

Present: Mr. Justice Wendt and Mr. Justice Middleton.

1907.
January 29.

PERERA v. KRIEKENBECK et al.

D.C., Kurunegala, 2,792.

Administrator, transfer by, of property not included in the inventory—
"Duly stamped"—Bonâ fides—Validity—Civil Procedure Code
(No. 2 of 1889), ss. 539, 540, and 547—Stamp Ordinance (No. 3 of
1890), ss. 24, 25, and 26.

Where an executor or administrator transfers property belonging to the deceased's estate to a *bonâ fide* purchaser, such transfer cannot be invalidated on the ground that the value of such property has not been included in the amount on which stamp duty has been paid in the administration proceedings, and that therefore the probate or grant of administration was not "duly stamped" within the meaning of section 547 of the Civil Procedure Code.

Judgment of the Full Court in *Silva v. Weerasuriya* (10 N. L. R. 73) distinguished.

WENDT J.—The expression "duly stamped" must be construed with reference to the date of issue of the probate or letters of administration.

WENDT J. and MIDDLETON J.—The penal proviso to section 547 of the Civil Procedure Code contemplates the transfer of a deceased's assets without the formality of taking out probate or letters of administration at all, and not a mere deficiency in stamp duty.

ACTION *rei vindicatio*. The facts relied on by the plaintiff were as follows: The late Alfred Payne was the owner of the property in dispute; he died on or about 25th June, 1897, leaving a last will whereby he appointed his wife, Margaret Agnes Payne,

1907. his executrix. Margaret Agnes Payne, being out of the Island, sent
 January 29. a power of attorney to Messrs. Loos & Van Cuylenberg appointing
 them her attorneys jointly and severally; Mr. Loos applied for and
 obtained letters of administration *cum testamento annexo* to the
 estate of the said Alfred Payne in testamentary case No. 975 of the
 District Court of Colombo and, as such administrator, conveyed
 the property to the said Margaret Agnes Payne to be held by
 her in trust for her children according to the provisions of the will.
 Margaret Agnes Payne obtained the authority of the District Court
 of Kurunegala, on 20th October, 1904, under the provisions of
 Ordinance No. 11 of 1876, to sell the property, and by deed
 No. 19,520, dated 22nd October, 1904, she conveyed the same to the
 plaintiff.

It appeared from the testamentary case that the property was not
 included in the schedule to the application for letters of administra-
 tion or in the inventory filed by the administrator. The total
 estate, which did not include the property in question, was
 valued at Rs. 70,800 in the schedule, and duty was paid on that
 amount.

It was objected on behalf of the first defendant that the letters of
 administration were not "duly stamped" within the meaning of
 section 547 of the Civil Procedure Code owing to the omission of the
 property from the inventory, and that therefore the transfers
 from Mr. Loos to Margaret Agnes Payne and from the latter to the
 plaintiff were bad.

The District Judge (Bertram Hill, Esq.) over-ruled the objection.

The first defendant appealed.

H. Jayewardene (A. St. V. Jayewardene with him), for the appel-
 lant.—The property having been omitted from the inventory, and
 its value not having been included in the amount on which stamp
 duty was calculated, the letters of administration were not "duly
 stamped" within the meaning of section 547 of the Civil Procedure
 Code and the Stamp Ordinance. An administrator's power extends
 only to property on which duty has been paid; as regards property
 on which no duty has been paid, he is not clothed with the character
 of administrator. The decision of the Full Court in *Silva v. Weera-*
suriya (1) is conclusive on this point. Assuming that the letters
 were not duly stamped, the transfer is void, as such a transfer is
 made the subject of an offence by section 547 of the Civil Procedure
 Code, and is consequently prohibited by law. A penalty implies a
 prohibition [*Cope v. Rowlands* (2); *Smith v. Mawhood* (3); *Law v.*
Hodson (4); *Taylor v. The Crowland Gas and Coke Co.* (5); *Re Cork*

(1) (1906) 10 N. L. R. 73.

(3) (1845) 14 M. & W. 452 p. 464.

(2) (1836) 2 M. & W. 149 p. 157.

(4) (1809) 11 East 300.

(5) (1854) 10 Ex. 293.

