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LUCIA GUNERATNE *v.* DE ALWIS.

C. R., Colombo, 19,825.

Jurisdiction of Court of Requests—Testamentary suit in District Court—Action in Court of Requests by legatee against executor of executor for recovery of interest of money due to him—Value of claim—Liability of executor of executor.

Where a testator bequeathed a share (valued at Rs. 1,800) of his estate to a person, and testamentary proceedings were pending in the District Court,—

Held, that it was competent to the legatee to raise in the Court of Requests an action against the executor of an executor for the rents and profits of his share due to him for certain months, aggregating in value Rs. 213; and that in the absence of any proof that one of the original executors of the testator was still alive and officiating, the defendant was responsible for the money claimed.

THE plaintiffs in this case sued the defendant to recover Rs. 213 under the following circumstances:—

One Cornelis de Silva died in 1880 leaving a last will, by which, among other bequests, he bequeathed one-eighth of the residue of his estate to his niece Lucia, who was married in community to the plaintiff. He directed by the will that her share should be under the control of the executors, who were required to pay the income, interest, and profits that should be derived therefrom.

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One David de Alwis was one of the executors of the said will proved in testamentary suit No. 4,227 C of the District Court of Colombo, and duly managed and controlled the whole estate. He filed final account in the said case, but retained the one-eighth share that fell to the said Lucia as directed by the will.

According to the final account, Lucia (first plaintiff) was entitled to the interest on a sum of money, and one-eighth share of rents and profits accruing from the premises No. 147, Kollupitiya road, Colombo, and from premises Nos. 14 and 15, Kotte road, Colombo.

David de Alwis sold the above-mentioned properties and retained the purchase amount, and paid the plaintiff the interest on the said purchase amounts until he (David de Alwis) died in 1901. The defendant was then appointed executor of David de Alwis, but failed to pay the interest on the amounts retained by David de Alwis.

The plaintiff sued the defendants as executor of David de Alwis to recover the interest on the said money due to them by the will of the said Cornelis de Silva.

The Commissioner (Mr. H. White) dismissed the plaintiff's action by the following judgment:—"I am of opinion that this Court has no jurisdiction to try this action, as it will be an encroachment on the exclusive testamentary jurisdiction of the District Court, and also that no ground is afforded by the framing of this action for a final decision upon the matter in dispute, which really is plaintiff's one-eighth share of the property worth Rs. 1,865.58, a matter beyond the jurisdiction of this Court.

"This being my view, it is unnecessary for me to enter into the questions whether plaintiffs should sue the surviving co-executors of Cornelis de Silva's will, or whether they are right in suing the executors of a deceased co-executor. I hold that this Court has no jurisdiction, and dismiss the action with costs."

Plaintiffs appealed. The case was argued on the 2nd October, 1902.

H. Jayawardene, for appellants.—It is true that the one-eighth share of the lands out of which the present claim arises is worth Rs. 1,865, but the first claim is for Rs. 213, being interest and rents due for certain months only not paid to the appellants. *Fernando v. Soysa*, *2 N. L. R. 40*, amply bears out the proposition that, even when a testamentary suit is pending it is competent to a legatee to claim in a separate action what is due to him. Here the testamentary suit is not pending, being closed after final account filed.

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Sampayo, for respondent.—In law the defendant is not liable to pay, because the other executor of the testator is alive. The executor of an executor cannot be sued. He does not represent the original testator so long as there is another executor of the original testator living. The Commissioner has not considered this point. There were three executors; two were dead and the third is insolvent, it is true, but he is alive. There is a special trust created by the will, which the executor of an executor cannot take up. *Williams on Executors, p. 829; Re Baban (1 C. L. R. 41); Ekanayaka v. Appu (3 N. L. R. 350); 2 Browne 387.*

H. Jayawardene, for appellant.—The effect of the authorities cited is only to show that other remedies are open to the respondent. They do not disprove that the remedy he is at present pursuing is not available to him. There is no special trust under the will. *Fernando v. Soysa* is authority that the pending of testamentary proceedings is no bar to an action like the present.

Cur. adv. vult.

