GUNARATNE *v.* HAMINE.

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D. C., Kurunegala, 1,828.

Administration—Civil Procedure Code, s. 547.

Whenever it appears in the course of a case that administration is necessary, it becomes the duty of the Court to see that the provisions of section 547 of the Civil Procedure Code are complied with, before the litigation proceeds any further.

That section is a statutory bar to the maintenance of an action for the recovery of any property belonging to the estate of any person dying testate or intestate which amounts to or exceeds in value the sum of Rs. 1,000, unless grant of probate or letters of administration have been issued to some person as executor or administrator of such testator or intestate, and cannot be got over by the implied or express agreement of the parties to the action that, as the title to be deduced from the deceased is not contested, his estate need not be administered.

IN this action for declaration of title to certain fields and lands it was alleged by the plaintiff that one Dingiri Banda, the second defendant, being the owner thereof, sold them to the plaintiff; that the plaintiff instituted case No. 1,556 against the said Dingiri Banda and obtained a judgment against him, declaring the plaintiff entitled to the said lands and fields; that upon the issue of a writ of possession the first defendant, the wife of the second, refused to give up possession to the plaintiff; and that

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therefore the present action for ejectment against both defendants had become necessary.

Among other pleas the defendants pleaded that Punchi Menika, the mother of Dingiri Banda, died intestate about the year 1880 leaving an estate above the value of Rs. 1,000, to which no administration had been taken, and that the plaintiff was not entitled to maintain his action without obtaining letters of administration.

The District Judge, Mr. G. A. Baumgartner, ruled that no administration was necessary for the following reasons:—

"It is common ground that full title to the lands in claim vested in Dingiri Banda, whether it all came to him by inheritance from his mother or whether only one-third of it came to him in that way and the other two-thirds from his grandmother and father respectively.

"It being once admitted by both sides that the full title vested in Dingiri Banda, the Court is not concerned in the present action with the transit of the title to Dingiri Banda. The field of inquiry must be limited to the issues that properly arise. The directions of the Civil Procedure Code on this point are that the Court shall ascertain upon what material propositions of fact or law the parties are at variance. (Section 146). The parties here are not at variance as to Dingiri Banda's sole right to the lands. There is no call upon the Court to frame an issue on a point on which the parties are not at variance.

"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 in *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 reported in *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.

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" 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 plaintiff appealed.

The case came on for argument before Layard, C.J., and Wendt, J., on the 6th July, 1903.

H. A. Jayewardene (with *Wadsworth*), for appellant.—Apart from any question of title, the Court has no jurisdiction to entertain a plaint unless it is proved that the estate was small or letters of administration obtained. As soon as it became apparent that a person was trying to recover property through an intestate without administration, the plaint became inadmissible. D. C., Kegalla, 1,189 decided on the 4th June, 1903.

Dornhorst, K.C. (with *H. J. C. Pereira*), for plaintiff, respondent.—The plaintiff's title through Dingiri Banda being admitted, the Court below did not insist upon the administration of Punchi Menika's estate. There is no duty cast upon the District Judge to insist upon the administration of old estates. Having acquired title from Dingiri Banda, the plaintiff relies on prescriptive title as well as on the admission of the defendants of the validity of his title. [Layard, C.J.—The conveyance in favour of plaintiff is not bad, but there is a bar to it in the Code.] It has been held that the words " dying intestate " in section 547 of the Code are not retrospective. [Layard, C.J.—That case has been over-ruled.] Then how far back will the Court go? There must be a limit surely. Here the intestate died twenty years ago. What if he had died one-hundred years ago? [Layard, C.J.—We shall decide that point when it arises. We have gone as far as insisting upon administration whenever an estate is found to have passed without administration.] The words in the Code are " shall die " meaning in future. That is not retrospective. Is it too late to raise that point now? [Layard, C.J.—I am afraid so.] I do not understand what Bonser, C.J., means by the expression " finds it necessary " in his judgment reported in *5 N. L. R. 16:* " If a person desires to prove title to property and finds it necessary to deduce his title to it ..... he must prove," &c. We do not find it necessary in the present case to deduce title from Punchi

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Menika. That case does not apply to the present one. [Layard, C.J.—Perhaps if an appeal is taken in this case to the Privy Council, his lordship, who is there now, will explain himself.] [Wendt, J.—He disclaimed the idea of laying down anything new. He said emphatically that it was the old law.] That was not correct. I have been in practice for more than twenty-five years and I have never known the law to be so. I am surprised that your lordship did not tell him he was wrong. [Wendt J. you can still tell him that in the Privy Council.] *Tikiri Banda v. Ratwate* (*3 C. L. R. 70*) was decided in March, 1894. It was held there that an heir-at-law could alienate the property of his intestate pending the administration of the estate. Such a conveyance is good. This was after the Code. A similar decision was given in *Tikiri Menika v. Tikiri Menika* (*9 S. C. C. 63*). See also *Sivalingam v. Kumarihami, ibid. 181.* [Layard, C.J.—These cases have been already considered in the previous judgment.]

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 this 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.

It may be that the plaintiff has established a prescriptive title to the land claimed on the plaint, and in view of that 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 respondent to establish either that Punchi Menika's estate did not exceed the sum of Rs. 1,000 or, in the event of his 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.

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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 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.