1943 *Present :* **Jayetileke J.**

GUNETTI *v.* FONSEKA.

881—M. C. Badulla, 8,004.

Criminal Procedure—Accused kept out of Court during evidence of defence witnesses—Fatal irregularity—Criminal Procedure Code, s. 297.

The accused is entitled to be present when evidence is led for the prosecution or the defence.

Failure to observe this rule of procedure is an illegality.

***Police Vidane Kandana, v. Amaris Appu (25 N. L. R. 400)* followed.**

APPEAL from a conviction by the Magistrate of Badulla-Haldummulla.

N. E. Weerasooria, K.C. (with him *D. W. Fernando*), for first accused, appellant.

E. F. N. Gratiaen (with him *Kulatileke*) for complainant, respondent.

February 12, 1943. JAYATILEKE J.—

The appellant and three others were charged under section 189 of the Penal Code with having obstructed the complainant, a Fiscal's process server, in the execution of his duties.

The appellant was convicted and sentenced to pay a fine of Rs. 25 and the 2nd and 4th accused were acquitted. Summons was not served on the 3rd accused.

At the close of the case for the prosecution, Mr. Wilmot Perera, who appeared for all the accused, moved to call one Thomas as a witness. Mr. J. E. M. Obeyesekere, who appeared for the complainant, stated that if the accused were to be called they should be called first. Mr. Perera replied that he had not made up his mind whether he would call the accused to give evidence.

The Magistrate thereupon made the following order :—" As there is a possibility that the accused may be called as witnesses, I think it proper that they should not listen to the evidence of witnesses who will be called before them and I therefore order the accused to go out of Court."

The accused then left the Court and Thomas' evidence was recorded in their absence.

Learned Counsel for the appellant contended that under section 297 of the Criminal Procedure Code all evidence should be taken in the presence of the accused and that the action of the Magistrate was illegal. He cited in support of his contention the judgment of Bertram C.J. in *Police Vidane, Kandana v. Amaris Appu* [1], which appears to be on all fours with the present case.

Section 297 of the Criminal Procedure Code clearly lays down that all evidence shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. The words " all evidence " include both the evidence for the prosecution as well as for the defence. The language of the section is imperative and the accused is entitled as of right to be present when evidence is taken.

[1] *25 N. L. R. 400.*

The procedure adopted by the Magistrate is not only irregular but illegal and it is unnecessary for me to consider whether the accused has been prejudiced or not. In my opinion the trial that was held was not a legal one. The conviction cannot therefore stand.

I may mention that learned Counsel for the respondent very frankly admitted that the procedure that was adopted by the Magistrate was quite indefensible.

The only other question is whether I should order a fresh trial. The case has been strenuously fought on both sides and the trial has taken two days. The evidence of the complainant was that the appellant snatched a list that was in his hands, the 2nd accused pushed Banda who accompanied him, the 3rd accused seized him by the neck and pushed him out and the 4th accused threatened to kill him if he did not leave.

The Magistrate has acquitted the 2nd and 4th accused because Banda has contradicted the complainant as to the part played by them. On the whole the evidence for the prosecution does not seem to be quite satisfactory.

In the circumstances, I do not think I should put the appellant to the anxiety and expense of a fresh trial. I would set aside the conviction and sentence and acquit him.

Set aside.

1943 *Present* : **Soertsz S.P.J., Hearne and Wijeyewardene JJ.**

SUPPAMMAL, Appellant, *and* GOVINDA CHETTY, Respondent.

109—D. C. Colombo, 7,457.

Administration—Application to amend inventory—Addition of sums of money claimed by administrator—Contest between the parties—Judicial settlement—Scope of s. 718—Civil Procedure Code, s. 736.

Where an application was made by an heir of an estate for a direction to the administrator to have the inventory filed by him amended so as to include certain sums of money which the administrator claimed as his own,—

Held, that the application fell within the scope of section 718 of the Civil Procedure Code.

Where a question such as the above arises between the accounting party (*i.e.*, the executor or administrator) and any of the other parties to the testamentary case, that question may be determined in the proceeding for judicial settlement and not by separate action.

It would be within the discretion of the Court to direct amendment under section 718 or to refer a party to the procedure of section 736, viz., judicial settlement, according to the nature and scope of the particular application and the stage at which it is made.

de Zoysa v. de Zoysa (*26 N. L. R. 472*) and *Pawistaina v. Veyachchey* (*5 Bal. N. C. 22*) overruled.