1907.
January 29.

and *Youghal Railway Co.* (1); and *Melliss v Shirley Local Board* (2)]. [MIDDLETON J.—Would the transferee be guilty of an offence under section 547 if he took the transfer in good faith, and without knowledge that the letters were not duly stamped?] It is submitted that the transferee would be guilty of an offence. This being an offence enacted purely for the protection of the revenue, *mens rea* does not form a constituent element of it, and *bona fides* would not be a valid defence to a prosecution: *Sherras v. De Rutzen* (3); *Reg. v. Prince* (4); *Cundy v. Le Cocq* (5). If the administrator himself cannot sue for the recovery of the property, he cannot by transferring it to a third party enable such third party to do so. He cannot confer a greater or better right than he himself has. To hold otherwise would be to nullify the provisions of section 547 of the Civil Procedure Code.

H. J. C. Pereira, for the plaintiff, respondent.—It cannot be said that the letters of administration were not “duly stamped.” They were “duly stamped” as at the date of stamping. The Stamp Ordinance contemplates that the value should be only approximate; it is impossible to give the exact value of the estate. It is not open to a third party to impeach the validity of the letters on the ground that some property has been excluded from the inventory, provided the letters are “duly stamped” on the face of them. It would be unreasonable to expect a purchaser from an administrator to find out whether the administrator has included all the assets of the deceased in the inventory, and whether stamp duty has been paid on them. Such a course would unnecessarily hamper an administrator in the performance of his duty. Under section 540 of the Civil Procedure Code, where administration is once granted, the administrator’s powers extend to every property which the deceased died possessed of. The Court ought to presume that everything was properly done; and it is not competent for a Court other than the one that granted administration to go into the question whether the letters were “duly stamped” or not. The case of *Silva v. Weerasuriya* (6) is distinguishable. There the administrator himself sued for the recovery of a debt not included in the inventory, and on which no stamp duty was paid. There he was fixed with knowledge of the deficiency. In the present instance the suit is by a purchaser who bought the property *bona fide* and without any notice of any defect in the letters of administration. Even if there happen to be a defect, such a purchaser will be protected, and will not be amenable to the penal provisions of section 547 of the Civil Procedure Code.

(1) (1869) *L. R.* 4 *ch.* 748.(2) (1885) 16 *Q. B. D.* 459.(3) (1895) 1 *Q. B.* 918.(4) (1875) 13 *Coz.* 138.(5) (1884) 13 *Q. B. D.* 207.(6) (1906) 10 *N. L. R.* 73.

1907.
January 29.

Besides, the sale was with the sanction and knowledge of the Court, although such sanction was obtained under the provisions of the Trustees' Ordinance (No. 11 of 1876). The policy of the law is always to protect such purchasers. If the appellant's contention be upheld, several titles, hitherto considered valid, will be upset.

G. Koch, for the 2nd defendant, respondent.

E. W. Jayewardene, for the added-defendant, respondent.

Cur. adv. vult.

29th January, 1907. WENDT J.—

The facts material to this appeal have been fully set out by my brother Middleton, whose judgment I have had the advantage of perusing, and I need not therefore recapitulate them. I agree with my learned brother in thinking that the order of the District Judge should be affirmed. I desire to put my judgment on the broad ground that a purchaser in good faith from an executor or administrator of an asset of the deceased is entitled in law to rely upon his vendor's possession of probate or letters issued by a competent Court and regular on the face of them, and is not bound to inquire (in the absence of special circumstances calculated to arouse inquiry) as to the regularity of the steps by which such probate or letters were obtained. If the purchaser, before buying, were bound to satisfy himself that all the assets of the testator had been duly inventorized and truly valued and duty paid upon such true value, it would most seriously hamper executors and administrators in the discharge of their duties. It may be said here, as Lord Thurlow said in *Scott v. Tyler* (1), upon the suggested obligation of the purchaser to see to the due application by the executor of the proceeds sale, that "it is of great consequence that no rule should be laid down which may impede executors in their administration, or render their dispositions of the testator's effects unsafe or uncertain to a purchaser. His title is complete by sale and delivery."

