MOYSA FERNANDO *v.* ALICE FERNANDO.

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D. C., Colombo, 11,024.

Administration—State of the law, as to necessity of taking out letters in case of intestacy, before and after the passing of the Civil Procedure Code, 1889—Inventory and division of joint estate by surviving husband without administration—Action by heir for share of inheritance—Proper remedy.

BONSER, C.J.—By the Charter of 1833 the English law of executors and administrators was introduced into this Island, and in 1841 a duty was imposed by Ordinance No. 7 of that year on letters of administration and probate of wills in regard to all classes of estates.

The law thus introduced and carried into effect by Rules and Orders in that behalf made being new to the people of the country, the Supreme Court directed the District Courts not to enforce the new law too suddenly or inflexibly, whence arose the lax practice of not requiring administration in the case of "small" estates, and the question of what was a small estate was left to the discretion of individual judges.

The Civil Procedure Code of 1889 took away this discretion, and by section 547 it was provided that no estate which amounted to the sum of Rs. 1,000 was to be considered small, and that in every case where the estate amounted to or exceeded in value Rs. 1,000 administration should be taken. It was further provided that no action should be maintainable for the recovery of any property included in such an estate unless probate or administration had been granted.

The effect of the enactment in section 547 is to declare that the executor or administrator was the only person who could sue for the recovery of any property included in such an estate.

Where, on the death of a wife leaving her surviving her husband and a minor daughter, the husband, without taking out administration, inventorized the joint estate and, dividing it into two halves, settled one half on the minor daughter by means of proper conveyances, and then married again; and when upon his death intestate, his widow claimed the whole of his estate, save the part already conveyed to his daughter,—

Held, in an action brought by the daughter against the widow for the recovery of certain lands not included in the settlement by her father, that the inventory and division of the original estate were irregularly made, and that the proper remedy of the daughter was to apply for administration of her deceased mother's estate and to divide the estate according to law among the parties, independently of her father's division of the estate.

IN this case the plaint alleged that one Denis Fernando was married in community of property to one Anso and had by her an only child, the first plaintiff, who on the 24th June, 1897, married the second plaintiff; that Anso died intestate in November, 1884, leaving her surviving her husband Denis and the first plaintiff, each of whom became entitled to a moiety of the joint estate; that the joint estate included, amongst other properties, a house at St. John's road, Colombo, and two lands at

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Mount Lavinia, of the aggregate value of Rs. 23,000; that from the time of Anso's death in 1884 up to the time of the first plaintiff's marriage in June, 1897, the first plaintiff was a minor; that the first plaintiff's father died on 11th January, 1897, and from the time of Anso's death to his (Denis's) death, he was in possession of the entirety of the lands without accounting to the first plaintiff for her share; that Denis married the defendant in 1887, and after his death in 1897 the first defendant obtained letters of administration to the estate of the late Denis, and wrongfully included in the inventory filed in the testamentary suit the entirety of the three lands in question as belonging to Denis's estate, whereas only an undivided half share thereof was his, and the remaining half belonged to the first plaintiff by inheritance from her mother; that the first defendant is in wrongful possession of the first plaintiff's share of the said premises, and neither she nor her intestate had accounted to the first plaintiff for the rents and profits arising from her share of the lands.

The plaintiffs therefore prayed that the first plaintiff be declared entitled to an undivided half share of the three lands in question and be restored to possession thereof, and for mesne profits till restoration.

The defendant pleaded that the joint matrimonial estate of Anso and Denis consisted of six lands and houses, together with certain shop debts and liabilities; that in February, 1887, Denis, desiring to marry a second time, divided the joint estate of Anso and himself into two parts and kept half for himself and gave the other half to the first plaintiff, which consisted of three lands; and that the plaintiffs, having accepted those three lands, were not now entitled to claim a moiety of the remaining three lands which Denis had reserved for himself.

At the trial the issues framed were as follows:—

(1) Did the first plaintiff receive from her father Denis Fernando a just half of the immovable property belonging to her parent's estate on the death of her mother in 1884?

(2) If not, what did she receive?

(3) What mesne profits, if any, are now due to her?

After evidence heard on both sides, the District Judge found that the manner in which Denis inventorized, valued and allotted to his daughter, the first plaintiff, the moiety of the joint estate was open to much criticism; that the first plaintiff lost no time when she came of age by marriage in repudiating the allotment of her deceased father, and that she was entitled to a moiety of the properties she claimed.

