1938 *Present :* **Maartensz and Moseley JJ.**

THORNTON *et al. v.* VELAITHAN CHETTY.

79—D. C. Galle, 24,593.

Administrator—Right to continue action brought by predecessor in office—Legal representative summoned to defend action—Objection to be urged in first instance—Right of administrator to vindicate title to land—Civil Procedure Code, s. 404.

Under section 404 of the Civil Procedure Code a succeeding administrator may continue an action brought by his predecessor in office.

Where a person is summoned to defend an action as legal representative an objection that he is not the legal representative must be raised and determined in the first instance.

An administrator is entitled to bring an action to vindicate title to immovable property belonging to the estate without joining the heirs unless the Court so directs.

[1] *I. L. R. 21 Bom. 228.*

APPEAL from an order of the District Judge of Galle declaring the substituted plaintiffs as administrators entitled to the premises of the intestate in place of the plaintiffs, whose letters had been recalled.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for first substituted defendant, appellant.—An administrator cannot continue an action brought by his predecessor in office ; when he succeeds to the office, he must bring a fresh action. On the death of the administrator the action would abate, and a fresh action has to be brought by the new administrator. The right to sue is personal to the administrator. With him the right dies and does not survive, because it is a right personal to him. In the Trusts Ordinance, No. 9 of 1917, for example, express provision is made in section 77 giving the right to a new trustee to continue an action on the death of a trustee. There is no similar provision in the Civil Procedure Code to enable a new administrator to continue an action brought by his predecessor. Further, in England and New York express provision is made for the continuance of an action when an administrator dies. See *Williams' Law of Executors and Administrators, pp. 464 and 465 (10th edition)*.

[MAARTENSZ J.—Cannot section 404 of the Civil Procedure Code apply ?]

No. "Any interest" in section 404 must be construed according to the context. The earlier sections refer to cases where the interest in some property devolves. "Any interest" does not include the right to bring an action.

An administrator cannot bring an action to vindicate title to land. See *Silva v. Silva*[1].

The appellant was made a party defendant in his capacity as executor *de son tort, i.e.,* in a personal capacity; but judgment has been entered against him in a representative capacity. Under section 35 (2) of the Civil Procedure Code, no claim can be made against a defendant partly in his personal capacity and partly in his representative capacity.

The document P 13 must be read as a whole, although it was put in for the admissions contained there—*Ameer Ali's Law of Evidence, p. 234 (9th edition); Chowdhry v. Shikdar*[2]*; Sooltan Ali v. Chand Bibee et al.*[3]

N. Nadarajah (with him *J. R. Jayawardene*), for plaintiff, respondent.—Order 22, rules 1-10 of the Indian Code correspond to Chapter 25 of our Civil Procedure Code. Rules 4 and 10 are particularly relevant. Rule 4 corresponds to section 398 of our Code. The appellant was orginally brought into the case as executor *de son tort*. He did not deny his representative character at the stage mentioned in the proviso to section 398. Where the legal representative of a deceased defendant is already a party though in another capacity, no special application is necessary to implead him as legal representative. See *Chitaley and Rao's Commentary on the Code of Civil Procedure, p. 2118, note 12*. Any person acting in any representative manner may be made a party—*Arunaselam Chettiar v. Arunaselam Chettiar*[4]*; Rahman Dole v. Abesiriwardene*[5]*; Saminathan Chetty v. Silva*[6]*; Webster v. Webster*[7].

[1] *(1907) 10 N. L. R. 234.*
[2] *(1868) 9 Sutherland's Weekly Reporter 290.*
[3] *(1868) 9 Sutherland's Weekly Reporter 130.*
[4] *(1934) 36 N. L. R. 49 at 51.*
[5] *(1905) 1 Weer. 49.*
[6] *(1904) 7 N. L. R. 279.*
[7] *(1804) 10 Vesey 93.*

Rule 10 of Order 22 of the Indian Code corresponds to section 404 of our Code. As to meaning of "devolution of interest", see *Chitaley and Rao; p. 2145.*

Plaintiff's right to bring an action, as administrator, for declaration of title to land belonging to the estate cannot be questioned—*Fernando v. Unnanse*[1]; *Moysa Fernando v. Alice Fernando*[2]; section 540 of Civil Procedure Code.

H. V. Perera, K.C., in reply.—

June 23, 1938. MAARTENSZ J.— *Cur. adv. vult.*

This is an appeal from a decree of the District Court of Galle declaring the substituted plaintiffs as administrators of the estate of the late A. R. A. R. S. M. Somasunderam Chetty entitled to the premises described in the schedule to the decree and to eject the substituted defendants therefrom.

The plaint in this action was filed by Bastian Emanuel, who had been appointed official administrator, and A. R. A. R. S. M. Subba Naidu, as administrator of the estate of Somasunderam Chetty in March, 1927, against Narayanan Chetty.

On July 7, 1930, according to the journal entries, Mr. Wickremesinghe filed proxy of the substituted plaintiffs and moved that they be substituted as the letters of administration granted to the plaintiffs had been recalled and letters granted to the movers.

The defendants' Proctor took notice subject to objections. The Judge ordered the case to be called on August 29, 1930.

On August 8, 1930, defendants' Proctor moved that a certified copy of the letters granted to the substituted plaintiffs should be filed. This was done on August 29, 1930. The case was called again on September 3, 1930, and the present plaintiffs were substituted as plaintiffs.

No objection was raised by the defendant to the status of the substituted plaintiffs.

The trial was postponed from time to time and the defendant died before the case could be tried. He died, according to the journal entry, in April, 1933.

The appellant was made a defendant as executor *de son tort.* He filed answer as such in February, 1935, and took the objection that the plaintiffs had no status and also that they could not continue the action.

