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Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

GUNERATNE *v.* APPUHAMI.

D. C., Kurunegala, 1,829.

Statute—Retrospective application—Statute enacting procedure—Pending actions—Absence of administration—Matter of substance—Civil Procedure Code, s. 547—Ordinance No. 12 of 1904, s. 2.

Retrospective effect should not be given to a statute dealing with matters other than procedure, unless it is made retrospective by express enactment or by necessary intendment.

The administration of an intestate estate is not a mere matter of form or procedure, but is a matter of substance.

Judgment of the Privy Council in *Ponnamma v. Arumogam* (8 *N. L. R.* 223) followed.

Section 2 of Ordinance No. 12 of 1904, which enacts that "no action for the recovery of, or involving proof of title to, any property, movable or immovable, belonging to or included in the estate or effects of any person who died intestate before the commencement of this Ordinance, shall be defeated, nor shall the title to such property claimed through such person be deemed invalid, by reason only that letters of administration to the estate or effects of such person have not issued."

Held,—Not to be applicable to actions pending when the Ordinance was passed.

Silva v. Swaris (1 *Balasingham* 61) *over-ruled.*

Judgment of the Privy Council in *Colonial Sugar Refining Co. v. Irving* (74 *L. J. P. C.* 77) followed.

MIDDLETON J.—An appeal to the Supreme Court is not a re-hearing.

THE plaintiff instituted this action in March, 1900, against the defendant for a declaration of title to a land. The plaintiff alleged that one Dingiri Banda was by virtue of a deed of gift No. 6,832, dated 3rd July, 1870, and by maternal inheritance the owner of the land in question, and that he by deed No. 2,806, dated the 14th day of December, 1887, transferred the same to the plaintiff. The defendant objected that the plaintiff could not maintain the action without taking out letters of administration to the estate of Dingiri Banda's mother Punchi Menika, who died about the year 1880. The District Judge (Mr. Baumgartner) over-ruled the objection and held that administration was unnecessary. In appeal the Supreme Court reversed the order of the District Judge and held that administration was necessary, unless the plaintiff could prove that Punchi Menika's estate was under Rs. 1,000 in value, and remanded the case to the District Court for further hearing (1). Before the further hearing

(1) (1903) 7 *N. L. R.* 299.

in the Court below Ordinance No 12 of 1904 was passed which enacts as follows:—

" 2. There shall be added to section 547 of " The Civil Procedure Code, 1889," the following provisos, namely:

" Provided always that no action for the recovery of, or involving proof of title to, any property, movable or immovable, belonging to or included in the estate or effects of any person who died intestate before the commencement of this Ordinance, shall be defeated, nor shall the title to such property claimed through such person be deemed invalid by reason only that letters of administration to the estate or effects of such person have not issued.

" Provided further that the transferor and transferee of such property as is mentioned in the foregoing proviso shall not be guilty of the offence created by this section."

After hearing evidence the District Judge (Mr. Hill) held that Punchi Menika's estate was over Rs. 1,000 in value, but that administration was rendered unnecessary by the operation of Ordinance No. 12 of 1904. His judgment was as follows:—

" Plaintiff brings this action for a declaration of title to the land Andiagollehena and for ejectment of defendant, who resisted his taking possession of the land, and for damages.

" The facts are briefly these. One Dingiri Banda obtained the property in dispute by inheritance from his mother together with other lands. In 1887 he sold to the plaintiff and then denied that he had sold and declared the deed to be a forgery. Plaintiff instituted in this Court case 1,556 in 1897 and obtained judgment against Dingiri Banda and isued writ of possession, when the defendant, who had in 1894 obtained from Dingiri Banda a usufructuary mortgage of the land and was in possession, resisted the execution of the writ by the Fiscal.

" The chief bulwark of defendant's case is the technical objection that the estate of Punchi Menika from whom Dingiri Banda inherited this and other property was worth more than Rs. 1,000, and was not administered, and that therefore this action is not maintainable (section 547 Civil Code). He also avers that the deed of sale in favour of plaintiff is a forgery, and that the judgment in D. C., 1,556 in his favour was obtained by fraud and collusion.

" This question of administration came up in all these connected cases, and it was decided in appeal in one of them that administration was necessary unless the estate of Punchi Menika could be proved to be under Rs. 1,000 in value and it had been agreed between the parties that the order in that case should regulate the procedure in all the other cases.

