**1971** *Present*: **H. N. G. Fernando, C.J., and Samerawickrame, J.**

W. S. FERNANDO, Appellant, *and* W. E. J. DABARERA, Respondent

*S. C. 373/68 (F)—D. C. Chilaw, 17874*

*Civil Procedure Code—Section 547—Action for recovery of immovable property of a testator or intestate—Maintainability if the name of the property is not specified in the Inventory filed in the testamentary action.*

When an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a successor in title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the Inventory filed in the testamentary action relating to the estate of the deceased owner. In such a case the burden of establishing that the particular land was not included in the Inventory must lie on the party who takes such objection.

APPEAL from a judgment of the District Court, Chilaw.

*M. S. M. Nazeem,* for the plaintiff-appellant.

*W. D. Gunasekera,* for the defendant-respondent.

*Cur. adv. vult.*

September 13, 1971. H. N. G. FERNANDO, C.J.—

The plaintiff brought this action for a declaration of title to a land called Ehetugahawatte, claiming to be a successor in title of one Quintin Dabarera who had died intestate, and whose estate had been administered in D. C. Chilaw (Testy.) No. 2174. The action was dismissed on the ground that this land had not been included in the Inventory of the estate of Quintin Dabarera.

Section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of an action relating to land on the ground that it was not included in the Inventory of the estate of a deceased owner. Hence, in a case where probate or letters of administration have (as here) in fact been issued, the burden of establishing that a particular land was not included in the Inventory must lie on the party who takes such an objection. Indeed, I have doubts whether the practice of entertaining the objection in such a case is justified by the terms of s. 547.

No land called "Ehetugahawatte" was included in the Inventory filed in the Testamentary case relating to the estate of Quintin Dabarera. But land No. 23 was described in the Inventory as "The residing land (i.e. of Dabarera) ....in extent 1½ acres".

According to the evidence in the present action, the land called "Ehetugahawatte" is bounded on the south and east "by the land of Quintin Dabarera", and before the plaintiff purchased it there was no fence separating it from the other adjoining land of Quintin Dabarera. It is therefore quite possible that both lands were possessed as one, and were inventorized as one land in extent 1½ acres.

The learned trial Judge was impressed by the fact that the Inventory did not mention any land named "Ehetugahawatte". But even in the case of item No. 23, the name of the "residing land of 1½ acre" is not specified. Thus the omission to specify the name of a land in the Inventory would not justify the assumption that it was not in fact inventorized.

I am therefore of opinion that the defendant in this case failed to prove that this land was not included in the Inventory filed in the Testamentary case, and I hold that issues Nos. 6 and 7 have to be answered in favour of the plaintiff.

The decree dismissing the plaintiff's action with costs is set aside, and the case will proceed to trial upon the other issues. The costs of this appeal will abide the ultimate event.

SAMERAWICKRAME, J.—I agree.

*Appeal allowed.*