1921.

Present: Bertram C.J. and De Sampayo J.

NAGAHAWATTE *et al.* *v.* WETTESINGHE *et al.*

124—D. C. Galle, 17,640.

Action by heirs against debtor to estate—Collusion between debtor and administratrix—Administratrix made defendant—Right of heirs to pay the additional duty in testamentary action and proceed with the action against debtor—Civil Procedure Code, s. 547.

Plaintiffs, as heirs of S, sued the first defendant for the recovery of a sum due to the estate of S, and made the administratrix of the estate second defendant, alleging that the administratrix had neglected to include the debt in the inventory, and that she was acting in collusion with first defendant, who was her brother, and that the debt was about to be prescribed.

Held, that the action was maintainable by the plaintiffs (heirs), and that the heirs themselves may pay the additional duty in the testamentary action to enable them to maintain the action.

Ordinarily, a legatee or other beneficiary cannot be a party to an action for the recovery of an asset of the estate unless collusion is alleged, or unless there is such a relation between the executor and the debtor as to interpose a substantial difficulty in the way of the executor calling the debtor to account.

THE facts appear from the judgment.

Samarawickreme, for plaintiff, appellant.

Bawa, K.C. (with him *[illegible]. Jayawardene*), for respondents.

December 5, 1921. BERTRAM C.J.—

This is an action in which the plaintiffs, appellants, as heirs of one Don Cornelis de Silva, claim to sue the first defendant, who is said to be a person indebted to the estate of Don Cornelis de Silva. The widow of Don Cornelis de Silva, who is the administratrix of his estate, is made the second defendant. The first defendant is the brother of the administratrix, and the plaintiffs in the plaint allege that the administratrix has neglected to include the debt sued on in the inventory of the estate; that she is acting in collusion with her brother, the first defendant, and that there is danger that, owing to this action on her part, the debt may be prescribed. The defendants contest the right of the plaintiffs as heirs to sue for a debt due to the estate, and the learned Judge, having considered this question of law without going into the facts of the case, has given judgment in favour of the defendants.

Mr. Samarawickreme, who appears for the appellants in this case, in the first instance, based his argument entirely upon section 472 of the Civil Procedure Code. It was objected that that section has no application to this case. It was contended that the cases to which that section applies are cases in which an action is brought by an executor or administrator, and some person interested is added as a party by special order of the Court. It was even contended that the indirect effect of the section was that no beneficiary of an estate had any status to sue a person indebted to it, either as original plaintiff or as an added party, unless a preliminary order is first made granting him a right to do so.

In my own opinion section 472 has nothing to do with the case. It does not contemplate a case of this kind, nor, on the other hand, is it fatal to an action brought outside that section. It does not say that the consent of the Court is a condition precedent to an heir or other beneficiary being party to an action by an executor or administrator. All that it says is that, ordinarily speaking, such heir or beneficiary is not a necessary party, but that if it transpires that the addition of such an heir or other person interested as a party to the suit is desirable, the Court may make order to that effect. That section was fully considered by the Full Court in *Muttu Menika v. Fernando*,[1] and it was determined that in applying that section the Court would be guided by a certain principle of the English law of executors and administrators which was applied to this Colony by the Charter of 1833. That case was not a case like the present. In that case both the executor and certain legatees sued together. Objection was taken to the legatees being joined as parties. The Court referred to the principle of English law, which is that, ordinarily speaking, a legatee or other beneficiary cannot be a party to an action for the recovery of an asset of the estate unless collusion is alleged, or unless there is such a relation

[1] *(1912) 15 N. L. R. 429.*

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between the executor and the debtor as to interpose a substantia difficulty in the way of the executor calling the debtor to account.

