1939 *Present* : **Soertsz and de Kretser JJ.**

DE SILVA *v.* RAMBUKPOTA.

293—D. C. Ratnapura, 6,352.

Administration—Right of administrator to sue for property—Legal representative of heirs—Plea of res judicata *available to him as to heirs—Civil Procedure Code, s. 472.*

The property of an intestate vests in the administrator for purposes of administration.

The administrator is the representative in law of those who have been found in administration proceedings to be the lawful heirs of the intestate and in an action by the administrator a plea of *res judicata*, which is available to the heirs, would also be available to the administrator.

THIS was an action brought by the official administrator of the estate of one Mudiyanselage Podi Singho, to recover the value of rubber coupons issued in respect of two lands purchased by the defendant from one John Singho, who professed to be the sole heir of Podi Singho. The question whether John Singho was the sole heir of the deceased arose between him and some others, who applied for administration. While this question was pending the District Judge appointed the present plaintiff as official administrator of the estate.

[1] *9 Ceylon Law Weekly 72.*

The District Judge held that John Singho was not an heir and his finding was affirmed in appeal.

The District Judge thereupon made order directing the plaintiff to continue as administrator.

The defendant pleaded that the order made and the findings in the testamentary case were not binding on him.

The learned District Judge gave judgment for the plaintiff.

N. K. Choksy (with him *N. L. Jansz*), for defendant, appellant.—The parties to the present case are not bound by the order in the testamentary case No. 987. That order would bind only the parties to the proceedings—*Chinniah v. Suppramaniam et al.*[1] It has been held that a judgment against some of the heirs does not operate as *res judicata* against the other heirs, although they derive title from the same source—*Silva et al. v. Kumarihamy*[2].

The plaintiff was not a party in the testamentary case. The finding in that case cannot operate as a finding *in rem*—*Punchirala v. Kiri Banda et al.*[3] where section 41 of the Evidence Ordinance is considered. See also *Velupillai v. Muthupillai et al.*[4] and *Spenser Bower* on *Res Judicata, para 242.* The only effect of the former proceedings on the defendant is to debar him from taking letters of administration.

Furthermore, the plaintiff, being administrator, has no title to the immovable property and is therefore not entitled to bring this action. There is a fundamental distinction between English law and Ceylon law in regard to the position of an administrator. In Ceylon, on the death of a person intestate, his estate passes at once to his heirs and the *dominium* vests in them and not in the administrator—*Silva v. Silva et al.*[5]; in England, it vests in the administrator appointed by Court—*Hukum Chand* on *Res Judicata p. 196, Art. 91.*

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *E. S. Dassenaike*), for plaintiff, respondent.—The question whether there is privity between the plaintiff of this case and the heirs who took part in case No. 987 is conclusively answered by section 472 of the Civil Procedure Code. There is an identity of interest between the administrator and the heirs, and a plea of *res judicata* which is available to the heirs would also be available to the administrator. There is not merely privity, but identity between the administrator and the heirs just as identity of parties remains when a new administrator is appointed to succeed another.

Silva v. Silva et al. (*supra*) is correct to the extent that on the facts of that case a further conveyance from the administrator would not be necessary. The statute law, viz., section 472 of the Civil Procedure Code, cannot be altered by that decision.

N. K. Choksy, in reply.—The wording of section 218 of the Civil Procedure Code implies that there is no identity between the administrator and heirs.

[1] *(1929) 10 C. L. Rec. 152.*
[2] *(1923) 25 N. L. R. 449 at 452.*
[3] *(1921) 23 N. L. R. 228.*
[4] *(1923) 25 N. L. R. 261.*
[5] *(1907) 10 N. L. R. 234.*

Section 472 is a procedural section and should be so interpreted as not to conflict with the substantive law. *Silva v. Silva et al.* (*supra*) has been consistently followed—*Fernando v. Rosa Maria et al.*[1] There may be identity of interest between the heirs and the administrator, but certainly not identity of personality ; it is impossible to conceive of the latter.

Cur. adv. vult.

March 29, 1939. SOERTSZ J.—

In this action, the official administrator of one Jayatunge Mudiyanselage Podisingho, sues the defendant-appellant to recover the value of rubber coupons obtained by him on the strength of a deed of transfer No. 557 of February 22, 1933, by which one Muhandiramage John Singho, professing to be the full brother and sole heir of Podisingho, purported to convey to him eleven parcels of land, including the two lands in respect of which the coupons were issued.

