

1896.
November 27
and
December 10.

EDIRISHAMY *et al.* v. DE SILVA.

D. C., Galle, 3,482.

Executors and administrators—Their liability for costs of unsuccessful action brought by them as such—Civil Procedure Code, s. 474—English Law on the subject.

When an executor or administrator brings an action for the benefit of his testator's or intestate's estate and fails, and is ordered to pay the costs, those costs can, both under section 474 of the Civil Procedure Code and according to the English Law which governed cases of the kind before the passing of the Code, be recovered from him personally and not from the estate.

THE facts of the case appear in the judgment of BONSER, C.J.

Wendt and Peiris, for appellant.

Sampayo, for respondent.

10th December, 1896. BONSER, C.J.—

The short question in this case is, whether when an executor or administrator brings an action for the benefit of his testator's or intestate's estate and fails, and is ordered to pay the costs, those costs can be recovered from the estate, or whether they are only recoverable from him personally ?

In the present case the executrix, who had been married in community and had made a joint will with her husband, the testator, whereby certain lands, the property of the community, were settled on the survivor for life with remainder to the children, brought an action in respect of certain lands belonging to the estate, and was condemned to pay the costs.

The interest of the executrix in the land, the subject of this present action, being part of the settled land, was accordingly sold by the Fiscal for payment of these costs, and the Fiscal conveyed to the purchaser that interest.

The present plaintiffs thereupon brought an action to recover the land from the purchaser, and the Acting District Judge gave judgment in their favour, on the ground that the decree for costs was only against the executrix personally.

On an appeal to this Court the action was dismissed as premature, on the ground that the purchaser was entitled to the interest of the executrix; which was in any event at least a life-interest, and that therefore the plaintiff had no cause of complaint until her death, but that if he then declined to give up possession it would be time enough to assert their rights.

The executrix has now died, and the defendant refuses to give up possession.

I am of opinion that the executrix was liable personally for the costs of the unsuccessful action, and that it made no difference that the action was alleged to be brought for the benefit of the testator's estate, but with this the defendant had nothing to do.

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Since the passing of the Civil Procedure Code this is clearly so, for section 474 expressly provides in the case of an action brought by an executor or administrator in right of his testator or intestate that the plaintiff is to be liable as though he were suing in his own right upon a cause of action accruing to himself, and that the costs are to be recovered accordingly.

This case occurred before the passing of the Code, but the English Law does not allow a defendant to recover his costs from the estate of the deceased in such cases, and in my opinion that law should govern the present case. The Fiscal therefore could not sell or the petitioner buy more than the personal interest of the executrix in the settled land, that is to say, a life-interest. That interest has determined by her death, and the plaintiffs are entitled to judgment.

LAWRIE, J.—

It is not without considerable hesitation that I agree to set aside this decree of dismissal and to give judgment for the plaintiffs as prayed for.

The question to be decided seems to me to be, when judgment has been pronounced against a woman who styled herself widow and executrix, and who was in fact the duly recognized executrix of her deceased husband, and when in execution of that decree against her a part of the testator's estate was sold in execution, whether that sale can be challenged successfully by the heirs of the deceased, unless they can show misconduct on the part of the executrix in that action in which she was unsuccessful.

I do not doubt that an executor or administrator is personally liable in costs of an action, but it is equally well established law that executors and administrators, like other trustees fairly conducting themselves, are entitled to their costs out of the estate.

I know nothing of the action in which the executrix failed. I do not know whether it was one which she did right or did wrong to bring. It was (I understand) one in which if she had been successful, that success would not have been her personal success, but would have benefited the estate. I do not know whether she got the approval of the District Court, as a Court of testamentary jurisdiction, to charge these costs against the estate; whether the Court approved expressly or tacitly the sale of this land to satisfy the decree for costs.

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The executrix is dead ; the facts of this case were not investigated. A question of law was put, and I cannot but agree in the answer given to that question by the Chief Justice. As I said, I am not sure that that was the right question, and whether (if the facts had been inquired into) it would not have been found that the defendant had both law and equity on his side.

Another point on which I feel much difficulty is, assuming that the estate of the deceased testator could not be sold to satisfy the cost due by the executor, did not the sale, in execution of which the defendant purchased the widow and executrix's interest, carry to him the widow's one-half of the land, not merely her life rent of the whole but the half which fell to her on her husband's death by virtue of the then existing law of community ? Did that not remain subject to her debts ? Was it not liable to be seized by her creditors ? Can those whom she had designated in the joint will as her heirs to that half have rights superior to those of creditors in debts she contracted after her husband's death ?

I find that a difficult question.

These doubts however give way before the clearly expressed statement of the law by the Chief Justice, and I formally concur in the proposed judgment.

