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*Present :* Fisher C.J. and Drieberg J.

KANDIAH *v.* KARTHIGESU.

*99—D. C. Jaffna, 23,599.*

*Action for declaration that the signature of a deceased person is forgery—Recovery of property—Letters of administration—Civil Procedure Code, s. 547.*

Where an action was instituted to have it declared that the signature of a deceased person to the discharge of a mortgage bond and the transfer of a land were forgeries,—

*Held*, that the action was one for the recovery of property belonging to the estate of the deceased within the meaning of section 547 of the Civil Procedure Code.

APPEAL from a judgment of the District Judge of Jaffna. The facts appear from the judgment of the Chief Justice.

*H. V. Perera* (with *N. E. Weerasooriya*, *Navaratnam*, and *Subramaniam*), for defendant, appellant.

*Kcuneman* (with *Ramachandra*), for plaintiff, respondent.

November 4, 1929. FISHER C.J.—

In this case plaintiff prays for a declaration that an endorsement on a mortgage bond (P 5) and a deed of transfer (P 4) are forgeries. After hearing a very considerable body of evidence the learned Judge gave judgment in favour of the plaintiff and a decree was issued declaring that both the documents referred to were forgeries. In my opinion the case in respect of P 4 and P 5 must be carefully separated. P 4 is a notarially executed document and the onus being on the plaintiff to prove that it was a

forgery the question is whether he discharged that onus. The parties to the document were one Mootathamby and his wife Sinnappillai as transferors and the defendant as transferee. The document purports to have been executed on October 11, 1927. It was apparently registered on November 18, 1927, and Mootathamby, who was an old man of over eighty years of age, died on November 26, 1927. For the purpose of proving that this document was a forgery the plaintiff has, in my opinion, to rely entirely on the evidence of a handwriting expert. It was urged that there was other evidence to support the plaintiff's contention, namely, certain statements alleged to have been made at some indefinite date by the deceased man indicating an intention to benefit the second plaintiff and his brother. The sole deponent to this expression of intention is the second plaintiff himself, who in the course of the action became the only plaintiff, and even if such evidence is legally admissible on the issue the Court had to try, namely, whether this document was a forgery or not, I do not think that it is of any value. That being so, is it possible to hold that P 4 was a forgery solely on the evidence of the handwriting expert? Looking at his evidence as a whole one is forced to the conclusion that he was by no means free from doubt in his opinion on the question of Mootathamby's signature. He had to consider the same question in connection with the document P 5, and after two authentic specimens of Mootathamby's signature had been put before him he felt constrained to admit that he might have to modify a clause in his report with regard to Mootathamby's signature having been forged. The evidence of an expert on handwriting is at best the expression of an opinion, no doubt in many cases a very well founded opinion. But having regard to the whole of the expert's evidence I do not think it is possible to accept it as a basis for a definite finding that P 4 was forged. This view is, moreover, supported by what I cannot help thinking was the reliable evidence of the Notary employed to draft the document. His evidence does not read like the evidence of a man who is out solely to support the case of the person on whose behalf he is giving evidence. In examination in chief, for instance, he deposed to something which he certainly would have refrained from disclosing had he been, as he must be taken to be if his evidence is rejected, a co-conspirator with the defendant in concocting a false case. Whether the defendant is speaking the truth when he says that he paid the consideration for the transfer, or not, is a matter open to question, but unfortunately parties with a good case occasionally seek to bolster it up by false evidence, and having regard to the relationship between the deceased man and the defendant, which appears to have been filial in its character, it seems to be probable that the transfer was in reality in recognition of the services the defendant

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had rendered to Mootathamby and his wife though for some reason or other both defendant and Sinnathamby have sought to show that it was a sale. However that may be, in my opinion plaintiff has failed to prove that P 4 was a forgery.

P 5, however, stands on a different footing. The forgery alleged in this case is a so-called endorsement purporting to show that the deed for Rs. 1,750 for which the document was a security had been discharged. In this case the person in whose favour the document was originally executed was a son of the deceased man Mootathamby who predeceased his father and died on September 5, 1927. The document itself bears date March 20, 1926, and the discharge was said to have been effected on April 2, 1927. The probabilities seem to be against the debt having been discharged. There was no receipt or other document to support any of the payments on account which were alleged to have been made. Nor was there any reliable evidence to show that the defendant was in a position to pay the mortgage debt. The appearance of the endorsement itself is suspicious and the statement of the Notary referred to, to the effect that on the day after Mootathamby's death the document was not in the state in which it was when it was brought before the Court, all constitute elements of suspicion which, in my opinion, threw the onus on the defendant of proving that the document had in fact been duly executed. This onus he certainly did not discharge and, in my opinion, the finding of the learned Judge on this document must be upheld.

My brother Drieberg has dealt with the question of the right of the plaintiff to bring this action.

I agree with his judgment and with the form of the decree which he proposes.

DRIEBERG J.—

I agree with the judgment of my Lord the Chief Justice on the question of the execution of the transfer, P4, and the alleged discharge of the mortgage bond, P 5.