The question whether the appellant's vendor, John Singho, was the sole heir of the deceased arose between him and a number of others who claimed to be the lawful heirs, when all of them in opposition to one another, applied for letters of administration. While this question was pending, the District Judge, on August 13, 1935, appointed the Secretary of the Court, that is, the present plaintiff official administrator, "*pro tempore* until the rival claims are decided". On January 16, 1936, the District Judge decided that John Singho is not a brother of the deceased, Podisingho, and that Mr. Proctor Peries's clients are the next-of-kin of the deceased. There was an appeal from this order and on July 27, 1936, this Court, dismissed the appeal. On August 13, 1936, the District Judge made order directing the secretary to continue officiating as administrator. This order was most probably made with the consent or acquiescence of the next-of-kin, for when on October 26, 1936, the official administrator filed this case, their proctor, Mr. Peries, was his proctor.

The defendant filed answer pleading, *inter alia,* "that any orders made or findings arrived at in D. C. Testy. case No. 987 of this Court to which this defendant was no party do not bind him his vendor having divested himself of all title previously, deliberately failed to place all evidence before Court."

When the case came up for trial, a number of issues were framed, among them—

(5) Even if John Singho was not the sole heir or an heir of the estate of Podisingho, do the orders in the testamentary case No. 987 operate as *res judicata* against the defendant to the effect that John Singho did not inherit any rights from Podisingho ?

(7) Was plaintiff the administrator of the estate of the deceased, Podisingho, at the date of the institution of this action ?

(8) Has there been a judicial settlement of the estate in testamentary case No. 987, and if so, can plaintiff maintain this action ?

The District Judge decided to try these three issues as preliminary ones, He heard all the evidence adduced to him on these issues, and the argument of Counsel, and on August 27, 1938, delivered judgment

[1] *(1926) 28 N. L. R. 234*

finding in favour of the plaintiff and entering judgment for him for Rs. 2,251.10, which was the amount the parties had agreed would be payable by the defendant in the event of its being found that he was bound by the earlier decision.

This appeal is from that judgment. The only question really debated on appeal was that raised by issue 5, and I wish to say that we were greatly assisted by the able argument of Counsel on both sides. After careful consideration of that argument, I have come to the conclusion that issue (5) must be answered in the affirmative, that is to say, against the defendant-appellant. In brief, Mr. Choksy's contention was that although the defendant is the privy of John Singho, the plaintiff is a stranger to the proceedings in which it was held that John Singho was not Podisingho's heir, and that he cannot rely on that finding against the defendant ; that the only persons who could have repelled the defendant with that plea are Mr. Peries's clients, who were found to be next-of-kin and that between them and the plaintiff there is no privity whatever ; that the only hypothesis on which it could have been sought to bind the defendant by the finding in the testamentary case is that that finding was a finding *in rem*, but that was not a sound legal hypothesis. (See the Divisional Bench Case of *Punchirala v. Kiri Banda.*[1])

Mr. Perera's contention was that although the official administrator is the nominal plaintiff, he is present as the representative in law of those who were found to be the lawful heirs of the deceased, and that, in effect, this question of *res judicata* now arises between those heirs and the defendant, who is the privy of John Singho, the unsuccessful party. For this proposition Mr. Perera relies on section 472 of the Civil Procedure Code, which runs as follows: "In all actions concerning property vested in a trustee, executor, or administrator when the contention is between the persons beneficially interested in such property and a third person the trustee, executor, or administrator shall represent persons so interested, and it shall not ordinarily be necessary to make them parties to the action. But the Court may, if it thinks fit, order them or any of them to be made such parties."

The reply made by appellant's Counsel to that argument is that that section is purely procedural and will operate when an appropriate case arises, namely, a case in which the property of a deceased person is found to have vested in an administrator. He says he is not aware that any such case has arisen so far, nor can he visualize such a case, the law being so, he contends, that title to immovable property belonging to the intestate estate of a deceased person does not vest in the administrator of the estate of such person, but in the heirs. He relies on the Divisional Bench Case of *Silva v. Silva*[2] for this proposition.