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"Now the finding of the Supreme Court on the question of administration was prior to the passing of the Ordinance No. 12 of 1904, which lays down (section 2) that no action for the recovery of property included in the estate of any person who died intestate before the commencement of the Ordinance (Civil Code) shall be defeated by reason only that letters of administration to the estate of such person have not been issued. It is argued that this Ordinance is not retrospective and does not apply to cases pending at the date of the passing of the Ordinance. It seems to me that the object of the Ordinance was to give immediate relief to suitors, and that the application of the Ordinance to pending cases is not to make it retrospective, a term which could be correctly applied only if it were sought to make the Ordinance operate in cases already decided. That this is the view taken by the Supreme Court is clear from the decision quoted in *Balasingham* 61, and there is a Chilaw District Court case instituted before Ordinance No. 12 of 1904 was passed which went up in appeal on this very point of administration. When the case came on before the Supreme Court for adjudication the Ordinance No. 12 of 1904 had in the meantime been passed, and their Lordships held that the passing of this Ordinance had obviated the necessity for administration, and sent the case back for trial on the other issues.

"As regards the value of Punchi Menika's estate at the time of her death, I do not think there can be any doubt it was worth more than Rs. 1,000. It is true that that sum is given in the deed of gift as its value, but that must have been a merely nominal valuation. The estate included a large number of jungle lands, at least two gardens, and eight amunams of paddy fields. The fields alone at Rs. 200 an amunam would have been worth Rs. 1,600. And a cocoanut garden with a house of about 200 bearing cocoanut trees must have been worth at least Rs. 1,000."

The defendant appealed.

H. Jayewardene (*E. Jayewardene* with him), for the defendant, appellant. The Ordinance No. 12 of 1904 is not retrospective, and does not apply to actions that were pending when it was passed. No statute other than one merely regulating precedure is retrospective, unless there are clear and unambiguous words making it so, *Pettamberdass v. Thackoorseydass* (1); *Gardner v. Lucas* (2); *Young v. Adams* (3). The question of administration is not a fiscal or a formal matter, but is a matter of substance going to the root of the action and the title: *Ponnamma v. Arumogam* (4). In *Colonial*

(1) 5 *Moore's Indian App.* 109.
(2) *L. R.* 3 *App. Case* 582.
(3) (1898) *A. C.* 469.
(4) (1905) 8 *N. L. R.* 223.

Sugar Refining Co. v. Irving (1) it was held that a statute taking away the right of appeal to the Privy Council was not retrospective and did not apply to actions pending at the time; similarly this statute, which gives a right of action where formerly no right of action existed, cannot be construed retrospectively. *Silva v. Swaris* (2), in which the Supreme Court applied the statute retrospectively, cannot be considered any longer as law in view of the judgment of the Privy Council in *Ponnamma v. Arumogam* (3). Even if the statute be retrospective, it cannot affect cases in which the question of administration has already been decided. Such decision is binding on both parties in all future stages of the suit, and cannot be re-opened even if the law is subsequently altered (*Hukm Chand* on *Res judicata*, 296).

H. J. C. Pereira (*R. L. Pereira* with him), for respondent.—Ordinance No. 12 of 1904 is merely a declaratory statute, and as such is retrospective, the *Attorney-General v. Theobald* (4). Even if it be not a declaratory statute, it is one which merely regulates procedure. The question of administration is one of procedure; it only lays down who should bring an action to recover property included in an intestate estate [LASCELLES A.C.J.—Are we not bound by the ruling of the Privy Council that it is a matter of substance and not one of form only?]. The Privy Council held that in that particular case it was a matter of substance, but it does not follow that it is so in every case. Section 547 of the Code was apparently construed as one merely regulating procedure, because it was applied restrospectively to the estates of persons who died before the passing of the Code. If 547 is restrospective, the proviso to that section enacted by Ordinance No. 12 of 1904 must also be retrospective. It has been decided in England that a statute extending the time within which a prosecution should be initiated is retrospective, it being a mere matter of procedure: *Rex v. Chandra Dharma* (5). In *Ponnamma v. Arumogam* (6) the Privy Council has not over-ruled the judgment of the Supreme Court in *Silva v. Swaris* (7). The question is still an open one. The judgment of the Privy Council seems to be based on the limited powers it possesses as a Court of Appeal. The powers of the Supreme Court are much wider.

H. Jayewardene, in reply.—Section 547 was not applied retrospectively; it was held to regulate only all future actions. Absence

(1) (1905) *A. C.* 369; 74 *L. J. P. C.* 77.
(2) 1 *Balasingham* 61.
(3) (1905) 8 *N. L. R.* 223.
(4) (1890) 24 *Q. B. D.* 597.
(5) (1905) 2 *K. B.* 335.
(6) (1905) 8 *N. L. R.* 223.
(7) 1 *Balasingham*, 61.

