1964 *Present :* **Basnayake, C.J., and G. P. A. Silva, J.**

P. RATNAYAKE (*nee* Perera), Appellant, *and* CASPERSZ and another, Respondents

S. C. 164/61—D. C. Colombo, 16766/NT

Executors and administrators—Petition by legatee to compel executor to make payment of legacy—Procedure at inquiry—Right of petitioner to call unlisted witnesses—Money to which a minor is entitled as legatee—Duty of executor to pay it into Court—Invalidity of direct payment to the minor—Civil Procedure Code, ss. 121 (2), 175, 553, 554, 720, 721.

The petitioner-appellant was a minor who had been left a legacy of Rs. 5,000, which was to be paid to her on her attaining the age of 18 years. After she attained that age, and while she was still a minor, she presented a petition to the District Court and asked under section 720 (*b*) of the Civil Procedure Code that the respondent-executors be directed to pay the petitioner the legacy to which she was entitled. The executors filed an affidavit that the petitioner had already been paid the sum of Rs. 5,000 by cheque and that a receipt was obtained from her. The matter was then fixed for inquiry. The petitioner impugned as forgeries the endorsement on the back of the cheque as well as the signature on the receipt. At the end of her evidence her Counsel made an application to the Court for leave to call certain persons who, in the Court's own opinion expressed in the judgment delivered subsequently, were very material witnesses. The Court refused the application stating that " these are all steps that should have been taken before coming into Court and not after the executors have given evidence and after his own client had already given evidence ".

Held, (i) that, in disallowing the petitioner's application to call the material witnesses, the Court acted contrary to law. The procedure laid down in section 721 of the Civil Procedure Code is of a special nature and is not the " regular " procedure, and the provisions of sections 121(2) and 175 are not therefore applicable to proceedings thereunder.

(ii) that an executor's liability is prescribed by the Civil Procedure Code, section 353 of which requires that when an executor has in his hands any money to which a minor is entitled as legatee, he should pay that money into Court. Accordingly, even assuming that the cheque in the present case was handed to the petitioner, who was a minor, there was no legal discharge of the debt. The petitioner was therefore entitled to the decree she asked for on the ground that there was no legal payment.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, for Petitioner-Appellant.

E. B. Wikramanayake, Q.C., with *R. L. N. de Zoysa*, for Respondents. Respondents.

2—R 9676—1,855 (10/65)

January 22, 1964. BASNAYAKE, C.J.—

The petitioner who is a legatee under the last will of one Phillip Rodrigo Babapulle (hereinafter referred to as the deceased) has filed this petition under section 720 of the Civil Procedure Code. The deceased died on 2nd May 1955 leaving a last will dated 14th January 1955 in which he left a number of legacies to his children and other heirs. The petitioner is a daughter of an adpoted daughter of the deceased. The relevant portion of the last will reads :—

> " I direct my Executors to sell by private treaty or public auction all that house and garden called ' Raysland ' bearing Assessment No. 47, Training School Road aforesaid in which I now reside, and apply the proceeds of the sale thereof together with all monies recovered from mortgage debtors and others owing monies to me, and monies lying to my credit in any Bank or Banks, after the payment of funeral and testamentary expenses and Estate Duty, for the payment of the following legacies :—" (here follows a list of seventeen legacies).

We are concerned with the eighth of the legacies. The relevant paragraph of the will reads :

> " To the seven (7) children of my said adopted daughter namely :— Anton, Stephanie, Dottie, Philomena, Patrick, Louis and Bernadette a sum of Rupees Thirty-five thousand to be divided equally and Rupees Five thousand (Rs. 5,000) to be paid to each on his or her attaining the age of eighteen (18) years ; in the event of any one or more of the said children dying before the age of eighteen (18) the share or shares of the child or children so dying shall be divided equally among the surviving children and paid to each survivor along with his or her share of Rupees Five thousand (Rs. 5,000) aforesaid."

On 14th March 1959 the petitioner filed a motion and moved the Court to impound the receipt filed by the executors along with the final account. The receipt purported to come from her. She asked that it be kept in safe custody as she alleged it was a forgery, and the receipt was accordingly placed in the safe of the Court. On 30th March 1960 the petitioner presented a petition to the District Court and asked under the second limb of section 720 of the Civil Procedure Code that the respondent-executors be directed to pay the petitioner the legacy she was entitled to. On presentation of this petition, the District Court issued a citation to the following effect :—

> " Take notice that you are hereby required to show cause, if any, on the 23rd day of June 1960, at 10.45 o'clock in the forenoon, why the prayer of the petition of the petitioner (A copy of the petition is attached hereto) should not be allowed."