The defendant appealed.

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H. J. C. Pereira and *H. Jayawardena*, for appellant, opened the case on the facts and contended that the division of the joint estate made by respondent's father in 1887, and his allotment of the portion conveyed to the respondent by the title deeds then made in her favour and delivered to her soon after her marriage in June, 1897, should be considered a fair settlement and binding on the first plaintiff. [BONSER, C.J.—But Anso's estate does not appear to have been administered.] Under the old law, administration was not necessary. The Civil Procedure Code has made administration compulsory in all cases, except where the amount involved did not exceed Rs. 1,000. The Supreme Court has held that the provisions of chapter XXXVIII. of this Code are not retrospective (*Muttu Kiriya v. Sellamma, 9 S. C. C. 197*). The law of Ceylon discourages administration to small estates (*Hakurugey v. Hakuruge, Lorenz 92*). [BONSER, C.J.—But the present case is not a small estate. The plaint sets down the value of the property claimed to be something more than Rs. 10,000.] That is so. The plaintiff has no right to come into Court without taking out letters to administer her deceased mother's estate. It is true this point was not taken in the Court below, but that is only a matter of costs. In *Fernando v. Perera* (*1 C. L. R. 39*) CLARENCE, J., was of opinion that the burden of bringing an estate under the exception that it is one too small for administration lay on the party suing. In the present case, plaintiffs have not undertaken the onus. On the contrary, it is stated in the plaint that the value of the estate is Rs. 11,500. In *Fernando v. Perera* (*8 S. C. C. 55*) CLARENCE, J., held as follows:—"It has been decided, and it is the law, that "except where the inheritance is small, no one but the legal "representative can maintain an action for the recovery of money "or other property claimed as due to the estate of a deceased "person." And in *Tikiri Menika v. Tikiri Menika* (*9 S. C. C. 63*), the case of *Tamel v. Fenando* was cited to show that BURNSIDE, C.J., had decided on the 28th June, 1889, that plaintiffs had no title to sue in that case, because they had not taken out administration and the estate was not shown to be a small one. [BONSER, C.J.—There ought to be administration. Without it the plaintiff has no *locus standi* in Court. We would like to hear counsel for respondent.]

Rámanáthan, S.-G. (with *Sampayo*), for respondent.—The want of administration was not urged in the Court below in the answer of the defendant, nor in her petition of appeal. Even if 1½ per cent. were calculated as due to the Crown, the stamp duty would not come to more than Rs. 250, which may yet be recovered by the District Judge in other ways. Considering that

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the objection was not taken in the Court below or in appeal till the suggestion came from his Lordship the Chief Justice, and in view of the fact that the principal issue agreed between the parties was whether the first plaintiff received from her father Denis a just half of the joint estate, it would not be fair now to force the plaintiff out of Court on the ground that no administration had been taken to her mother's estate.

The law, as understood by the counsel on both sides in the Court below, appeared to be that administration was not necessary. Otherwise, counsel for the defendant would have raised that plea, and the judge would have given his decision thereon. There is ample authority for supposing that an heir, whose parent died before the introduction of the Code, can come into Court and pray for a declaration of title without first obtaining letters of administration. The very case first cited by counsel for appellant and reported in *9 S. C. C. 79* is an authority in point. *Tamel v. Fernando* was indeed cited in the discussion of *Tikiri Menika v. Tikiri Menika* (*9 S. C. C. 63*), but that case was not followed, and it was expressly held that the plaintiff in that case, who claimed a portion of the estate of his deceased grandfather, was entitled to succeed in his action without taking out letters to administer his estate. In *Ex parte Parian's case* (*7 S. C. C. 79*), LAWRIE, J., seemed to hold that, where the heirs agree to divide an intestate's estate amicably among themselves, and there appeared to have been no debts due to or from the estate, administration was not necessary. And Mr. Justice WITHERS' opinion may be seen in his judgment in *Uduma Lebbe v. Segu Ali* (*2 N. L. R. 349*).

A change in the law of the country thus understood by the profession should not be given effect to in a case like the present.

BONSER, C.J.—

In my opinion the plaintiff in this case has mistaken her rights.