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of administration is fatal because no title could pass without it: *Fernando v. Fernando* (1); *Fernando v. Dochchi* (2); *Gunatilleke v. Silva* (3).

Cur. adv. vult.

12th April, 1906. LASCELLES A.C.J.—

This is an appeal from a ruling of the District Judge of Kurunegala that section 2 of Ordinance No. 12 of 1904 applies to cases pending at the time when the Ordinance came into force.

The effect of this section was to introduce certain exceptions to the general rule laid down by section 547 of the Civil Procedure Code. The last-named section enacted in effect that no action should be maintainable for the recovery of property included in the estate of any person dying testate or intestate when the amount of such estate exceeds in value one thousand rupees, unless grant of probate or letters of administration shall first have issued.

Section 2 of Ordinance No. 12 of 1904 added a proviso that no action for the recovery of property belonging to or included in the estate or effects of any person who died intestate before the commencement of the Code should be defeated by reason only that letters of administration have not issued.

In *Silva v. Swaris* (4) Layard C.J. and Moncreiff J. decided that this Court had power to give the benefit of section 2 of Ordinance No. 12 of 1904 to the plaintiff in a case which was pending at the time when the Ordinance was enacted.

In *Ponnamma v. Arumogam* (5) the decision of the Court was discussed in the Privy Council, but their Lordships refrained from considering whether the case was rightly decided.

Nothing is to be found in section 2 of Ordinance No. 12 of 1904 which shows any intention on the part of the Legislature that the enactment should be retrospective in the sense of affecting pending suits. It was however contended that the enactment was a matter of procedure only, and as such would extend to the present action.

In my opinion the question is concluded by the judgment of the Privy Council in the *Colonial Sugar Refining Co. v. Irving* (6).

By the Australian Commonwealth Judiciary Act, 1903, a right of appeal to the King in Council which had previously existed was taken away, and the question was whether or not this right still subsisted in a suit pending when the Act was passed.

Lord Macnaghten in delivering the judgment of the Board said: "The only question is, Was the appeal to His Majesty in Council a

(1) (1900) 4 *N. L. R.* 201.
(2) (1901) 5 *N. L. R.* 15.
(3) (190) 5 *N. L. R.* 27.
(4) 1 *Balasingham* 61.
(5) (1905) 8 *N. L. R.* 223.
(6) 74 *L. J. P. C.* 77.

right vested in the appellant at the date of the passing of the Act or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

This reasoning is clearly applicable to the present case. The defendant, before the passing of Ordinance No. 12 of 1904, by pleading that administration had not been taken to the estate of Punchi Menika, would have been able to defeat the claim in the action. If the Ordinance is given a retrospective effect the defendant will be deprived of this defence. It is clear to me that this is not merely a matter of procedure—it touches a right which was in existence when the Ordinance was enacted.

We have been pressed with the decision of *The King v. Chandra Dharma* (1), but the decision of the Privy Council to which I have referred is obviously more appropriate to the present case.

It has also been contended that even if the Ordinance No. 12 of 1904 is more than a matter of procedure and does affect existing rights, it is nevertheless merely a declaratory Ordinance and as such may be construed retrospectively.

The Ordinance is certainly not declaratory in form—it does not profess to explain or remove doubts.

I cannot find any ground for treating the Ordinance as declaratory; it adds a proviso to a section in an existing Ordinance which excepts from the operation of that section a certain class of cases, namely, cases where the intestate died before the enactment of the principal Ordinance.

I would allow the appeal with costs and set aside the judgment of the District Court.

MIDDLETON J.—

This was an action forming one of a series from No. 1,828 to No. 1,833 in the District Court of Kurunegala to vindicate title to certain land. The defendant took the objection that the plaintiff was not entitled to maintain these actions without obtaining letters of administration to the estate of Punchi Menika, the mother of Dingiri Banda, through whom the plaintiff claimed. It was conceded

(1) (1905) 2 *K. B.* 335.

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that Dingiri Banda's right was only by inheritance, and not by deed of gift as originally claimed.

It was agreed by the parties that the judgment of the Supreme Court in No. 1,828 should be considered binding in this and the other connected cases.

In action No. 1,828 this Court held that the District Judge was wrong in permitting the plaintiff to proceed in the action without taking out letters of administration to the estate of Punchi Menika unless the plaintiff proved that Punchi Menika's estate was worth less than Rs. 1,000.