I agree with the District Judge that it is not open to the appellant to say that the substituted plaintiffs are not the administrators of Somasunderam Chetty's estate. That objection should have been taken by the defendant when the plaintiffs moved to be placed on the record.

In support of the alternative plea it was contended that (1) the Code made no provision for an administrator continuing an action brought by his predecessor in office and an administrator who succeeds to the office must bring a fresh action; (2) an administrator could not bring an action to vindicate title to land.

In support of the first contention we were referred to the following passage at page 464 of the *10th edition of Williams' Law of Executors and Administrators*: "If an action was brought by the administrator, and

[1] *(1918) 20 N. L. R. 378.* [2] *(1900) 4 N. L. R. 201.*

while it was pending administration was committed to another, the writ would formally have abated". It was urged that the Court of Probate Act (*20 & 21 Vict. c. 77*) and the Judicature Acts under which proceedings commenced by or against an administrator may be continued after revocation by or against the person to whom the new grant is made (*ibid.*, page 465) were not in force in Ceylon.

I am unable to agree with the contention that there is no provision in the Code for an administrator continuing the action commenced by his predecessor in office. In my judgment the succeeding administrator may continue the action or the action may be continued against him under the provisions of section 404 of the Civil Procedure Code which enacts as follows: "In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require".

It has been held in India that "where a suit is brought by or against a person in his representative character and a devolution of the representative interest takes place the rule that is applicable is not rule 3 or rule 4 but rule 10" of Order 22 which corresponds to sections 395 and 404 of our Code. See *The Code of Civil Procedure (1908) by Chitaley and Rao, vol. 2, p. 2145.*

To get over the effect of section 404 it was contended that an administrator could not commence an action to vindicate title and that therefore there was no interest which could pass to his successor in office.

It was argued on the authority of the case of *Silva v. Silva et al.*[1] that the legal as well as the beneficial title to immovable property belonging to the estate of a deceased person vested in the heirs and that therefore the provisions of section 472 of the Civil Procedure Code, which enacts that '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 think fit, order them, or any of them, to be made such parties", did not entitle an administrator to bring an action for declaration of title to immovable property. This is a startling proposition and entirely inconsistent with the practice which has prevailed since the enactment of the Civil Procedure Code and prior thereto. In my judgment it cannot be sustained. It is now settled law that the executor or administrator in Ceylon has the same powers as regards immovables as an English personal representative had in 1833 as regards personal property. (See *Vanderstraaten's Reports (1869-1871), p. 273.*)

In *Silva v. Silva* (*ubi supra*) Grenier J. said, "It is a fallacy therefore to suppose, as urged by appellant's Counsel, 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 by the Court, he is entrusted

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

and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it; the person of the deceased is, by a legal fiction, continued in him until under the provisions of Chapter LIV of the Civil Procedure Code the estate is finally settled by the Court, or a distribution of the same is made amongst the heirs".

I am of opinion that one of the purposes would be the vindication of immovable property belonging to the estate. In an action brought for that purpose by virtue of the provisions of section 472 of the Civil Procedure Code, the administrator may sue alone and the heirs need not be made parties unless the Court so directs.

I accordingly hold that the present plaintiffs were entitled to continue the action brought by their predecessors in office.

Appellant's Counsel next contended that the appellant had not been properly entered as defendant upon the record as there was no evidence that he had intermeddled with the estate. Counsel for the respondent referred us to the affidavit filed in support of the plaintiffs' application sworn to by one Carthigesar Canapathypillai that Velaithan Chetty (the appellant) is intermeddling with the estate of the deceased. This statement has not been rebutted and the contention fails.

Apart from that, under the proviso to section 398 of the Civil Procedure Code the person summoned to defend the action as legal representative must object that he is not the legal representative or make any defence appropriated to his character as such. In my opinion the question whether the person summoned is the legal representative must be determined in the first instance. He cannot both take exception to the claim that he is the legal representative of the deceased and also file answer as such.

I accordingly hold that the defendant's name was entered upon the record in due course.

It was finally contended that the learned District Judge's findings of fact were not justified by the evidence.

The plaintiffs' case is formulated in the first and second issues which are as follows:—

" (1) Were the estates referred to in the schedule to the plaint purchased by Narayanan Chettiar the original defendant as agent and trustee of the late A. R. A. R. S. M. Somasunderam Chettiar?"

" (2) Was the said Narayanan Chetty in charge and possession of the same estate for and on behalf of the said Somasunderam? "

As regards the first issue there can be no doubt that Narayanan Chettiar purchased the estate as agent and trustee of the late A. R. A. R. S. M. Somasunderam Chettiar. He admitted it himself in the course of his evidence in case No. 2,133 of the District Court of Matara. P 13 is a copy of the evidence. He went on to say, however, that he had, in pursuance of an agreement with Somasunderam, taken over the estate and paid him a sum of approximately Rs. 51,000 the amount agreed on. The appellant submitted that this evidence was not rebutted and that the District Judge should have answered the second issue in the negative.

Respondent's Counsel contended that he had only put in evidence Narayanan's admission and that the passage relied on by the appellant

was not evidence in this case. I do not think it necessary to decide whether the passage is in evidence or not. It appears to me that the admissions made by Narayanan in cross-examination that he continued to remit amounts to Somasunderam, that he wrote to the Colombo branch that the Mudaliyar had valued the estate at Rs. 50,000 for the purposes of estate duty, and that he had asked the Mudaliyar to reduce the valuation clearly establish, apart from the other evidence in the case, that there is no truth in his evidence that he purchased the estate from Somasunderam.

I am accordingly of opinion that the learned District Judge's findings on the issues of fact are amply justified by the evidence.

I would dismiss the appeal with costs.

MOSELEY J.—I agree.

Appeal dismissed.