Present: Lascelles C.J. and Wood Renton J. 1912.

HASSEN HADJIAR *v.* LEVANE MARIKAR.

57—D. C. Galle, 10,347.

Civil Procedure Code, s. 547—Transfer of property without administration—Transfer not invalid—Is partition action an action for recovery of land?—Power of Court to give plaintiff an opportunity of obtaining administration after the institution of the action.

Section 547 of the Civil Procedure Code, while it penalizes, does not prohibit, the transfer of property which ought to have been, but has not been, administered.

In an action for the recovery of land a Court has the right to allow the plaintiff an opportunity of obtaining administration so as to get rid of the objection that the action was not maintainable.

WOOD RENTON J.—It may fairly be argued that the words in section 547, "no action shall be maintainable," mean only "shall be capable of being proceeded with."

WOOD RENTON J.—I do not understand the Privy Council in the case of *Ponnamma v. Arumugam*[1] to have held that every partition action is an action for the "recovery of property" within the meaning of section 547.

THE facts are set out in the judgment of Wood Renton J.

H. A. Jayewardene, for the fourth defendant, appellant.—The transferring of a property by an heir without taking out administration is rendered an offence by section 547 of the Civil Procedure Code. A contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition. The deed of transfer is therefore void. [Wood Renton J.—Do not the words "in the event of the property being transferred" suggest the possibility of a valid transfer?] No. The imposing of the penalty shows that Courts will not lend their assistance to give effect to such transfers. [Wood Renton J.—If the Legislature intended to render the deed void, it would have been so simple for it to have said so.] The Courts will infer the intention of the Legislature from the fact of the penalty being imposed. [Lascelles C.J.—You must look into the law to see if the act was declared an offence merely for the purpose of protecting the revenue. Is not the penalty in this section imposed for the purpose of protecting the revenue only?] The object of the section appears to be partly for protecting the revenue, and partly for preventing persons from transferring bad titles. But in any case the penalty renders

[1] *(1905) 8 N. L. R. 223.*

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the deed void. Counsel cited *Peris v. Fernando*,[1] *Mudianse v. Wilson*,[2] *Krishnappa Chetty v. Carpen Chetty*,[3] *Victorian Daylesford Syndicate, Ltd., v. Dott*,[4] *Cope v. Rowlands*.[5]

The action is not maintainable. Section 547 expressly prohibits such an action as this unless letters of administration are taken out. The Court cannot now allow letters to be taken out and then give the letters a retrospective effect. The rights of parties to an action should be determined as at the date of the action. *Silva v. Nonahamine*.[6] The objection that no letters had been obtained is not a technical objection, but one of substance; a partition action is an action for the recovery of land. *Ponnamma v. Arumugam*.[7]

Bawa, K.C., for the plaintiff, respondent.—The penalty in section 547 was clearly imposed for the protection of the revenue. The section further provides that the Crown may recover from the transferor or transferee the stamp duty which would have had to be paid for the administration. This shows that the transfer is valid. The penalty is not imposed for the protection of the public, as title passes to the heirs without any administration. *Silva v. Silva* [*(1907) 10 N. L. R. 234.*] Where the penalty is imposed merely for protecting the revenue the contract is not void. See *Melliss v. The Shirley and Fremantle Local Board of Health*,[8] *Krishnappa Chetty v. Carpen Chetty*.[3]

The Court has often stayed proceedings and allowed administration to be taken out. See *Gooneratne v. Hamine*.[9] The word in the section is " maintain " and not " institute."

H. A. Jayewardene, in reply.

Cur. adv. vult.

June 18, 1912. LASCELLES C.J.—

This is a partition action in which the plaintiff claimed, in addition to another share, with regard to which no question arises on this appeal, one-sixth of certain house property in Galle by virtue of a conveyance dated August 2, 1902, by which Natchia Umma and Mohamed, who are stated to be respectively the widow and only child of one Abdul Asiz, purported to convey the interest of Abdul Asiz to the plaintiff. The appellant intervened, and by his answer averred that the estate of Abdul Asiz was over Rs. 1,000 in value, and that the conveyance from his widow and child to the plaintiff was invalid under section 547 of the Civil Procedure Code, as administration had not been taken out. It was conceded that the estate of Abdul Asiz exceeded Rs. 1,000 in value. In the decision, from which the appeal is taken, the learned District Judge held (1)