The appellant in his answer took the objection that the action could not be maintained unless a grant of letters of administration of the estates of Kanapathipillai and Mootathamby had been obtained as required by section 547 of the Civil Procedure Code. An issue was framed on this point; the learned District Judge held that administration was not necessary and the trial proceeded. His order was based on two cases, *Lewis Hamy v. de Silva* [1] and *Weerasooriya v. Weerasooriya.* [2] These were actions brought by the wife and the heirs of the wife to set aside transfers of the common property made by a husband who had married his wife in community of property. Under the Roman-Dutch law the husband, where the marriage is in community of property, has power of

[1] *(1906) 3 Bal. 43.* [2] *(1910) 13 N. L. R. 376.*

disposition over the whole of the common property, but where he has transferred the common property with the fraudulent intention of depriving his wife of the moiety of the common property which she would have on his death, she or her heirs can have the transfer set aside so far as she has been thereby defrauded. It should be noted, however, that such a transfer is good and that title to the wife's moiety is in the transferee until it is set aside.

In *Lewis Hamy v. de Silva* (*supra*) the action was by the wife against donees of her deceased husband. The half share which she sought to recover by setting aside the gift never belonged to her husband nor did it form part of his estate, and on the deed being set aside the half share would have vested in her of her own right and not by virtue of a title derived from her husband.

The spouses are during the continuance of the marriage the owners in equal shares of the common property. Though the husband alone has the power of disposition of it, on the death of the first there is a dissolution of the community and a separation of the shares of the spouses; the surviving spouse does not derive his or her title to a moiety from the first dying spouse, on whose death only a half of the common property is subject to administration. There was thus no necessity for administration of the estate of the husband.

In *Weerasooriya v. Weerasooriya* (*supra*) the action was brought by the children of the deceased wife to set aside a transfer by the husband in fraud of their mother's rights to her half share. It was contended that administration of the mother's estate was necessary. The title to the wife's half being in the transferee, until the deed was set aside to that extent, it was not at the date of the action " property belonging to or included in the estate or effects " of the wife, and section 547 could, therefore, have no application to the case.

In this case the foundation of the action is the assertion that Kanapathipillai did not discharge P 5 and that Mootathamby did not execute the transfer P 4, and that the land dealt with in P 4 and the right of action on the bond were their property and included in their estate at their death. The prayer is for a declaration that the signatures to the discharge and to the transfer be declared forgeries in order, so it is alleged, in paragraph 8, that the estates of Kanapathipillai and Mootathamby might be administered and distributed among their heirs.

The action is, therefore, one for property included in the estates of these persons, but Mr. Keuneman contended that by reason of the fact that the action was one for a declaration of title only it was not an action for the " recovery " of property. This argument is based on an observation of Withers J. in *Uduma Lebbe v. Seyadu Ali* [1] that an action for declaration of title only to land might be

[1] *(1897) 2 N. L. R. 348.*

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brought by an heir and letters of administration to the estate of the intestate obtained after the successful result of the action, but he said that in such a case some condition should be attached to the judgment to prevent the successful heir having the land delivered to him without obtaining letters of administration. It is not easy to see how this could be done, and in fact the action was dismissed as the estate in question was not administered.

But it is well settled in later cases that where a person desires to prove title to property derived from a person who has died intestate, he must prove either that the intestate estate is under Rs. 1,000 in value, or if it is over Rs. 1,000 in value, that administration has been taken out. Bonser C.J. in *Fernando v. Dochi.* [1]

The action does not cease to be one for the recovery of property because possession is not asked for; it may be necessary in some cases to vindicate title to property through the intestate and those claiming title through him might have no right to possession by reason of a third party having a life interest in the property.

In the present case no prayer for possession was needed as regards the bond—the plaintiffs have in fact obtained possession of the bond. So far as the land conveyed by P 4 is concerned it is not stated that the appellant has taken possession of it.

But this is more than an action by an heir for a declaration of title to an interest derived from an intestate, for the plaint expressly states that the declaration is sought for the purpose of administering the estate left behind by Kanapathipillai and Mootathamby and distributing it among their lawful heirs. It is just such an action as might be brought by a legal representative of the estate of an intestate.

As the case has been fully argued it is best that we should now give our finding on all the questions raised in this appeal.

The plaintiffs cannot, however, be allowed the advantage of a final determination unless and until the provisions of section 547 of the Civil Procedure Code are complied with. Upon that being done decree will be entered as follows:—

(1) That the endorsement on mortgage bond, P 5, No. 27,680 of March 20, 1926, attested by A. Sithamparanathapillai, Notary Public, purporting to be receipt by Mootathamby Kanapathipillai for payment of all sums due thereon, is not the act and deed of the said Mootathamby Kanapathipillai and that it is a forgery.

(2) That the plaintiffs' action in respect of the deed of transfer, P 4, bearing No. 1,084 of October 11, 1927, and attested by S. Kandyahpillai, Notary Public, be dismissed.

(3) That the defendant do pay to the plaintiffs half of the costs incurred by them in the District Court.

(4) There will be no costs of this appeal.

*Decree varied.*

[1] *(1901) 5 N. L. R. 15.*