It appears that in the year 1884 Enso, the wife of one Denis Fernando, a merchant in the Pettah, died leaving one child, Moysa, who was then an infant, and who, inasmuch as her parents had been married in community, became entitled to her mother's share in the joint estate. In the year 1887, Denis being minded to marry again, thought it right to divide the joint property of himself and his daughter and to set aside a portion as being his daughter's share, so that there might be no dispute about it in the future. He called in his daughter's maternal uncle and four of his neighbours, merchants like himself in the Pettah, to assist him in valuing the property and making a fair division between

himself and his child. One of the persons called in to assist was the father, now dead, of the co-plaintiff in this case, who married Moysa. Amongst other properties belonging to the joint estate were six lands and a quantity of jewellery. An inventory was taken and deeds were drawn up by a notary, whereby the father declared that he took for himself three of these lands and that he assigned to the child the remaining three; and it was expressly provided that the child, when she came of age or married, should be entitled to repudiate the division. These proceedings had some foundation in the Roman-Dutch Law, but they were quite irregular according to the law of this Island.

By the Charter of 1833, the English law of executors and administrators was introduced into this Island, and in 1841 the Crown, by Ordinance No. 7 of 1841, imposed a duty on letters of administration and probates of wills. The Legislature by that Ordinance spread the net very wide and the meshes were exceedingly small, for it provided for cases where the property was under £2 in value, and there were no less than six categories of cases where the estate was under £100 or a thousand rupees.

The Supreme Court in 1833 drew up Rules and Orders for carrying into effect the provisions of the Charter as to the testamentary jurisdiction of the District Court, and provided for the cases of persons dying intestate where no next of kin appeared to take out administration. In those cases the Secretary of the Court, when he got notice of the death, was to take measures to have the property appraised and the proper parties cited to take out letters of administration. If no parties appeared on citation, then letters were to be issued to the Secretary himself or some other fit person. These provisions had the object of ensuring that the parties interested in the intestate's estate got what they were entitled to.

At the time the Rules and Orders were drawn up no question as to the right of the Crown to duty had yet arisen. The Crown did not impose these duties, as I said before, until 1841. The Rules and Orders were drawn up by the Judges of the Supreme Court, of whom Sir Charles Marshall was one, being the Chief Justice.

This being an entirely new procedure—the law of executors and administrators being new to the majority of the people of this Island—the Supreme Court took upon itself to direct the District Courts not to enforce the new law too suddenly or inflexibly (*Marshall's Judgments, p. 1*).

The District Courts would seem to have liberally construed this intimation, and the practice grew up of not requiring letters of

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administration in small estates. As I pointed out, no question of the duties payable to the Crown arose at first, and therefore Government had no interest in interfering with this practice. But after 1841 the position of things was different, for if administration were dispensed with the Crown lost the duties upon the letters of administration. However, no objection seems to have been taken on this ground, and the practice of not requiring administration in the case of small estates became so firmly established, that it was recognized by the Legislature in the year 1889, when the Civil Procedure Code was passed.

Before that date, the question what was a small estate, and whether it was necessary to take out administration or not in any particular case, was left to the discretion of individual judges, but by the Civil Procedure Code that discretion was taken away, and by section 547 it was laid down that no estate which amounted to the sum of Rs. 1,000 was ever to be considered a small estate, and that in every case where the property amounted to Rs. 1,000 and upwards administration ought to be taken out. It also enacted that no action should be maintainable for the recovery of any property included in the estate of any person where the estate amounted to or exceeded Rs. 1,000, unless probate or administration had been granted. The effect of that was to declare that the executor or administrator was the only person who could sue in respect of an estate amounting to Rs. 1,000 and upwards. But even before the enactment of the Civil Procedure Code the same rule prevailed, namely, that no action could be maintained except by the administrator or executor in the case of estates which were not small estates. The only effect of section 547 was to determine what was a small estate as pointed out by Clarence, A.C.J., in 1891, in *1 C. L. R., p. 39*, where he says:—" Before the Code no " action was maintainable to recover property of the estate of a " deceased intestate save by an administrator, excepting in cases " where the estate was too small to need letters of administration, " and all that section 547 has done is to fix the limit at Rs. 1,000."

Now, in the present case, the daughter within reasonable time of attaining her majority repudiated this division which had been made by her father of the joint property, as she had a right to do, and the result was that the parties were remitted to their original position as though no such arrangement had been made. She then, joined by her husband, commenced an action against the administratrix of her father who was then dead, in which she asked for a declaration that she was entitled to a half share of the three lands which, according to the arrangement, were appropriated by her father, and the District Judge has made a decree as

asked for in her favour declaring that she is entitled to one undivided half share of these three lands, and ordering her to be put in possession of them, and giving her damages by way of mesne profits on certain grounds.

