FERNANDO *v.* SOYSA.

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D. C., Colombo, 6,796.

Amendment of plaint—Order for amendment—Amendment of issues—Issues, on what material to be framed—Answer of defendant—Executor's assent to legacy—Insufficiency of assets in executor's hands—Legatee's action for legacy—Technical objections to pleadings—Civil Procedure Code, ss. 93, 146, and 720.

Per BONSER, C.J.—

(1) When a plaint is once accepted by a Court it cannot be returned for amendment. It is, when so accepted, a part of the record, and can only be dealt with by the Court.

(2) An order for amendment of a pleading is bad in form if it does not clearly specify the amendments to be made.

(3) In the chapter in the Civil Procedure Code dealing with the trial of actions and settlement of issues there is provision as to amendment of issues and framing of additional issues, but none as to amendment of pleadings. That is dealt with in section 93, by which power is given to the Court to amend pleadings ; and when necessity arises to amend a plaint for the purpose of properly stating the plaintiff's case, the Judge should make the amendments there and then, and not direct the plaintiff to do so.

(4) A legatee may maintain an action for the legacy against the executor of the will under which the legacy is claimed without alleging or proving the latter's assent to the bequest, nor need he allege or prove sufficiency of assets in the hands of the executor to meet the bequest. Whether the assets are sufficient or not, is a fact peculiarly within the knowledge of the executor, and he may plead insufficiency of assets in answer to the legatee's claim.

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(5) Under the Roman-Dutch law a legatee may assert by action his claim to the legacy. Neither section 720 (*b*) of the Civil Procedure Code nor the provisions of the Code for judicial settlement of executors' accounts have the effect of taking away the legatee's right to such action.

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

Wendt, for plaintiff appellant.

Dornhorst, for defendant respondent.

Cur. adv. vult.

5th June, 1896. BONSER, C.J.—

In my opinion, the order appealed against is wrong both in form and substance.

The plaintiffs are husband and wife, the son-in-law and daughter of the late C. H. de Soysa, who died on the 29th September, 1890, and the defendant is his widow, and the only one of the executors who has proved.

C. H. de Soysa on the day of his death made a will jointly with the defendant, which contained the following clause :—" We have " given our daughter Fanny [*i.e.*, the female plaintiff] on her marriage " with Doctor Solomon Fernando [*i.e.*, the male plaintiff] property " of great value, but if the value thereof be under Rs. 200,000 " it is our desire that the deficiency should be made up in real " and personal property, and she should hold such property upon " the same terms and conditions as the property already gifted " to her."

It appears that on the plaintiff's marriage, which took place in November, 1887, an estate known as the Andiambalam estate was conveyed to them, and the conveyance contained a recital that the value was Rs. 150,000. The plaintiffs allege that at the date of the will and the death of the testator its value was considerably less than that sum, and that after giving credit for some payments, amounting to Rs. 9,000, made by the defendant after the testator's death, there was a deficiency of Rs. 146,000, which they ask the Court to compel the executrix to make good in accordance with the directions of the will.

The plaint was accepted by the District Judge, and cannot be returned for amendment. It is now part of the record, and can only be dealt with by the Court. The defendant filed an answer, in which she took various objections, some technical and some of

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substance. Issues were framed, and the action came on for trial, when, after hearing argument, but without taking any evidence, the District Judge decided that the plaint was insufficient, and made the order now appealed against. The grounds of the insufficiency of the plaint were three in number :—

First, that it contained no allegation that the defendant had assented to this bequest.

Second, that it contained no allegation that the assets were sufficient to answer the bequest.

Third, that it did not state whether the payment claimed was to be made out of the estate of the testator or out of the joint estate of the two spouses dealt with by the will.

The material parts of the order are as follows :—" It is ordered " and decreed that the plaint be amended as directed, and that the " further hearing of this action be postponed for one month from " the date of this order to enable the plaintiffs to amend their " plaint, and that the plaintiffs do pay to the defendant the cost of " the hearing on the said date as taxed by the officer of this Court ; " and it is further ordered and decreed that if the plaintiffs shall " not within the said period of one month amend, their action be " dismissed."

Now, in my opinion, this order is bad in form, inasmuch as it does not specify what amendments are to be made. They are to be " as directed." By those words I understand the learned District Judge to refer to his judgment ; but it should not be left to the parties to spell out the meaning of the order from a judgment of many pages in length. Moreover, such a form of order is admirably calculated to afford a defendant opportunities for delay. When the plaint has been amended I foresee a long discussion over the question whether the amendments comply with the order, followed by a further appeal to this Court, with the result that the decision of the simple question raised in this action might be indefinitely delayed.

But I go further, and say that no order ought to have been made on the plaintiffs to amend, even if the plaint were insufficient.

