*Present:* Drieberg and Akbar JJ.

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VELUPILLAI *v.* SIDEMBRAM *et al.*

*450—D. C. Jaffna, 22,349.*

*Action for money lent—I.O.U. unaddressed to plaintiff—No evidence of money lent—Account stated—Executrix* de son tort.

An I.O.U. is no evidence of money lent.

The production of an I.O.U. which is not addressed to anyone, is *primâ facie* proof that it was given to the holder of it.

Where the defendant, who was the widow of a postal employee, received a sum of money from a Public Officers' Guarantee Fund due to her husband's estate,—

*Held*, that she was liable to be sued as executrix *de son tort* of the estate.

PLAINTIFF-respondent, who was resident in the Federated Malay States, by his attorney sued for the recovery of the sum of Rs. 542.50 which was borrowed from him by one R. Aiyampillai, who died in Jaffna in March, 1926. The action was brought against the first defendant-appellant, his widow, as legal representative, and the second defendant, his minor child. Aiyampilai, who was employed in the Postal Department of the Federated Malay States, was entitled on retirement to a gratuity, which was paid to his widow. She also received a sum of Rs. 83.06, which was a refund of payments made by her husband to the Public Officers' Guarantee Fund. The plaintiff sought to make her liable as executrix *de son tort*. The defendant in her answer denied all knowledge of the transaction and put the plaintiff to the proof thereof. The learned District Judge gave judgment for the plaintiff.

*H. V. Perera*, for defendant, appellant.—The I.O.Us. are only evidence of an account stated. The action is for money lent. There is no evidence of a loan. Nor is there evidence that the I.O.Us. were given to the plaintiff. There is no proof of the debt. In fact the defence is that the I.O.Us. referred to another transaction. The action is against the estate of a dead man. It is a rule of law that the Court should insist on strict proof of the liability. Counsel cited *Byles on Bills, 18th ed., p. 42*, and *Fessenmeyer v. Adcock.* [1]

*N. E. Weerasooria* (with *Nadarajah*), for plaintiff, respondent.—An I.O.U. need not be addressed to a particular person. The person in possession is *primâ facie* deemed to be the person to whom it was

[1] *(1847) 16 M. & W. 449.*

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given (*Curtis v. Rickards* [1] and *Douglas v. Holme* [2]). The explanation given by the defence has been rejected. There is evidence that the defendant was indebted to the deceased at the material dates. Such evidence is sufficient to connect the debt with the claims on the I.O.Us. The letters written by the deceased constitute an admission of liability made by him. No special degree of proof is therefore required.

*H. V. Perera*, in reply.—There must be definite evidence of the loan in regard to which the I.O.U. was given.

June 18, 1929. DRIEBERG J.—

The respondent, who resides in the Federated Malay States, brought this action to recover two sums of 100 dollars and 210 dollars, amounting to Rs. 542.50, which he said were borrowed from him in the Federated Malay States by R. Aiyampillai on March 15, 1924, and April 21, 1924, respectively. He pleaded that for each of these sums Aiyampillai gave him an I.O.U. Aiyampillai returned to Ceylon and died in March, 1926.

The action is brought against the first defendant-appellant, his widow, as the legal representative of his estate, and the second defendant-appellant, his minor child, over whom the first defendant-appellant was appointed guardian *ad litem*. The respondent sought to render the first defendant-appellant liable as an executrix *de son tort*. Aiyampillai shortly before his death gifted a certain land to the first defendant-appellant. Under section 11 of Ordinance No. 1 of 1911 the property remained liable for the debts and engagements of her husband. In considering the issue whether Aiyampillai left an estate the learned District Judge held that this formed part of his estate and that the first defendant-appellant had dealt with it. This view is not right. Though the land is subject to the claims of creditors of the donor, the right of property in it is in the donee.