In the case before us the plaintiff purchased from Mrs. Payne who held a conveyance from the administrator *cum testamento annexo* of her husband's estate. Assuming he is in the same position as his vendor, all he had to satisfy himself about was first the testator's title, next the terms of the will, and lastly that the will had been admitted to probate. On this last head it is not denied that Mr. Loos held letters issued by a competent Court authenticating the will, that such letters *ex facie* were duly stamped by the Commissioner of Stamps, as required by the Stamp Ordinance. The law throws upon the Court the duty of seeing that the probate or letters are duly stamped, and the fact of the issue of the instrument is proof that the Court had been satisfied. The law is that an executor, before

(1) (1788) 2 *Dickens' reports*, p. 726.

he has obtained probate, is as fully entitled to alien his testator's assets as after issue of probate, subject to the qualification that if it is necessary in any proceeding in Court to support his act by showing that he filled the character of executor, the only proof admissible is the probate. I cannot imagine that the proof would be initiated by evidence that some asset existed which had not been inventorized and had not paid duty. It may be different if the executor is himself seeking to recover such an asset, and indeed I concurred with some hesitation in holding in *Silva v. Weerasuriya* (1), that in such a case his title might be defeated. The present is not such a case.

I agree with respondent's contention that the expression "duly stamped" must be construed with reference to the date of issue of the instrument. At the time when the Court determines the amount payable as probate duty it has only before it the affidavit required by section 24 of "The Stamp Ordinance, 1890," to the effect "that the movable and immovable property and estate of the deceased in this Island are of the value of a certain sum, to be therein specified to the best of the defendant's knowledge, information, and belief in order that the proper and full stamp duty may be paid." Upon that sum (without at all knowing how it is made up) the Court assesses the duty, the executor pays it into Court, and the Court sends it, together with the probate, to the Commissioner of Stamps, "who shall cause such instrument to be duly stamped." That is the process the letters of administration went through in this case, and in my opinion they were "duly stamped" when issued to Mr. Loos. This finding disposes of the contention that Mr. Loos's conveyance was void by reason of the provision in section 547 of the Code; but I also agree with my brother in holding that the event which the Legislature contemplated in that section was the transfer of a deceased's assets without the formality of taking out probate or letters at all. The penalty exigible, viz., the value of the stamps "which would by law have been necessary to be affixed to any such probate or letters of administration," supports this view.

The appeal will be dismissed with costs.

MIDDLETON J.—

This is an action claiming that the plaintiff be declared entitled to a certain land called Kandehena, for damages, and ejectment.

The following facts were admitted. The plaintiff had purchased the land in question from Mrs. Payne, the executrix of her husband, Alfred Payne. Mrs. Payne being absent from the Island, sent a power of attorney to Messrs. Loos & Van Cuylenberg, who thereupon applied for and obtained letters of administration with the will annexed in District Court, Colombo, No. 975.

1907.
January 29.
MIDDLETON
J.

Mr. Loos, as administrator, conveyed the property in dispute, amongst other property, to be held by Mrs. Payne in trust according to the provisions of the will. Mrs. Payne subsequently applied to the Court under Ordinance No. 11 of 1876 for authority to sell the property in question, and the District Court gave authority by its order dated 20th October, 1904. Thereupon Mrs. Payne sold the property to the present plaintiff and conveyed it to him by deed. The property in question was not inserted in the schedule to the application for administration with the will annexed. Mr. Loos did not mention the property in question, nor is it mentioned in the inventory.

The estate was valued at Rs. 70,800 in the schedule, and the stamp duty for letters of administration has been calculated on that value.

It was agreed by the parties that the Court should look into the testamentary case, District Court, Colombo, No. 975, and that case is now in the record before me. From the diary I gather that duty was paid to the amount of Rs. 1,062 on or before 30th December, 1897, and that the inventory was sworn to on the 26th April, 1898. There is no suggestion of any fraud or chicanery on the part of any of the parties or the administrator, and the plaintiff is a *bona fide* purchaser for value.

The first defendant and added defendant pleaded that Mrs. Payne had no right to sell the property in dispute to the plaintiff, and denied that he had any title thereto.

Several issues were settled, but the seventh issue: Had Margaret Payne any right to convey the property in the plaint to the plaintiff? was first discussed, and the District Judge held that she had such a right, and thereupon this appeal.

The question is, Would the fact that the administrator had failed to pay the necessary probate duty render the transfer by Mrs. Payne to the plaintiff void and of no effect? In my opinion it would not.

The point decided in *Silva v. Weerasuriya* (1) was that an administrator was not entitled to maintain an action for a debt alleged to form part of his intestate's estate where it was evident that the inventory did not include the debt, and so *prima facie* no duty having been paid on it no action could be maintained under section 547 of the Civil Procedure Code to recover the debt by the administrator.