[1] *(1905) 1 Bal. 199.*
[2] *(1909) 12 N. L. R. 134.*
[3] *(1912) 15 N. L. R. 243.*
[4] *(1905) 2 Ch. 624.*
[5] *(1836) 2 M. & W. 149.*
[6] *(1906) 10 N. L. R. 44; 1 A. C. R. 15.*
[7] *(1905) 8 N. L. R. 223; 1 Bal. 166.*
[8] *(1885) 16 Q. B. D. 446.*
[9] *(1903) 7 N. L. R. 299.*

that the plaintiff's claim in this particular action was not an action " for the recovery of land " within the meaning of section 547 of the Civil Procedure Code, and (2) that in view of any doubt which might exist as to the validity of the conveyance on which the plaintiff claimed, the plaintiff should be allowed an opportunity of obtaining administration.

In the appeal the legal questions involved were very fully discussed, but there are practically only two questions for decision, namely, (1) whether the effect of section 547 is to invalidate transfers of property where administration has not been taken out, and (2) whether the learned District Judge was right in allowing the plaintiff an opportunity of obtaining administration so as to get rid of the objection that the action was not maintainable.

With regard to the first question, it was contended that it must be inferred that the transfer was invalid from the fact that the section declares that the transferor and transferee, in a case where property is transferred without administration having been taken out, are guilty of an offence, and provides for their punishment. In a recent case, where an analogous question came before this Court (*Krishnappa Chetty v. Carpen Chetty*[1]), I cited the judgment of Lord Esher in *Melliss v. The Shirley and Fremantle Local Board of Health*[2] as a clear and practical exposition of the principle of construction which should be followed in such cases. Applying this test, it is clear that the principal and, as far as I can see, the only object of the penalty is the protection of the revenue. The heavy penalty which the section imposes (a fine which may extend to Rs. 1,000) justifies the inference that the Legislature considered that the punishment provided in the section would be sufficient to enforce compliance with the law without the addition of a further penalty in the shape of the invalidation of the transfer, which in some cases would be a punishment of extreme severity. Then, there is the provision enabling the Crown to recover from the transferor and transferee the amount of the stamp duty payable on administration. This, I think, to some extent is an admission of the validity of the transfer; for if the transfer were invalid, why should the transferee, who would have no interest in the estate, be held responsible for administration duty?

Looking at the section as a whole, I am of opinion that the penalties imposed by the section are exhaustive, and that the Legislature deliberately refrained from invalidating the transfer. It is not for us to speculate on the reasons which determined the Legislature to take this course. But there are at least two circumstances which can hardly have escaped consideration. The invalidation of the transfer in these cases would be a punishment of extreme severity; in many cases, as where it was honestly believed the property was under Rs. 1,000, it would amount to grave injustice. But the

[1] *(1912) 15 N. L. R. 243.*

[2] *(1885) 16 Q. B. D. 446.*

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punishment would be unfair in its incidence. It would penalize the transferee; but as regards the transferor or his heirs, it would have the effect of restoring the property to him or them. Further, the invalidation of the transfer would lead to widespread confusion and uncertainty in the titles to landed property, for the cases in which administration is not taken out are very numerous indeed. For these reasons I am of opinion that it cannot be deduced from the language of section 547 that the transfers penalized by the section are necessarily invalid.

The second point, namely, the question whether the Judge was right in allowing the plaintiff the opportunity of obtaining administration, is covered by authority. In *Gooneratne v. Hamine*,[1] Layard C.J., in an action for declaration of title, held that in the event of the estate being proved to be of the value of Rs. 1,000, administration must be taken out before the plaintiff could be allowed to proceed with the action. This decision involves the construction that the words " no action shall be maintainable " are not equivalent to " no action shall be instituted, " and disposes of the argument which has been addressed to us on the point. We have been invited to reconsider this decision. But from the fact that the judgment is binding on us I see no reason for doing so. The decision has been repeatedly followed, and is now settled law.

It is not necessary to consider whether this is an action for the recovery of land within the meaning of the section, as the question at this stage is purely academic, and will not arise if the plaintiff makes use of the opportunity given him by the District Judge of obtaining administration. I would dismiss the appeal with costs.