Aiyampillai, who was employed in the Postal Department of the Federated Malay States, was entitled on retirement to a gratuity, which after his death was paid to his widow. The trial Judge held that this was property to which Aiyampillai was entitled, but was not certain whether it could be made liable in execution against his estate on a writ of a Ceylon Court.

The first defendant-appellant has however clearly made herself liable as an executrix *de son tort* by receiving the sum of Rs. 83.06, which was a refund of payments made by Aiyampillai to the Public Officers' Guarantee Fund.

I cannot agree with the learned District Judge that the respondent has proved his right to recover the money on the I.O.Us. from the estate of Aiyampillai. The first defendant-appellant in her answer

[1] *(1840) 1 Man. & G. 46.*

[2] *(1840) 12 Ad. & E. 641.*

pleaded that she had no knowledge of the debts sued for or of the I.O.Us. produced, either from information given by her husband or otherwise, and she put the respondent to the proof of them. She said further that there was one I.O.U. given by the deceased to the respondent, which the latter had sued on and which had been settled. At the trial she stated that the last liability was one on a transaction between the respondent's attorney and the deceased, and that this was settled by the deceased; but as the respondent has failed to establish his claim it is not necessary to consider the evidence on this point.

The respondent did not give evidence at the trial. His attorney said that he was not present when the I.O.Us. were made and that he was not aware of the transactions between the respondent and Aiyampillai. He said that the respondent had not received any payment on account of the I.O.Us, but this was not a matter of personal knowledge. The only corroborative evidence produced was a letter, P 4, written by Aiyampillai to the respondent on April 3, 1924, promising to make a payment to him on the 15th of that month, and a similar letter, P 5, on May 30, 1924, expressing regret that he could not keep his word and promising to settle definitely the following month on the return of a certain Kantiah. The letter, D 1, of May 31, 1924, was produced by the first defendant-appellant, in which the respondent writes to Aiyampillai that he had received no reply to his letter and asking Aiyampillai to remit money.

These letters were written in the States and they contain no reference to the I.O.Us., nor is any amount mentioned in them. Aiyampillai was two years in Ceylon prior to his death here in March, 1926, and no correspondence during this period is produced.

The first point for consideration is whether the I.O.Us. were given to the respondent. In *Curtis v. Rickards* [1] and *Douglas v. Holme* [2] it was held that though an I.O.U. was not addressed to anyone, as is the case here, the production of it by the plaintiff was *primâ facie* proof that it was given to him. "*Primâ facie* proof" in effect means nothing more than sufficient proof—proof which should be accepted if there is nothing established to the contrary; but it must be what the law recognizes as proof, that is to say, it must be something which a prudent man in the circumstances of the particular case ought to act upon—s. 3, Evidence Ordinance.

This is a claim against the estate of a dead man. Though there is now no rule of law that judgment cannot be obtained in such a claim on the uncorroborated evidence of the plaintiff, "it is the duty of the Court to watch with great jealousy" such evidence

[1] *(1840) 1 Man. & G. 46.*
[2] *(1840) 12 Ad. & E. 641.*

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(Fry L.J. in *In re Garnett: Gandy v. Macaulay* [1]); the evidence must be such as " brings conviction to the tribunal which has to try the question " (Hannen J. in *In re Hodgson: Beckett v. Ramsdale* [2]). In this case there is not even the sworn testimony of the respondent, and there is one circumstance which calls for explanation by him: in his letter P 4 of April 3, 1924, Aiyampillai promised to pay what he owed by the 15th; according to the respondent the amount then due was 100 dollars, and it is unlikely that if Aiyampillai made default on that day the respondent would have lent him 210 dollars six days later, especially as one can infer from D 1 that the respondent had difficulty in meeting his own liabilities.

In my opinion there was in the circumstances insufficient proof that these I.O.Us. were given to the respondent.