The question was one of revenue for the Crown, as my brother Wendt put it, and a stamp objection which was good without evidence in rebuttal was upheld and the administratrix debarred from bringing her action until she had complied with the law. In that case the administratrix herself was plaintiff, but in the present case it is a *bona fide* purchaser from the executrix who is suing on a transfer from the executrix.

It is contended that the plaintiff, as transferee from an executrix of an estate on which probate duty has been insufficiently paid, has committed an offence under section 547, and that, inasmuch as the transfer involves the commission of an offence, it is void at law, and the plaintiff has therefore no title, on the authority of *Cope v. Rowlands* (1); *Melliss v. Shirley Local Board* (2); and *In re Cork and Youghal Railway Co.* (3).

1907.

January 29.

MIDDLETON
J.

It is not possible for this Court in these proceedings to determine if probate duty has been paid which will cover the property sold, but it is not unlikely from an examination of Mr. Loos's final account that it might be found in the testamentary proceedings that the duty paid was in fact sufficient to cover the property in question. Sections 24, 25, and 26 of the Stamp Ordinance, No. 5 of 1890, contemplate that letters will not be granted except on an affidavit of approximate value of the estate and also the possibility of overpayment and underpayment of probate duty on that affidavit and its proper adjustment. Sections 29 and 32 penalize the payment of too little duty if it is not paid within six months of the discovery of the mistake or misapprehension. Section 30 further contemplates a conditional rebate of stamp duty upon proof of payment of debts certified to by the District Judge which reduces the value of the estate below that sum on which duty has been paid.

Under section 538 of the Civil Procedure Code, according to the terms of Form 86, the inventory has to be sworn to apparently after the grant of letters, and in the present case the letters are dated 30th December, 1897, the duty was paid before that date, and the affidavit supporting the inventory being dated 26th April, 1898. Under section 539 of the Civil Procedure Code limited probate or administration may be granted, and section 540 enacts, if no limitation is expressed, that the powers of administration, which is authenticated by issue of probate, extends to every portion of the deceased's property.

In the present case the letters did not issue until the stamp duty was paid, and the stamp duty was certainly paid before the inventory was sworn to.

All these sections of the Stamp Ordinance in my opinion point to the conclusion that the law contemplates the difficulty of an absolutely accurate estimation of a deceased's estate when the duty is first paid, and provides for further payment or return in the cases of over and underpayment, only making the latter an offence in the executor or administrator under certain circumstances laid down in sections 29 and 32. It must be borne in mind also that the Stamp Ordinance is subsequent in date to the Civil Procedure Code.

(1) (1836) 2 M. & W. p. 157.

(2) (1885) 16 Q. B. D. p. 446.

(3) (1869) L. R. 4 Ch. 748.

1907.
 January 29.
 MIDDLETON
 J.

We then come to section 547, upon the construction of which by the Full Court the appellant mainly bases his case. Looking at that section in conjunction with those I have referred to, my view is that its scope and object may reasonably be deemed to be aimed at an absolute evasion of the law by the entire omission to take out probate or letters of administration on the part of those whose duty it was to obtain probate or letters of administration. It is argued, however, that the use of the words "duly stamped" and "such probate and administration" necessarily imply that an offence would be committed if the letters were not fully stamped. I cannot accede to this, as stamping to an approximate value is contemplated by the Stamp Ordinance, and the *reductio ad absurdum* would be committed and an otherwise perfectly valid transfer invalidated if the letters on an estate valued at Rs. 1,000,000 were stamped on a sum Rs. 5 below the right value, for which the offender might be fined Rs. 1,000. The offence contemplated, in my opinion, is the transfer without probate or administration being taken out, and this view is, I think, further confirmed by the provision that the Crown is entitled to recover from the transferor and the transferee such sum as would have been payable to defray the cost of such stamp as would by law have been necessary to be affixed to any such probate or letters of administration. This part of the section, like the preceding part, does not seem to consider the case of a deficiency in stamp duty, but rather an absolute omission to pay any duty whatever.

If, then, it is not an offence under this section to have paid less probate duty than the law enjoins, the contract of sale by the executrix to the plaintiff is not void on the strength of the authorities quoted by the appellant's counsel. If the contract of sale by the executrix to the plaintiff is good, then the plaintiff is entitled to maintain this action for the recovery of property which does not belong to nor is included in the estate of the deceased.

In the Full Court case relied upon the debt sought to be recovered clearly belonged to or was included in the estate of the deceased.

I think, therefore, that the judgment of the learned District Judge should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