The effective part of that judgment, as I understand it, is the decision that a conveyance by an heir of an estate under administration is not ineffectual merely because the administrator did not concur or assent to it. This finding is contrary to the view Bonser C.J. took in two earlier cases, and it must now be regarded as the settled law on that point. It has been recognized as such for nearly a third of a century. But I do not think that case compels us to hold that the property of the

[1] *(1921) 23 N. L. R. 228.*

[2] *(1907) 10 N. L. R. 234.*

deceased can never vest in the administration in any sense at all. It is notorious that frequently administrators sell and mortgage property belonging to their intestate in the course of administration. This obviously they cannot do, if in no case, and in no sense, they are vested with title to that property. Hutchinson C.J. after examining a number of authorities concludes his judgment in the Divisional Bench case I have referred to, by saying "the personal representative still retains power to sell it (*i.e.*, immovable property) with the authority of the Court if the terms of the grant of administration so require, for the purpose of administration". Now, a power to sell implies a power to pass title and it is one who has title that can transmit it. Grenier J. however, in his judgment in *Silva v. Silva* (*supra*) put the matter on another basis. He said, "a grant of administration viewed by itself, is not a conveyance or assignment by the Court to the administrator of the title of the intestate . . . . a practice has, in consequence of the anomalous position which an administrator occupies as regards the immovable property of all intestates grown up in our Courts, which I think may correctly be described as inveterate, by which the Court, where it has ordered the sale of immovable property belonging to an intestate estate, permits and sometimes expressly orders the administrator to execute the necessary conveyance . . . . It is a fallacy therefore to suppose . . . . that an administrator obtains an absolute title to the estate of his intestate. What happens is that on letters of administration being granted to him . . . . he is entrusted and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it." Grenier J. took this view and described the administrator as being 'entrusted and charged' with the estate or as being 'permitted or ordered' to execute a conveyance because he refused to recognize the possibility that the title can be in both the administrator and the heirs at one and the same time. This is no doubt the correct logical view, but it sometimes happens that a logical inconsistency is tolerated and even encouraged by law for some very good reason. Take, for instance, the case of a lessor and lessee. The modern view is that a lease creates not only contractual rights, but also proprietary rights. In *Gunewardene v. Rajapakse*[1] Bonser C.J. and Withers J. held that a notarial lease was a *pro tanto* alienation and gave the lessee the rights of the owner during his term. In *Abdul Azeez v. Abdul Rahaman*[2] a Divisional Bench held that a lessee is dominus or owner for the term of the lease. "He is owner during that term against all the world including his lessor." But this does not prevent the lessor from conveying title to the leased land to a third party, during the term of the lease. The sale will, of course, ordinarily be subject to the lease. There is thus in a sense, concurrent title in two persons. Similarly for purposes of the law of registration, by a fiction, a title may be considered to exist in two persons at the same time. A sells to B. From that moment, title is clearly in B as between the two of them. But, the law says that if notwithstanding his sale to B, A sells again to C, who registers his deed before B, C gets the superior title. I adduce these instances to show that it is possible for a title to be regarded as vested in two

[1] *(1895) 1 N. L. R. 217.*

[2] *1 Curr. L. R. 271.*

different persons at the same time, for certain purposes. The position is not different in the case of administrators and heirs in relation to the property of their intestate, except that it results not from a legal fiction, but from the evolution of our law of succession, which is derived from three different systems of Jurisprudence, the Roman, the Dutch, and the English based on divergent theories relating to succession.

In my opinion, therefore, it would not be incorrect to say that the property of the intestate vests in the administrator for purpose of administration. Section 472 of the Civil Procedure Code in so far as it relates to executors and administrators can be given a meaning only in that view of the matter. The only alternative is to adopt appellants' Counsel's suggestion that that part of the section is meaningless in the present state of the law. That, however, is a suggestion that I am not at all disposed to accept. I cannot regard that part of that section as some Utopian forecast. Section 218 of the Code seems to support the view I take of section 472.

The conclusion I reach is that section 472 of the Code furnished a complete refutation of the defendant's plea, for by virtue of it, the present plaintiff occupies the place of those who claimed to be the intestate's heirs and succeeded against John Singho the predecessor-in-title of the defendant. In other words, as far as the plaintiff and the successful claimants (*i.e.*, the heirs) are concerned, there is identity and between John Singho and the defendant there is privity.

I dismiss the appeal with costs.

DE KRETSER J.—I agree.

Appeal dismissed.