The Civil Procedure Code of 1889 is a copy of the Indian Civil Procedure Code, slightly altered. Now, the English and the Indian systems of pleading proceed on entirely different principles. In England, the parties are left to frame their pleadings in the best manner they can, and the Judge tries the issues raised on the pleadings. If a pleading is objected to by the other side as insufficient, the Judge decides on the sufficiency or insufficiency of the pleading, and if he decides that the pleading is insufficient gives the party leave to amend. He does not as a rule dictate the

amendments. As Bowen, L.J., once observed, "the rule that the "Court is not to dictate to parties how they should frame their "case, is one that is always to be preserved sacred."

Under the Indian system the only obligatory pleading is the plaint. No answer is required, but the defendant may, if he pleases, file a written statement of his case.

The Court does not try the case on the pleadings, but uses the plaint and the defendant's written statement (if any) as material from which to ascertain what are the issues to be tried. They are supplemented by the examination of the parties, the statements of the pleaders, and the documents produced on either side. From these materials it is the duty of the Court to frame specific issues which it then proceeds to try.

Our Code closely follows the Indian in the matter of pleadings. The principal difference between them is that our Code requires the defendant to file an answer. But, like the Indian Code, it does not allow the Court to try the case on the pleadings, but requires specific issues to be framed.

These issues if the parties are agreed may be stated by the parties, but if the parties cannot agree must be framed by the Court (section 146). It is curious that section 146 follows the corresponding section of the Indian Code so closely that it does not include the answer amongst the materials to be used in framing the issues, and thus the answer would appear to have no *raison d'être*.

Provision is made under section 149 for the amendment of the issues, but nothing is said in the chapter dealing with the trial and settlement of issues about any amendment of the pleadings. Section 93, however, provides for the amendment by the Court in its discretion after notice to the parties of all pleadings and processes in the action; and every such amendment is to be initialled by the Judge. There is no corresponding section in the Indian Code. But I can find nothing in our Code corresponding to those provisions of the English Rules of Court which allow the parties, in some cases without the leave and in other cases with the leave of the Judge, to amend their pleadings. That omission is significant.

A further difference between the two systems may be noted. Here and in India the pleadings are filed in Court, whereas in England they are merely delivered by the one party to the other. If the amendments are necessary for the purpose of properly stating the plaintiff's case, the Judge should, in my opinion, have made them there and then. What he has practically done is to return the plaint to the plaintiffs for amendment, which he had

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no power to do. This would be in effect to introduce demurrers which have no place in our procedure. But the amendments were not necessary, for reasons which I will now proceed to state.

The first amendment apparently directed was the insertion of an allegation that the defendant had assented to this bequest. It was said that being a general pecuniary legacy no action would lie for its recovery until the executrix had assented to it. I asked for some authority for this proposition, but in vain. No such authority was forthcoming. But Mr. Dornhorst argued that an action would not have lain in an English Court of Common Law for a legacy unless the executor's assent was alleged and proved, and that this action being a common law action the same rule would be applied.

For my own part I confess that I do not understand what is meant by calling this a common law action.

In this Island there are not two separate systems of law and equity, nor have we separate courts or two separate sides or divisions of the same court for their administration. The Roman-Dutch law gives effect to equitable considerations wherever it is necessary to do justice between the parties.

But in my opinion no English Court of Common Law could have entertained such an action as the present to enforce a bequest to a married woman, and that a bequest involving a settlement as this bequest does. It could only have been maintained in a Court of Equity.

The ground on which English Courts of Equity exercised their jurisdiction in the case of legacies was that although the executor was the legal owner of the property bequeathed by the will, yet that it was impressed with a trust in his hands for the benefit of the legatee, and the Court compelled him to execute that trust (see *Story's Equity Jur., section 593*). The grounds on which the courts of this Island exercise this jurisdiction is slightly different owing to the fact that the division of ownership of property into legal ownership and beneficial ownership, and the corresponding relation of trustee and *cestui que trust*, are unknown to the Roman-Dutch law, which is administered in our Courts, but it is in substance pretty much the same. The executor is the owner of the property, but his ownership is coupled with an obligation to carry out the directions of his testator. That obligation will be enforced by the Court, which will not allow the executor to keep the property and repudiate the conditions on which he acquired it. As Mr. Burge expresses it, " he " (*i.e.*, the executor in Roman-Dutch law) " was considered to have come under a *quasi*

"contract with those for whose benefit he was appointed. His "office resembled, in the obligation which he thus incurred, that "of procurator, and he was compellable to discharge its duties" (*vol. IV., p. 736*).

It is obvious that the assent of the executor to the legacy is immaterial when the question is that of compelling an executor to do his duty. The rule as to assent by an executor may be stated thus. Wherever it is necessary to prove that a legatee is the owner of any property forming part of the testator's estate, the executor's assent to the bequest must be proved. For an illustration of this rule see *Ondatjee v. Juanis, 8 S. C. C. 192.*

The present action is not an action *rei vindicatio*, and raises no question of ownership. It is a personal action against the executrix on the question of *quasi* contract above referred to. It is clear that according to English law these plaintiffs could sue for their legacy without alleging or proving the executor's assent to the bequest, and I know of no authority which renders that necessary here which is unnecessary in England.