WOOD RENTON J.—

The plaintiff-respondent sues in this action for a partition of the property described in the plaint, relying for his title on a deed of transfer from the heirs of one Abdul Asiz dated August 2, 1902. The fourth defendant, the appellant, intervened, claiming a house standing on the premises in question, and objected that the respondent's action was not maintainable, inasmuch as the estate of the predecessor in title of the respondent's vendor, Abdul Asiz, exceeded Rs. 1,000 in value and had not been administered. The learned District Judge held in effect that the action could still be maintained, and the deed of transfer set up, if administration was taken out now, and he adjourned the trial for the purpose of enabling the respondent to obtain letters of administration. The present appeal is brought against the order enabling the respondent to comply with the requirements of section 547 of the Civil Procedure Code. The respondent's counsel objected that it was not appealable, but we over-ruled this objection and heard Mr. Hector Jayewardene on the appellant's behalf. Two points were urged in support of the appeal:

[1] *(1903) 7 N. L. R. 303.*

first, that the estate of Abdul Asiz not having been administered, the deed of transfer by the heirs in the respondent's favour was invalid; and, in the next place, that in any event section 547 of the Civil Procedure Code expressly prohibited such an action as the present from being maintained. In my opinion both points are bad. Section 547 of the Code does not prohibit the transfer of property which ought to have been, but has not been, administered. It penalizes such a transfer, but the language in which the penalty is imposed as well as that of the section as a whole point, in my opinion, to the conclusion that the Legislature did not intend to do anything more than this. The words " in the event of any such property being transferred ..... every transferor and transferee of such property shall be guilty of an offence " themselves indicate the possibility of a legal transfer taking place. The subsequent provision empowering the Crown to recover from " such transferor or transferee such a sum as would have been payable to defray the costs of the stamps necessary for letters of administration " corroborate this view. They seem to treat transfers of the character in question as valid transactions, in respect of which stamp duty may properly be recovered. Mr. Jayewardene argued that the provision that the transferor or transferee of property requiring administration, but unadministered, " shall be guilty of an offence," showed an intention on the part of the Legislature to make the transfer itself illegal. But these words are common form in enactments of this description, and do not of themselves justify the inference which Mr. Jayewardene sought to draw from them. There is no need to repeat what we have recently said in *Krishnappa Chetty v. Carpen Chetty* [1] as to the law applicable to the question with which we are here concerned. In addition to the authorities there cited, I would refer to the case of *Victorian Daylesford Syndicate, Ltd., v. Dott.*[2] In my opinion section 547, while it penalizes, does not prohibit the transfer of property which ought to have been, but has not been, administered. Such an enactment at the time when the Code of Civil Procedure passed would have unsettled the titles to very numerous properties, and I think that the Legislature must be taken to have deliberately abstained from declaring the law in this sense.

With regard to Mr. Jayewardene's second point, I think that it may fairly be argued that the words in section 547 of the Civil Procedure Code, " no action shall be maintainable," mean only " shall be capable of being proceeded with." This view of the law has the implied sanction of the decision of Layard C.J. and Wendt J. in *Gooneratne v. Hamine*,[3] where the point was taken in the appellant's argument, and where both the learned Judges held that while section 547 of the Code is imperative, it was open to the Court to give the party suing an opportunity of taking out the necessary

[1] *(1912) 15 N. L. R. 243.* [2] *(1905) 2 Ch. 624.*

[3] *(1903) 7 N. L. R. 299.*

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administration. That decision has, to my knowledge, been repeatedly followed in the Courts of Ceylon, and I think that the rule which it sanctions is an extremely salutary one. The primary object of section 547 is to protect the revenue. That object is obviously secured by the refusal of the Courts to allow an action for the recovery of property liable to administration, but not administered, to proceed until a grant of administration has been obtained. We ought not to place upon section 547 an interpretation which its language does not compel us to adopt, and which, as in the present case, can only serve to support purely technical objections. It appears to me, moreover, that the present action is not one for the " recovery " of property within the meaning of section 547. I do not understand the Privy Council in the case of *Ponnamma v. Arumugam*[1] to have held that every partition action comes within the scope of these words. On the contrary, the Privy Council pointed out in that case that the action was one for partition only in form; that a considerable portion of the property had already been dealt with by the heirs and alienated, and that consequently it was in reality an action for " the recovery " of property. The present appeal possesses no merits, and I am very glad that I have been able to come to the conclusion that it ought to be dismissed with costs.

Appeal dismissed.