But even if it is accepted that the I.O.Us. were given to the respondent, the action cannot succeed. The trial Judge has based his judgment on the ground that an I.O.U. is *primâ facie* evidence of an account stated and that the grantee of it is entitled to judgment unless the defendant opposes the claim by one of the defences open to him in such an action. But this is not an action on an account stated; it is one for the recovery of money lent. In *Fessenmeyer v. Adcock* [3] the plaintiff, an attorney, sued for work and labour as an attorney, with counts for money lent, money paid, and an account stated. At the trial he limited his claim to £32 for his bill of costs, £40 for money lent, and £13.10*s*. for money paid to a third person on the defendant's account. To prove the count for money lent the plaintiff offered in evidence an I.O.U. for £40 signed by the defendant but not addressed to the plaintiff. It was held that it was not evidence of the loan. Parke B. said " An I.O.U. is no more proof of money lent by the party holding it to the party sought to be charged by it, than of goods sold and delivered by one to the other. And unless it is evidence of an account having been stated by them, it proves nothing at all. In *Curtis v. Rickards*, the production by the plaintiff of the I.O.U. was held *primâ facie* evidence that an account had been stated by the defendant with him, though no name was mentioned on the instrument. I agree with that decision."

Alderson B. said " I am clearly of opinion that this instrument is not evidence of money lent by the plaintiff to the defendant, and it may be well that our opinion should be expressed on that point, in order to prevent any contrary impression from *Douglas v. Holme*."

[1] *(1886) (C.A.) 31 Ch. Div. 1, on p. 16.*
[2] *(1886) (C.A.) 31 Ch. Div. 1, on p. 183.*
[3] *(1847) 16 M. & W. 449.*

In *Curtis v. Richards* (*supra*) the claim was for money lent, money had and received, and on an account stated; *Douglas v. Holme* (*supra*) was an action for money lent. These cases must be regarded as overruled so far as they allowed the I.O.Us. as evidence of money lent.

In the present case the respondent sues for the recovery of money lent, not on an account stated, and offers the I.O.Us. as evidence of the loans. There is consequently no proof that these sums were lent by the respondent to Aiyampillai, and the appeal must succeed. Decree will be entered dismissing the action with costs; the respondent will pay to the appellants the costs of the appeal.

AKBAR J.—

The plaintiff-respondent by his attorney sued on two I.O.Us. for the recovery of Rs. 542.50, the equivalent of 100 dollars and 210 dollars.

The two defendants in this case are the widow and minor son of the maker of the I.O.Us., one R. Aiyampillai, who died in Jaffna about three years ago.

The parties went to trial on the following issues:—

(1) Did the late Ramanather Aiyampillai owe a sum of Rs. 542.50 to the plaintiff?
(2) Has any portion thereof been paid by deceased or his heirs?
(3) Did the deceased leave behind any estate?
(4) Is the first defendant wrongly joined?
(5) Did first defendant intermeddle with the estate?

It will be seen from issue (5) that the first defendant is sued as an executrix *de son tort*, in that she intermeddled with the estate of the deceased Aiyampillai. The District Judge has held that she is an executrix *de son tort* on the ground that Aiyampillai having purported to transfer a piece of land by way of sale to his wife in consideration of her dowry money which he had spent, she must be considered to have intermeddled with her husband's estate, inasmuch as such property is liable under the Theswalamai for her husband's debt. I cannot see the point of this reasoning, because by the transfer of the land there was an end of her husband's estate after his death so far as this land was concerned. But I think first defendant is an executrix *de son tort* for another reason, and that is, that she admittedly received from the Government of the Federated Malay States a sum of Rs. 3,701.52 as gratuity due under the Pension Minutes and also another sum of Rs. 83.06 from a Post Office Guarantee Fund. Clearly this sum of Rs. 83.06, being a refund of contribution money contributed by Aiyampillai, is a part of his estate, and therefore when first defendant received this sum she became an executrix *de son tort*. I am prepared to hold that by receiving the gratuity money also she became liable to be sued. The fact that