After this judgment the plaintiff allowed his actions to remain dormant for some time, and apparently No. 1,828 was settled, but the present action No. 1,829 was set down for trial. This action was commenced on the 30th March, 1900.

The issues were settled in April, May, and October, 1902, and the case came on for trial in October, 1905. In the meantime Ordinance No. 12 of 1904 had been passed.

The District Judge in his judgment found, amongst other things which are not material to this appeal, that Punchi Menika died about 20 years ago intestate, that she left an estate over Rs. 1,000 in value, that administration was not taken out to the said estate, that administration was not necessary, and even if it were, that plaintiff's action is not liable to be defeated by reason of such omission owing to the passing of Ordinance No. 12 of 1904, and gave judgment for the plaintiff.

Against this judgment the defendant now appeals, and it was argued on his behalf that the Ordinance No. 12 of 1904 was not retrospective and does not apply to pending actions, and assuming that the Ordinance were retrospective it was argued that a new law cannot affect a decision already given.

For the respondent it was contended that administration was a matter of procedure, that no vested rights were here attacked, that the Ordinance No. 12 of 1904 is not substantive but declaratory of the existing law, and many cases cited by learned counsel on both sides in support of their respective contentions.

If it be the fact, as stated in the petition of appeal, that the parties agreed that the judgment in No. 1,828 should be considered binding in No. 1,829 and the connected cases, it seems to me that the plaintiff would be concluded. It is not, however, clear, as far as I can see, that any such agreement was entered into.

In the case of *Ponnamma et al v. Arumogam et al.* (1), the Privy Council upheld the judgment of this Court, that section 547 of the

(1) (1905) 8 *N. L. R.* 223: 1 *Balasingham* 166.

Civil Procedure Code applied to the estates of persons dying before the commencement of that date and also that the objection of want of administration was one of substance and not merely a technical or fiscal objection.

In the course of the argument upon the hearing of that case, and in the judgment of the Privy Council, reference was made to the judgment of this Court in *Silva v. Swaris* (1) in which it was held that the Supreme Court had power under section 40 of the Courts Ordinance to give a plaintiff the benefit of Ordinance No. 12 of 1904, which was passed during the pendency of this appeal.

Without deciding whether that case had been rightly or wrongly decided, their Lordships pretty clearly intimated their opinion that the rule of construction laid down in *Maxwell, p.* 308, *3rd ed., i.e.*, that in general where the " law is altered pending an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights," was applicable to that case.

The case of *Quilter v. Mapleson* (2), relied upon in *Silva v. Swaris*, gives effect to the rule 2 of Order LVIII., which prescribes that " all appeals to the court of Appeal shall be by way of re-hearing," and Jessel M.R. says in his judgment on an appeal strictly so-called such a judgment can only be given as ought to have been given at the original hearing.

Now I take leave to think that the Supeme Court of Ceylon in its appellate jurisdiction under section 40 of the Courts Ordinance " in hearing a case in appeal " deals only with appeals " strictly so-called," and does not deal with them by way of re-hearing, but according to the law existing at the time when the action was begun.

It is true the Court has power to receive and admit new evidence additional to or supplementary of the evidence already taken, and has power to pass such judgment as it shall think fit, but the latter must, I think be according to the law existing at the date of action, and the former, I take it, must be governed by the same law; at least there is nothing I can find in this or other sections to warrant the assumption that an appeal to the Supreme Court is by way of re-hearing.

There is nothing in Ordinance No. 12 of 1904 making it expressly retrospective, and as I do not think that by necessary intendment it can be held to be so; the case of the *Colonial Sugar Refining Co. v. Irving* (3) is very strong in favour of the appellant's contention.

It is argued that the Ordinance is declaratory of the existing law, and therefore retrospective, but the judgment of the Privy Council

(1) 1 *Balasingham* 61. (2) 9 *Q. B. D.* 672. (3) 74 *L. J. P. C.* 77.

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in *Ponnamma v. Arumogam* (1) seems to negative this contention by holding that the estates of persons dying before " The Civil Procedure Code, 1889," are subject to the provisions of section 547.

That it is not a matter of procedure, but one of substance may be gathered from the Privy Council judgment in the same case.

The other cases quoted by the learned counsel for the respondent appear to turn on special enactments.

In my opinion, therefore, the law to be applied to this case is the law that was in existence at the date of the commencement of the action, and which is to be found in section 547 of " The Civil Procedure Code, 1889," and I think that this appeal should be allowed with costs and the judgment of the District Court set aside.

WOOD RENTON J.—I agree. I do not wish to add anything.