3rd October, 1902. MONCREIFF, A.C.J.—

Cornelis de Silva died in 1880, leaving a will by which he appointed three executors. One of the provisions of the will is to the following effect:—"It is my will and desire that the one-eighth share to which my daughter Louisa de Silva, wife of Charles de Alwis of Gorakana, shall be entitled under this my will shall not, nor shall the interest and income to be derived therefrom, be liable to be seized and sold in execution of her debts or for the debts of her husband, but the same shall be under the control of my said executors, who shall invest it in the purchase or in the mortgage of real property and pay to my said daughter during her lifetime the income, interest, and profit that shall be derived therefrom, and after her death the said one-eighth share or the moneys and property which it shall then represent or consist of, and all the accumulated income and interest, shall be divided by my said executors equally amongst my children."

The management of this property was left entirely in the hands of David de Alwis, one of the executors, and he duly paid to the first plaintiff the income to which she was entitled by virtue of the will of Cornelis de Silva. David de Alwis died in April, 1901, leaving a will by which the defendant was appointed executor, and the defendant was granted probate. When the plaintiff applied to him for the interest due to her, he declined to have anything to do with her. Hence this action.

The learned Commissioner has dismissed the action, as I understand, upon two grounds. First, he says that his Court has no jurisdiction, that the value of the property greatly exceeds his jurisdiction. The plaintiff, however, is only suing for Rs. 213, viz., interest due to her from a capital sum or property in which she has only a life interest. I think the Commissioner is mistaken on that point. Then it was said the Court of Requests had no jurisdiction, because the plaintiff should have gone to the Court where the proceedings relating to the will of Cornelis de Silva had taken place.

It seems to me clear that the Court of Requests has jurisdiction because in the case of *Fernando v. Soysa*, reported in *2 N. L. R. 46*, it was pointed out that an action for a legacy still lies in spite of the provisions of the Civil Procedure Code, and Chief Justice Bonser was at pains to quote from Justice *Thomson's Institutes* the remedies which a legatee had before the Civil Procedure Code came into operation. The first of the remedies is a personal action under the will against the representative or heir or any other person charged with the payment of the legacy. It is quite true that in the case reported *2 Browne, 389*, the Court considered it improper that a separate action should be taken in reference to the subject which was within the control of the Court having testamentary jurisdiction. But that was a case in which it was very naturally considered that, where a sale had taken place under the order of the Court of Colombo, it was improper that a stranger should sue the executrix in respect of a difference arising out of the sale in the District Court of Galle.

It was argued further, on behalf of the defendant in this Court, that the provision which I have quoted from the will contained a a special trust, *i.e.*, a trust which the testator desired to create on account of the personal confidence he had in his executors. A personal trust of that description could not be imposed upon the executor of any of the executors. I fail to see that the clause of the will creates any such special trust, therefore that objection fails.

There remains the objection that so long as any of the original executors are alive, the defendant, who is the executor of an executor, is not clothed with the responsibility of his testator. There is no evidence to show—there is not even an assertion—that Andrew de Silva is alive. All that is said about him is that he became insolvent. The other two executors are dead but I think that, when the defendant was taking an exception or pleading a defence to a claim, he ought to have alleged and proved that Andrew de Silva was still alive. He has not done that.

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His attitude is that of a person who has nothing to do with the subject. He did not even look into the testamentary case of Cornelis de Silva until this suit was brought against him. He urges that he is executor only until the testator's son becomes a major. He admits that the plaintiff asked for interest. He calls it interest money. He does not know what the interest was for. He never asked. He said he told the plaintiff that he must consult his proctors. I do not know whether he has consulted anybody. In any case he has not looked into all the documents. In fact, the attitude he has taken up is—"Go away, my good woman, don't fatigue me; I have nothing to do with you." As the executor of David de Alwis he is in possession of all the papers of David de Alwis, and I presume of all the property which belonged to him. If he was disposed to deal fairly with the plaintiff, and he had not accounted for this money, he would have said at once: "Andrew de Silva is executor in this case; he is the person responsible to you. I have handed over the whole matter to his charge, or, if I have not done so, I am prepared to do so at the first opportunity." Instead of that he adopted a line of conduct which seems to suggest the suspicion that he was endeavouring to conceal some transaction which he did not wish to avow. In any case, he is now, in my opinion, in the absence of proof to the contrary, responsible for this money just as his testator would have been. I therefore think the appeal should be allowed and judgment entered for the plaintiff.