Now, it appears to me that it is on the basis of that principle and not upon the basis of section 472 that this action must be decided. That principle has been explained in a series of English cases. In 1737, in the case of *Beckley v. Dorrington*, referred to in *6 Ves. Jr. 749*, it was said: "There can be regularly no suit against the debtor, but by the executor, who has the right both in law and equity . . . . There must be collusion or insolvency or some special case . . . . The Court will interfere if there is such special case as collusion or insolvency, and then the bill may be brought against both the debtor and the executor." Lord Eldon expressed the same views in *Alsager v. Rowley*[1]: "The established rule of the Court is certainly that in ordinary cases a debtor to the estate cannot be made a party to a bill against the executor; but there must be, as the cases express it, collusion or insolvency." But the most apt case on the question is that cited in *Muttu Menika v. Fernando* (*supra*), namely, *Saunders v. Druce*.[2] The Vice-Chancellor there said: "Now it is perfectly well known that though by the general rule a residuary legatee cannot file a bill for an account against an alleged debtor to the estate, that rule is subject to some exceptions. One is, that if the executor declines or refuses to do his duty in calling for an account, then any residuary legatee may file a bill; and there are several exceptions coming more or less to the same point. If an executor refuses, or there is such a relation between the executor and the debtor as to interpose a substantial difficulty in the way of the executor calling the debtor to account, then the rule does not apply."

It seems to me that the present case comes entirely within that principle. Mr. Bawa has objected that to adopt such a rule in Ceylon would be to multiply suits and to cause confusion. That difficulty was fully realized in England. In *Utterson v. Mair*[3] Lord Loughborough said: "If this suit was to stand the consequence would be that every creditor would be entitled to such a bill against every individual debtor; and the accounts would be inextricable." That difficulty, however, did not stand in the way of the application of the benevolent and clearly defined equitable principle above explained, and I do not think that it ought to stand in the way of its adoption here.

Mr. Bawa laid stress upon the case of *Muttu Menika v. Fernando*,[4] and there certainly are observations in that case which seem to lay down the rule that the executor or administrator is the only person who can sue in respect of a debt due to the estate. But that rule was simply laid down as a general rule, and not for the purpose of the question discussed in this case, but in a very different connection.

[1] *(1802) 6 Ves. Jr. at p. 749.*
[2] *(1855) 3 Drewry 856 (S. C. 24 L. J. Ch. 593).*
[3] *(1793) 2 Ves. Jr. 95.*
[4] *(1912) 15 N. L. R. 429.*

The principle there established was that the property which vests in the heirs under the rule laid down in *Silva v. Silva*[1] does not include property which has not been reduced into possession, and that for the purpose of recovering such property the executor is the only proper plaintiff. The equitable exceptions which have been annexed to the general rule by the English cases above cited necessarily did not come into consideration. The same explanation applies to the general principles laid down by Bonser C.J. in *Fernando v. Fernando.*[2]

Mr. Bawa, however, took another objection. The debt now sued on was not included in the inventory by the administratrix. He maintains, therefore, that under section 547 of the Civil Procedure Code no action can be brought in respect of it. I do not think, however, that that section need stand in the way of the application of the equitable principle above explained. Its sole object is to protect the revenue. The principle of this section was in force in England (see the cases cited by Wood Renton J. in *Silva v. Weerasuriya;*[3] but it did not impede the application of that other equitable principle of the law of England above explained. It has been repeatedly held that where the action is brought by the executor or administrator, the Court could, if necessary, allow it to be stayed, pending the payment of any deficiency in duty. I do not see why, in the present case, plaintiffs should not, in order to qualify themselves to assert their alleged rights, themselves tender the additional duty in the testamentary action, and why the case should not be stayed for that purpose. As Mr. Samarawickreme points out, it may very well happen that an heir in whom certain property is vested either under a will or by a succession may find himself in attempting to recover that property against a trespasser confronted by section 547, and the plea that the property sought to be recovered was never included in the inventory of the estate. It is clear that the heir in such a case would be allowed to put himself right by paying the additional stamp duty, even though he himself was not the person responsible for the inventory. I see no reason why the plaintiffs should not be entitled to take the same course in this case. I would, therefore, allow the appeal, and send the case back for further inquiry into the facts alleged by the plaintiffs in the plaint, and with the direction that the hearing of the case should be stayed until the plaintiffs should have had an opportunity of tendering the additional stamp duty in the action. If the plaintiffs' charges of neglect and collusion are substantiated, the amount recovered will, of course, not be paid to the plaintiffs personally, but will be treated as part of the assets of the estate. In my opinion the appeal should be allowed, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.

[1] *(1907) 10 N. L. R. 234.*

[2] *(1900) 4 N. L. R. on p. 206.*

[3] *(1906) 10 N. L. R. at p. 78.*