1930

Present : **Dalton S.P.J. and Lyall Grant J.**

SENARATNE *et. al. v.* NANDIAS SILVA.

109—*D. C. Tangalla,* 3,042.

Executor de son tort—*Application for probate —Filing of inventory—Order* nisi— *Action on mortgage bond.*

On the death of a person his son (the defendant) applied for probate tendering a last will and filing an inventory, although another person was named in the will as executor. Order *nisi* was issued but no further steps were taken in the proceedings.

Held (in an action against the defendant for the recovery of money due from the estate), that the defendant was liable to be sued as executor *de son tort.*

APPEAL from an order of the District Judge of Tangalla. The facts appear from the judgment.

Hayley, K.C. (with him *Soertsz*), for plaintiffs, appellants.

No appearance for defendant, respondent.

September 12, 1930. DALTON S.P.J.—

Plaintiffs sued defendant as executor of the late Tikiri Samel de Silva to recover the sum of Rs. 10,450 on three mortgage bonds executed by the deceased.

It appears that defendant, a son of the deceased, was first sued as administrator. His answer was to the effect that, admitting the correctness of plaintiff's claim, he had filed the will of deceased, but that no probate had been issued to him and that he was therefore not liable. Plaintiff then applied to have the plaint amended by substituting the word " executor " in place of " administrator " in the plaint, presumably because from defendant's answer the only inference could be that he was named executor in the will and so entitled to probate. This amendment was allowed. When the will, however, is examined it appears that one Hettihewage Ponthenis Appu is appointed executor and defendant is not mentioned. What has happened to the executor counsel cannot tell us. He appears to have been ignored in both the testamentary proceedings and in the proceedings in this case by everyone until his name is mentioned in the judgment.

Plaintiff's action has been dismissed, the trial Judge holding that defendant had not taken upon himself the office of executor or intermeddled with the estate.

The facts proved against him are as follows :—

By petition dated April 25, 1929, he set out the fact of deceased's death, tendered to the Court the last will and an inventory of the estate, and in the body of the petition asked for probate. In the prayer of the petition he prayed " that he may be granted probate and administration of the estate as son of the deceased ". Whether the will was read on this application being made is doubtful, as examination would have shown that Ponthenis Appu was named as executor. The only record made on this date is that the Court made an order *nisi*, with direction for publication and service. Service was presumably to be made upon the persons named as respondents, relatives of deceased, amongst whom the person named as executor in the will does not appear. The order which was published in the official *Gazette* of June 7, 1929, states that the petitioner " is entitled to have probate of the same issued to him ". How any Court could on the facts come to that conclusion it is difficult to understand. The subsequent proceedings in the testamentary case that are material go to show that papers were sent on his behalf to the Commissioner of Stamps for the assessment of stamp duty, the latter replying that he was awaiting the Government Assessor's report. The copy of the record of those proceedings put in does not go further than that, so what happened later does not appear. It is admitted however that no grant of probate or letters of administration with the will annexed have been issued, nor has the order *nisi* been

made absolute. There is some reason to think defendant took no further steps in the matter in view of this action brought against him.

The mere making of an inventory of the property of a deceased person will not constitute a person an executor *de son tort*, for that may be an office merely of necessity or charity (*Williams, Executors vol. I. p.* 187), but in this case that act has to be considered in connection with all the surrounding circumstances. Here the inventory was made by a person who said he was entitled to probate, however mistaken he may have been on that point. He told the Court that no one would object to his claim for probate, and that claim, which could only be on the footing that he was executor, was actually allowed by the Court. The obvious conclusion that strangers must draw from his conduct and from the decree *nisi* which was published was that he had produced a will of the deceased in which he was named executor and was proving the will in that capacity. The making of the inventory of the property of the estate and the steps taken by him for the payment of estate duty were clearly done in his alleged capacity as executor and for no other reason. There is in the special circumstances here, in my opinion the doing of acts by a person that go beyond anything a stranger may do without running the risk of involving himself in the executorship. There is an assumption of authority and an intention to exercise the functions of an executor coupled with the performance of definite acts (*Halsbury, vol. XIV., pp.*, 147–148). A very slight circumstances of intermeddling will make a person an executor *de son tort* (*Williams, vol. I., p.* 183), and on the facts here I think the trial Judge was wrong in his conclusion that the defendant is not an executor *de son tort*. It is of course difficult to understand what advice defendant could have received in taking up the attitude he did in the testamentary proceedings, but he clearly held himself out there to be executor. In addition, he admits to the intermeddling with the goods as set out. The issue on that point must be answered against him and the appeal must be allowed. Plaintiff will be entitled to judgment in the lower Court with costs. The attention of the lower Court must be drawn to the form the decree should take.

The order of the lower Court is set aside and the appeal is allowed with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.