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this woman is in receipt of a pension due to her as a widow in addition to this gratuity shows that the gratuity was paid in lieu of pension due to her husband and not as gratuity to his widow and children. However that may be, the receipt of Rs. 83.06 is sufficient to render her liable. As a matter of fact a decision on this point is not necessary in view of the conclusion to which I have come on the first issue. The plaintiff sues by his attorney, who merely produces the two documents which were admittedly signed by the late Aiyampillai, but in cross-examination he says that he was not present when the I.O.Us. were executed and that he is ignorant of the money transactions between his principal and Aiyampillai. In fact, beyond producing the I.O.Us., which he says were sent to him by his principal by post, he knows nothing of the transactions. He produces certain letters which were admittedly sent by Aiyampillai to the plaintiff, namely, letters P 4, P 5, and P 6, which together with letters D 1 and D 2 put in by the defence form a series of letters between the plaintiff and Aiyampilli. These two I.O.Us., although signed by Aiyampillai, are not addressed to anybody and are dated respectively March 15, 1924, and April 21, 1924. There is no evidence before the Court to prove that the I.O.Us. were handed to the plaintiff and that they were in respect of moneys lent to Aiyampillai by the plaintiff. It is however contended for the plaintiff-respondent that the letters P 4, P 5, and P 6, show that Aiyampillai was indebted in a sum of money and that therefore there was enough evidence for the District Judge to come to the conclusion that the sums covered by the I.O.Us. were in fact lent by the plaintiff to Aiyampillai. The defendants however urge that the letters P 4, P 5, and P 6 were in respect of another debt due by the deceased to the plaintiff. This defence is corroborated to some extent if documents P 2 to P 6 are read together with document D 1, for they show that the plaintiff was not likely to lend 210 dollars when Aiyampillai was promising to pay the previous debt of 100 dollars before April 15 and had not as a matter of fact done so. I may add that the letters P 4 to P 6 contain no reference to the I.O.Us. It is however really not necessary to decide this question of fact because in my opinion on the law the plaintiff has failed to prove that the I.O.Us. were in fact given by Aiyampillai to the plaintiff and that they were in respect of money lent. Even if we follow the English law, the authorities, notably *Fessenmeyer v. Adcock*,[1] show that an I.O.U. is evidence only of an account stated but not of money lent. These I.O.Us. are not addressed to the creditor nor have they been really "produced" by the plaintiff. All that the plaintiff's attorney can say is that they were sent to him by his principal. This does not show that they were actually given to the plaintiff by Aiyampillai nor the nature of the transaction in respect of which they were given.

[1] *16 M. & W. 449.*

It may well be that they were given to some other person and that plaintiff came by them dishonestly. Further, they may be in respect of debts already settled or in respect of a cause of action on which the plaintiff cannot sue, for example, a gambling transaction. We have no evidence of the circumstances and the plaintiff has failed to lead the best evidence on the point, namely, his own evidence. I do not think the case of *Knowles and Others v. Michael and Another*, [1] which was cited by respondent's Counsel, is in point, because in that case there was evidence to prove that the account stated was in respect of the particular cause of action which arose in that case. In this case there is no evidence at all of the transaction which resulted in the I.O.Us., and Aiyampillai's indebtedness as shown in letters P 2 to P 6 has not been connected with the two I.O.Us. put in evidence. There are many facts which have to be explained by plaintiff arising on the statements in the letters P 4 to P 6, and this explanation has not been given. Such explanation is particularly required and is expected by the Court in a case of this kind, where the debtor, Aiyampillai, is dead and the widow states that she knows nothing of the transactions and puts the plaintiff to the proof thereof (see paragraph 2 of the answer). In this view I think the judgment of the learned District Judge is wrong. I would, therefore, allow the appeal and dismiss plaintiff's action against both the defendants with costs in both Courts.

*Appeal allowed.*

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[1] *13 East 249.*