1962 *Present :* **T. S. Fernando, J., and Herat, J.**

M. GUNARATNAM, Appellant, *and* A. SELLAMMAH and others, Respondents

S. C. 98 (Inty.) of 1960—D. C. Kandy, 1561/T

Administration of estates—Testamentary action—Quantum of the estate—Stage at which it should be determined—Civil Procedure Code, ss. 513, 534.

In a testamentary action, a decision as to whether any particular asset is part of the estate of the deceased person is premature at the stage at which conflicting claims to administration are being considered by the Court.

APPEAL from an order of the District Court, Kandy.

C. Ranganathan, for the 8th respondent-appellant.

S. J. V. Chelvanayakam, Q.C., with *M. Tiruchelvam, Q.C.*, and *S. Sharvananda*, for the 1st respondent-respondent.

Cur. adv. vult.

March 7, 1962. T. S. FERNANDO, J.—

The short point arising on this appeal relates to the proper stage at which the District Court should, in the course of a testamentary action, adjudicate upon a dispute as to whether property alleged to belong to a testator should be excluded from the property of the estate on the ground that it is property belonging to another.

The testator died on 6th December 1957 leaving a last will in which he named the present appellant as executor. In the course of the contest that arose in the District Court between the 1st respondent who is the widow of the testator and who claimed a grant in her favour of letters of administration *cum testamento annexo* and the 8th respondent who had applied to have probate of the will issued to him, counsel for the 1st respondent moved the Court to determine an issue suggested by him as to whether a half-share of certain assets should be excluded from the estate of the deceased as being property belonging to the 1st respondent. Counsel for the 8th respondent objected to this issue being adopted on the ground that the proper stage for inquiry into what should comprise the assets of the deceased had not yet been reached. The learned District Judge overruled the objection, adopted the issue and, after inquiry, held that three specified immovable properties had been purchased

during the subsistence of the marriage between the testator and the 1st respondent and that, therefore, the latter is entitled in her own right to a half-share of each of those properties. He accordingly ordered a half-share to be excluded as not forming part of the assets of the testator.

The 8th defendant to whom the District Judge ordered probate of the will to be issued (the 1st respondent withdrawing her claim to letters of administration) appeals to this Court against that part of the order of the learned District Judge which directed exclusion of a half-share of the properties above referred to. Learned counsel on his behalf has submitted that the proper stage for such an adjudication to be made is yet to be reached. His submission receives support from previous decisions of this Court and is, in my opinion, entitled to succeed.

In *Mahamado Ali v. Sella Natchia* [1], it was held that an inquiry as to whether any particular asset is part of an estate is premature at the stage at which conflicting claims to administration are being considered by the Court. In the case of *Kathirikamasegara Mudaliyar* [2], where an executor named in a will applied for probate and an order *nisi* was entered in her favour, and certain parties, in showing cause against the order being made absolute, did not object to the will being declared proved, but objected to the validity of certain bequests in the will in that they were in favour of certain illegitimate children of the testator born to him in adultery, this Court held that, at that stage of the proceedings, it was not open to those parties to raise this objection, but that the executrix was entitled to an issue of probate. In a later case, *Kantaiyar v. Ramoe* [3], where in the course of deciding whether a person should be granted letters of administration in respect of the estate of his deceased wife, the sisters of the latter raised the question that the heir of the deceased was not the applicant's son but someone else, Wendt J. held that the question will be a proper one to be tried between the sisters and the administrator in a subsequent proceeding. These last two cases were followed in *Fernando v. Fernando* [4] where it was held that an inquiry as to who were the heirs of the deceased was not relevant at the stage of deciding who should administer the deceased's estate. De Sampayo A. J. (with whom Pereira J. agreed) stated in the course of the judgment in that case that "the decision of the issue appears to be right on the evidence, but we cannot ignore the objection to the proceedings". Although in the case before us the dispute raised did not relate to the identity of the heirs of the deceased but was confined to the question of the quantum of the estate, I am of opinion that in a petition presented to Court in terms of section 515 of the Civil procedure Code a description of the extent of the interests of the deceased in property specified therein is not a material allegation in the sense of that expression as it occurs in section 534 of the same Code. For that reason, and also following *Mahamado Ali v. Sella Natchia* (supra), the adjudication to which objection has been taken is premature, and should be set aside.

[1] *(1893) 2 Cey. Law Rep. 179.*
[2] *(1900) 5 N. L. R 29.*
[3] *(1904) 8 N. L. R. 207.*
[4] *(1914) 18 N. L. R. 24.*

The order of the District Court made on 4th November 1960 is accordingly set aside in so far as it directs the executor, the 8th respondent-appellant, to file an amended schedule of assets and to submit an amended declaration of assets. The order for costs must also be set aside. There will be no costs of the inquiry held in the District Court. The 1st respondent must pay to the 8th respondent the costs of this appeal.

HERAT, J.—I agree.

Order set aside.