THIS was a case referred to a Bench of three Judges. The facts appear from the argument.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *N. Kumarasingham*) for the petitioner, appellant, in Appeal No. 109 and petitioner, respondent, in Appeal No. 3.—These two appeals relate to certain assets which the petitioner, who is the widow of the deceased, alleges are the assets of the estate. She moved under section 718 of the Civil Procedure Code to have the inventory filed by the administrator amended. The administrator opposed her application, stating that part of the assets in question were his own and the other part did not belong to the deceased. The District Judge made order refusing the widow's application, on the ground that the inventory could not be amended at the stage at which it was sought to be amended. The widow subsequently sought to have the inventory amended at the stage of judicial settlement, under section 736 of the Code. The administrator objected, stating that the widow's only remedy was by way of a separate action. The District Judge gave judgment in the widow's favour ordering that the assets in question should be accounted for in the judicial settlement. Appeal No. 109 was preferred by the widow from the earlier order refusing her application, and appeal No. 3 is by the administrator with regard to the later order.

Appeal No. 109 is primarily a question of the interpretation of section 718 of the Civil Procedure Code. Section 538 of the Code contemplates the inclusion in the inventory of the whole of the property and effects of the deceased person. The inventory cannot be confined only to property believed by the executor to belong to the estate ; the ultimate test is the objective existence of the assets. Section 718 applies to a stage anterior to that of judicial settlement. It refers not only to an inventory but also to accounts. There is a distinction between claims by an executor or administrator and claims by third parties under section 712; in the former no separate action is necessary and the claims may be inquired into under section 718.

Conflicting views have been taken regarding the procedure for amendment of an inventory. See *Silva v. Cooray* [1], *Pawistaina v. Veyachchey* [2] and *de Zoysa v. de Zoysa* [3]. The view taken of section 718 in *Pawistaina v. Veyachchey* (*supra*) is not correct. The words of the section do not impose the limitation placed upon it by that decision. In *de Zoysa v. de Zoysa* (*supra*) no reference is made to sub-section 2 of section 736. The petitioner in the present case can have recourse either to section 718 or section 736 in order to have the inventory amended.

N. Nadarajah, K.C. (with him *T. K. Curtis*), for the administrator, respondent in appeal No. 109 and appellant in appeal No 3.—The view taken in *Pawistaina v. Veyachchey* (*supra*) is correct. Not judicial but supervisory orders are made by the Court under many sections of Chapter 54 of the Civil Procedure Code. Section 718 was intended to control the acts of the executor or administrator who in fact acts as an officer of Court. That section is only concerned with certain patent omissions and does not provide for any judicial inquiry. Where an inquiry is provided for, the words of the section would clearly indicate it; see, for example, sections 712, 720, 736 and 244. The effect of section 712 is considered *in re Kalideen Marikar Hadjiar* [4], *The Imperial Bank of India, Ltd. v. Perera et al* [5], *In re Don Cornelis Dias* [6], *Clara Fernando v. Rosa Fernando* [7] and *Gunawardene v. Jayawardene* [8]. *de Silva v. Jayakoddy* [9], deal with section 720. The word "thereupon" should be read as meaning on the material of the affidavit. The Court cannot go beyond the affidavit and proceed to hold an investigation. One cannot import into the words "if the Court is satisfied" a provision for an inquiry.

As regards Appeal No. 3, the scope of section 736 is considered in *Mohamado Jan v. Ussen Bebe* [10], *Holsinger v. Nicholas* [11] and *de Zoysa v. de Zoysa.* [12] Questions of a complicated nature should be determined by a separate regular action, and not under section 736. In the present case, for example, the question whether the deceased had disposed of certain properties before his death is important and requires a careful examination.

H. V. Perera, K.C., in reply.—One cannot overlook the provisions of section 736 (2) as one would have to if the second order of the District Judge is to be deemed wrong.

The word "thereupon" in section 718 (2) means on the filing of the affidavit and not on the material of the affidavit. Where cause is shown an inquiry can be held. Section 718 has to be examined more closely than it has hitherto been.

Cur. adv. vult.

[1] (1904) 4 Tamb 38.
[2] (1913) 5 Bal. N. C. 22.
[3] (1924) 26 N. L. R. 472 at 477.
[4] (1928) 25 N. L. R. 73.
[5] (1928) 30 N. L. R. 59.
[6] (1896) 2 N. L. R. 252.
[7] (1903) 9 N. L. R. 65.
[8] (1938) 40 N. L. R. 137.
[9] (1941) 42 N. L. R. 226.
[10] (1909) 1 Cur. L. R. 53.
[11] (1918) 20 N. L. R. 417.
[12] (1924) 26 N. L. R. 472.