I therefore hold that the order was wrong in directing the first amendment.

Then as to the second amendment ordered, which was founded on the proposition that it was necessary to allege and prove a sufficiency of assets. No authority was produced for this proposition. It would be unreasonable to require a legatee to allege and prove a fact peculiarly within the knowledge of the defendant. A deficiency of assets might be a good answer to the legatee's claim, but it should be alleged and proved by the executor as a reason for his inability to obey his testator's mandate. I hold that it is unnecessary for a legatee suing for his legacy to allege and prove that the defendant has assets sufficient to meet the legacy.

As regards the third amendment, Mr. Dornhorst admitted in the course of the argument that the estate of the testator was quite sufficient to meet the utmost claim of the plaintiffs, and therefore it is quite immaterial whether the claim is against the separate estate of the testator or the joint estate. But as I read the plaint there is no ambiguity in it, and it only claims to have the deficiency made good out of the testator's estate.

It was suggested by the District Judge that an action for a legacy does not lie since the introduction of the Civil Procedure Code, and that the proper course for the plaintiffs would have been to proceed by petition under section 720 (*b*), and if that failed then to have required a judicial settlement. I cannot agree with this view.

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It is admitted that there is no enactment which expressly takes away the actions which previously existed. These are stated by Mr. Justice Thomson to be three in number :—

(1) A personal action under the will against the representative, or heir, or any other person charged with the payment of the legacy, or against the representative for the delivery of the thing with such increase or decrease as it may have suffered, provided the latter has not been caused by the fault of the representative or heir.

(2) An action *in rem* to recover the thing itself against any person whatsoever.

(3) An hypothecary action on the ground of the tacit or implied mortgage which the law gives to legatees in this respect in all the property which comes to the heir from the testator. (*Thomson's Institutes, vol. II., p. 245.*)

The present action falls within the first class. The sections in our Code relating to a petition for payment and a judicial settlement are taken from the New York Civil Code. On reference to that Code I find that an action is still open to a legatee, and that he is not obliged to have recourse to these remedies. It cannot be contended that these provisions have the effect in our Code which they have not in the New York Code, of taking away the legatee's right to assert his claim by action.

I may mention in passing that the framers of our Code appear to have overlooked the fact that the law of New York respecting immovable property is entirely different from the law of this Island, and that a procedure which is appropriate for the one state of the law is not appropriate for the other. Thus, section 720 does not apply to a case when the assets may be amply sufficient to meet the legacy but consist of immovable property, for the petition is to be dismissed " where the Court is not satisfied that there is money or other movable property of the estate applicable to the payment or satisfaction of the claim " (section 721).

Again, it would be unreasonable to put the estate to the expense of a judicial settlement, which no one desires, merely in order to obtain a decision on the construction of a doubtful clause in a will. This would be to adopt the old procedure of the English Court of Chancery, which was found intolerable and has been superseded by a more summary and less expensive form of proceeding.

I have given my reasons at this length partly out of respect for the learned District Judge, and partly because I consider it important that there should be no uncertainty as to the practice in these matters.

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Our order will be that the order appealed from be discharged, and the case remitted to the District Court for trial of the issues which remain to be tried, and that the defendant pay the costs of the appeal and of the partial trial already had in the Court below.

I wish to say, in conclusion, that I regret that the defendant, instead of facilitating the decision of the question, which was a very proper one to raise as to the true construction of this clause, should have thought fit to interpose these technical objections. Such a course involves the parties in needless expense, is calculated to embitter their future relations, and serves no useful purpose.

LAWRIE, J.—

I agree in the order proposed by my Lord the Chief Justice.

I am, however, not prepared entirely to concur with all the reasons expressed in his judgment. I venture to think that it is the duty of a Court to allow, and even to order, any amendments which are necessary to raise clearly the real issue between the parties, and which shall bring out with perfect distinctness the questions on which they are disagreed.

The mistake which the learned District Judge made in this case was to order amendments on points on which the parties were not at issue.

It was unnecessary for the plaintiff to aver the assent of the executrix. She had always assented. Nor was it necessary to aver sufficiency of funds. Deficiency of assets had not been pleaded in defence. Sufficiency of funds was admitted. Nor was it necessary to state out of which estate the plaintiff claimed payment. The parties were not at issue on these points, therefore it was immaterial whether there were or were not averments in the pleadings regarding them.

As to assent, the executrix states in the third paragraph of the answer that she has always been ready and willing to carry out the provisions of the will. That is a sufficient assent.

I feel some difficulty in entirely concurring with my Lord the Chief Justice in his statement of the law of this Colony in the matter of assent of an executor. I reserve my judgment should the point ever arise in an action against an executor by a legatee where the executor has not assented.