

1965 *Present* : **Tambiah, J., and Abeyesundere, J.**

**W. A. BUYZER and others, Appellants, and P. G. ARIYARATNA
and another, Respondents**

S. C. 549/1962—D. C. Matara, 1150/L

*Civil Procedure Code—Section 547—Suit for recovery of property left by a testator—
Failure of plaintiff to produce probate—Action not maintainable.*

Where a person sues for the recovery of immovable property and bases his title on the Last Will of a person whose estate amounted to or exceeded in value Rs. 2,500, section 547 of the Civil Procedure Code debars him from maintaining the action unless he produces the probate.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera* and *B. Eliyatamby* for Plaintiffs-Appellants.

A. F. Wijemanne, for 1st Defendant-Respondent.

February 1, 1965. TAMBIAH, J.—

The plaintiffs-appellants brought this action for a declaration of title to the land described in the schedule to the plaint and for an order to eject the defendant from the said premises. He based his title on an alleged joint Last Will said to have been executed by Pannigalagamage Don Salaman de Silva and Margaret Buyzer in deed No. 3465 dated 9th February, 1930. The probate has not been produced during the course of the trial. Section 547 of the Civil Procedure Code 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 two thousand five hundred rupees, unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executer or administrator of such testator or intestate ;”

Section 547 of the Civil Procedure Code is a bar for maintaining this action where a person claims title from the deceased and relies on a will unless he produces the probate. It was brought to our notice that in view of the ruling in 48 N. L. R. page 566 this section is no longer in operation. Whatever may be the historical reason for enacting this section it is still on the statute book and a Court of Law cannot ignore the provisions of Section 547.

Therefore the learned judge should not have proceeded with the action. Mr. Jayewardene submitted that the only order the learned District Judge could have made is to lay by the action but it seems to me that it is open to the District Judge to dismiss the action for not following the imperative provisions found in Section 547 of the Civil Procedure Code. In this case I think the ends of justice would be met if the plaintiffs' action is dismissed on the footing that he failed to comply with Section 547 of the Civil Procedure Code. Since this action is being dismissed on the technical ground that order should not operate as *res judicata* and I give him the opportunity to file a separate action.

I set aside the order of the learned District Judge and dismiss the plaintiffs' action but I give him an opportunity to file a fresh action.

The 1st defendant-respondent is entitled to the costs of this appeal.
The respondents are entitled to costs of trial.

ABEYESUNDERE, J.—I agree.

Action dismissed.

