestate estate. In interpreting that section this Court laid down that it formed a statutory bar which could not be got over by the mere acquiescence, or even by the express agreement, of the parties to any particular litigation.

As to the wholesomeness of the provision I think there can be no question, but that is not an element which it is in our province to consider. The Legislature has thought fit to require due administration, while it is obvious that it is to the interest of the persons claiming to be heirs *ab intestato* to divide their ancestor's

property amongst themselves without paying the probate duty, which would of necessity be exacted if any executor or administrator were appointed by the Court. It is plain, therefore, that if parties were enabled by agreement to waive the necessity for administration, the intention of the Legislature would be frustrated.

Hence it is that whenever it appears, in the course of a case which a Court is trying, that administration is necessary, it becomes the duty of that Court to see that the provisions of section 547 are complied with before the litigation proceeds any further.

As to the suggested inconvenience and difficulty of insisting upon due representation of old estates, there is, as my Lord has pointed out, the enactment of the Prescription Ordinance, which enables a person who has had over ten years' possession to protect himself by means of the provisions of section 3 and so obviate the necessity for relying upon a title by inheritance.