Now it seems to me, as I said before, that she has misconceived her rights; that she was not competent to bring this action to recover property which belonged to the estate of her mother Enso, either under the old law or the new law, whether the case falls to be decided under the Code or under the law as it existed before the passing of the Code. It was quite clear that her mother's estate was not what could properly be termed a small estate, for it much exceeded in value Rs. 1,000. Now it is said that there are cases in which it has been decided by this Court that such an action will lie, and we were referred to a case in *9 S. C. C. 63*. But that case is not at all like the present. That was a case in which the relations of the father disputed the legitimacy of the plaintiff, and the object of that action was to have it declared that he was his father's legitimate son. Chief Justice Burnside, in dealing with the objection that he could not sue for a declaration of his right, as letters of administration had not been taken out, said:—

"I think the learned District Judge has rightly judged on the "facts as to the plaintiff's right to succeed to a portion of the estate "of his deceased grandfather, and his judgment only goes to the "extent of declaring that right. He neither decrees possession "nor damages. This judgment does not seem to me to be one "which would in any way conflict with an administrator's right "to deal with the deceased's property in the interests of creditors "or others, should administration be taken out." On the contrary, it would assist the administrator. Having regard to the disputed legitimacy of the plaintiff, the administrator might have been in a difficulty as to who was entitled to a share of the land, and the result of the action would be that he would have a decree of Court pointing out to him the person entitled. That is no authority for the present case.

My predecessor in this chair repeatedly insisted on the necessity of administration being taken out in cases of intestacy. In *Fernando v. Perera* (*8 S. C. C. 54*), he says: "As this "Court has already pointed out, the law on the subject is the "English Law, and we must administer it so as to secure the "objects which it had in view, viz., the administration of intes-"tates' estates under judicial control amongst creditors and others "in the regular order of administration and the payment of the "duty thereon due to Government." It seems to me that this

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principle has rather been lost sight of, and that the Courts have gone too far in allowing persons to divide property amongst themselves without reference to law, and in that way a large amount of duty has been lost to the Crown. In the present case the duty would be considerable, and if this decree were affirmed the Crown would be defrauded of its just due. It seems to me that it is the duty of this Court to see that every one gets his due, no less the Crown than others.

Again, in 1889, this Court reversed a decree of the District Court of Kandy which non-suited the plaintiff in the following circumstances. The plaintiff sued as the widow and sole heir of her deceased husband, and as such claimed from the defendant a box of jewellery of the alleged value of Rs. 500. She had not taken administration, and alleged the estate to be a small one. The District Judge entertained the action and gave her Rs. 250 damages. On appeal to this Court, Chief Justice BURNSIDE said: "In my "opinion the plaintiff cannot maintain her suit, as she has not "taken out letters of administration to the estate. It is true that "the defendant has not denied that the estate is a small one, but I "do not think our judgment ought to go so far as to say that, if the "parties agree or do not agree that an estate is a small one, then "administration is or is not unnecessary. I think we have decided "that it is for the judge to say in such a case what is large and what "is small, and in this case I do not think that an estate of which "the jewellery alone is put at the value of Rs. 500 can be called a "small estate."

I am of opinion, therefore, that the action ought to be dismissed. The plaintiff can, if she thinks fit, apply for letters of administration; but, whether she adopts that course or not, it will be the duty of whoever is appointed administrator to divide the estate fairly amongst the parties, and the plaintiff will get what is her due.

I do not think that the Additional District Judge is to be blamed for not having insisted on administration being taken out, because I do not find that his attention was pointedly called to the fact that no administration was taken out. But it seems to me that, if his attention had been called to it, it would have been his duty to see that administration was then taken, and call upon the parties who were entitled to administration to come forward and administer the estate, and if they refused then to grant letters of administration to the Secretary of the Court or some other fit person.

Each party will bear his own costs of the action in appeal and in the Court below.

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BROWNE, A.J.—

I only wish to add to my Lord's judgment, in justice to the Additional District Judge, that some share of the responsibility rests upon myself, as I find I passed the plaint in question. I presume I did so thinking that this action ran somewhat on the lines of the old cases of *Bell v. Bell* and the like, and probably thinking that the administration taken out by the defendant had been taken out for her husband's estate in both communities. I see of course now my error in so doing, and this I say to take upon myself my own share of responsibility.