February 19, 1943. SOERTSZ S.P.J.—

The difficulty that arises on these two appeals is due to conflicting views that have been taken of the meaning and scope of sections 718 and 736 of the Civil Procedure Code. But, before proceeding to consider those views, and to attempt an interpretation of the sections in question, a brief statement of the facts that led to these appeals is necessary.

The first appeal is from an order dated the 5th June, 1942, refusing an application made by the widow, one of the two heirs of the deceased whose estate is being administered, for a direction to the administrator to amend the inventory by including in it certain assets, which, she maintains, from part of the deceased's estate, but which the administrator says, belong to him, in part, having come to him from the deceased; and in regard to the other part, that it never belonged to the deceased.

This application was made after the Final Account had been filed by the administrator, and when that account was about to come up for judicial settlement.

On her application being refused, the widow preferred an appeal, and almost simultaneously moved the Court to permit her to raise the question whether the assets she claimed belonged to the estate or not, in the course of the judicial settlement.

Objection was taken, on behalf of the administrator, to this application as well, on the ground that a judicial settlement should be limited to the accounts in respect of the assets already in the inventory, and that a claim that property not included in it belongs to the estate should be submitted for decision in a separate action.

The Judge in the Court below rejected this contention and made order dated the 20th of November, 1942, that the judicial settlement should proceed in the manner desired by the widow. The second appeal is from that order.

If the administrator's contentions are entitled to prevail the result would be that an heir cannot obtain such relief as the widow in this case seeks either under section 718 or under section 736, but must have recourse to a separate action. Such a view appears to be inconsistent with the words of both section 718 and section 736.

To deal first with section 736, it provides that:—

> " where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or intestate, or by the testator or intestate to the accounting party, the contest must be tried and determined in the same special proceeding and in the same manner as any issue arising on a civil trial.".

These words are clear and peremptory. They require that, if at the stage of a judicial settlement, a question such as arose here, arises between an accounting party, that is to say, between an executor or administrator, and any of the other parties, that is to say, other parties to the testamentary suit, such as the widow in this case, that question *must* be determined " in the same special proceeding ", that is to say in the proceeding for the judicial settlement.

But it is contended that this view is opposed to that taken by Bertram C.J. in the case of *de Zoysa v. de Zoysa* (*supra*). In that case that learned Chief Justice made this observation : (p 47) :—

" another claim made by the appellant which cannot, in my opinion, be entertained, is the claim that certain properties of the testator have not been included in the inventory. *If the correctness of the inventory is to be challenged, it should be challenged under section 718.* A judicial settlement is a proceeding of a limited nature. Its scope is indicated by the provisions of section 739. A judicial settlement proceeds upon the footing that the inventory is a full and true inventory of the estate ".

If the words I have underlined correctly state the law, each of the orders now under appeal is wrong. The first order is wrong inasmuch as it holds that an inventory cannot be amended under section 718 where there is a " serious contest ", whereas Bertram C.J. holds that, in such an event, section 718 is the appropriate section. And the second order is wrong inasmuch as it permits such a contest to be investigated under section 736, contrary to the view taken by Bertram C.J.

It must have been in this dilemma that the widow, with wise precaution, appealed from the first order, and at the same time sought the aid of section 736. Her Counsel now contends that she is justified by both section 718 and section 736.

The language of section 736 does not, in my opinion, justify the interpretation put upon it by Bertram C.J. The words " where a contest arises . . . . respecting any *property alleged to belong to the estate,* but to which the accounting party lays claim " appear to me to contemplate just such a case as has arisen here. A property which the administrator, the accounting party, claims, is alleged by the widow, another party to the testamentary suit, to belong to the estate, and thus there has arisen a contest, which, in the words of the section, " *must be tried and determined* " in the course of the judicial settlement.

With great respect, I would, therefore, say that *de Zoysa v. de Zoysa* (*supra*) was wrongly decided on this point, and that the second order of the District Judge was correct.

In regard to the appeal from the first order on which too the parties desire a decision, the contention on behalf of the appellant is that the judgment in the case of *Pawistaina v. Veyachchey* (*supra*), upon which that order was based, does not correctly interpret section 718. In that case, Lascelles C.J. and Wood-Renton J. were of opinion that:—

"the language of section 718 is not appropriate to a case where there is any serious contention between the executor on the one hand and any other party on the other,"

the words " any other party " meaning, in the context " any other person who is a party to the testamentary suit ". For this view the reasons given were:—(*a*) that in an earlier case *Silva v. Cooray* (*supra*) Wendt and de Sampayo JJ. expressed a similar opinion: (*b*) that there is no provision in the section for the holding of an inquiry or for the fixing of issues as would be expected if the scope of the section extended to cases where there is a serious dispute as to the ownership of the property ": (*c*) that the procedure to be adopted is a very summary one and applies to cases "where the executor has wilfully and intentionally kept out of the inventory goods which he ought to have included", and not to cases where there is a serious dispute as to the ownership of the property.

In regard to (*a*) the case of *Silva v.Cooray* (*supra*) is distinguishable, for as pointed out by de Sampayo J. that was a case in which an heir required an administrator "to amend the inventory by adding to it the boutique, goods and timber which the administrator claimed as his own: the value of certain jewellery and prescious stones which the administrator said were never found in the estate; and the value of the stock-in-trade of a boutique which was alleged to have been sold by him, but which he said had been sold by the deceased in his lifetime; by rendering an account of certain plumbago which is said to be in the hands of a third party from whom, according to the administrator, nothing is due; and by reducing the amount of a debt shown in the inventory as due to a chetty by the estate". De Sampayo J. went on to say:—

> "There were other matters also gone into which I need not detail here. I have stated these particulars in order to indicate the nature of the inquiry that took place . . . . but it seems to me that this section (718) does not justify the Court entering at this stage upon an inquiry into *such contentious matters as above* . . . . In my view, the proper procedure for this purpose is by way of judicial settlement of the administrator's account under the provisions of Chapter 55". (Section 736 occurs in that Chapter).

The application in that case involved parties other than those who were parties to the testamentary proceedings.

I would respectfully associate myself with that view and say that having regard to the large and varied scope of the heir's application in that case, and involving, as it did, third parties, section 736 was the more appropriate section under which to proceed so far at least as the administrator and the other parties to the testamentary proceedings were concerned, and so far as third parties were involved, separate actions would have been the proper course, unless section 712 served the purpose.

The observations made by de Sampayo and Wendt JJ., regarding section 718, must be understood as made on the facts of that case. But here we are dealing with a very different matter, a straightforward application by an heir to have the inventory amended by including therein six sums of money which she alleges form part of the deceased's estate but which the administrator says, in respect of three sums, that they are his because the intestate had endorsed the promissory notes relating to them to him, and in respect of the three others that they never formed part of the estate. I cannot interpret the judgments in *Silva v. Cooray* (*supra*) as laying down that, in a case like the present one too, section 736 is the appropriate section. Such a case as this appears to me to be within the scope of section 718 more appropriately than it would be under section 736.

In short, the amendment of an inventory may be ordered either under section 718 or under section 736, and it would be in the discretion of the

Court to direct amendment under section 718 or to refer a party to the procedure of section 736 according to the nature and scope of the particular application and the stage at which it is made. I am therefore unable to agree with the view taken in *Pawistaina v. Veyachchey* (*supra*) that section 718 is not applicable to a case in which the administrator " seriously " claims the property as his own or " seriously " says that the property does not belong to the estate. Indeed, I do not quite understand what exactly the words " serious dispute " were intended to mean. They appear to have been used by way of contrast with what was said earlier, namely, that section 718 applies to " cases where the executor has wilfully and intentionally kept out of the inventory goods which he ought to have included ". I should have thought that it is such a wilful and intentional omission that would occasion a serious dispute. It seems to me that the application by the widow, in this case was well within section 718.

Another reason given for the ruling in *Pawistaina v. Veyachchey* (*supra*) was that there is " no provision in section 718 for the holding of an inquiry or the fixing of issues ". It is true that there is not as explicit a direction as to an inquiry in the case of section 718 as there is in that of section 736, but a sufficient inquiry is indicated in section 718 (2) and 718 (3).

For these reasons, I am of opinion that *Pawistaina v. Veyachchey* (*supra*) does not correctly interpret section 718 in so far as it says that that section does not apply to a case in which an administrator as executor seriously claims, as his own, property which a creditor or any person interested in the estate alleges is property of the estate.

In the circumstances of this case, I would direct that an inquiry be held under section 736 in the manner proposed by the District Judge. I would allow the widow one set of costs against the administrator.

HEARNE J.—I agree.

WIJEYEWARDENE J.—I agree.

Appeal allowed.