Thereupon the respondents to the petition filed an affidavit in which they stated that a sum of Rs. 5,000 was paid to the petitioner on 12th September 1958 by cheque No. A/2–813119 drawn by the executors in favour of Miss C. A. Philomena Perera and that the payment was made in terms of clause eight of the Last Will of the deceased and that a receipt was obtained from her (R35) and that it was filed in the testamentary proceedings. They asserted that the petitioner had been paid and settled in full, and resisted her claim. Section 721 which prescribes the procedure to be followed on an application under section 720 reads—

> " On the presentation of such petition the court shall issue a citation accordingly, and upon the return thereof shall make such decree in the premises as justice requires. But in any case where the executor or administrator files an affidavit setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality absolutely, or upon information and belief, or where the court is not satisfied that there is money or other movable property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction, the decree shall dismiss the petition, but such dismissal shall not prejudice the right of the petitioner to an action or accounting."

In the instant case instead of following the procedure prescribed in the section quoted above the learned District Judge made the following order :—

> " Objections on 10.11.60 "

and thereafter fixed the matter for inquiry on 26.1.61. The two executors gave evidence and stated that the petitioner came to them along with her parents, and a cheque bearing number A/2–813119 (R3) for Rs. 5,000 was written out, signed and delivered to her by them and a receipt was obtained from her. That cheque is a production in this case and it bears on it the words " C. A. Philomena Perera " and " Rupees five thousand " and the signatures of the executors also appear on it. The cheque appears to have been paid by the bank to whoever presented it and wrote on the back of it the name of the payee. The receipt (R4) which is produced in these proceedings reads as follows :—

> " Received from the executors of the estate of the late Mr. P. R. Babapulle, cheque No. A/2–813119 dated 12th September 1958 drawn on the Bank of Ceylon by the said executors in my favour for the sum of rupees five thousand (Rs. 5,000) in full payment of the Rupees five thousand (Rs. 5,000) due to me under the last will of the said deceased."

It is signed below as "C. A. Philomena Perera". The petitioner impugns the signature on the back of the cheque as well as the signature on the receipt.

In a letter dated 13th August 1958, a month before the cheque was made out, addressed to the executors of the estate of the deceased through their Proctors she had informed the executors as follows :—

"I, Catherine Agnes Philomena Perera, have been left with Rs. 5,000 (Rupees Five thousand only) in cash by the will of my late grandfather, Mr. Felix Babapulle. My second eldest sister Paulin Perera was also left with Rs. 5,000 (Rupees Five thousand) in cash by my late grandfather's will.

Both these sums are in the possession of the court. On the 1st of April 1958 my minor sister's money was removed from the possession of the court by my father and squandered after her consent had been obtained under the false pretence of utilising her money for her future.

Now my parents have threatened me to give my consent, so that they may withdraw my share too from the court when I attain eighteen years of age in August this year, and use the money for their own purposes.

Therefore, I wish to transfer my money from the Court's possession to a savings Bank Account as I am 18 years of age now. This transferring of the money to a Savings Bank Account should be done without the knowledge of my parents and the correspondence that may transpire during the transaction should be addressed to me personally to the address given above.

I enclose a certified copy of my birth certificate and my Post Office Savings Bank Book."

This letter is signed "Philomena C. Perera". It was after the receipt of this letter and after the order for the filing of final account that the alleged payment of money has taken place. The executors denied any knowledge of the receipt of the letter, and their Proctor has not explained why he did not forward it or communicate its contents to the executors. In the course of the inquiry the petitioner gave evidence and stated that at the relevant time she was not living with her parents and that she was living with her friends whom she referred to as "Yapas" and she stated that on the day she left her parents' house she made an entry at the police station. At the end of the evidence of the petitioner, her counsel made an application to the Court for leave—

(*a*) to produce a certified copy of an entry alleged to have been made by her at the police station when she left her parents' house,

(*b*) to call expert evidence as to the handwriting, and

(*c*) to call Mr. and Mrs. Yapa.

In refusing the application the learned District Judge said—

> "I intimate to Mr. Somasunderam that these are all steps that should have been taken before coming into Court and not after the Executors have given evidence and after his own client had already given evidence."

Without the assistance of the vital evidence which the petitioner desired to place before the Court, the learned District Judge gave judgment for the executors. In doing so, he has stated—

> ". . . Philomena's evidence however is that at the time Mr. Ratnayake made this application to the District Court of Kandy she had left her parents' house and had gone to reside with some friends of hers known as the Yapas in Kandy. She states that on the 12th of September 1958 she could not have come along with her parents either to the house of Mr. Caspersz or to the house of Mr. Britto Muthunayagam to withdraw this sum of Rs. 5,000. If that is so the simplest thing would have been to summon the Yapas to give evidence on her behalf. The Yapas are alive and available to give evidence. I fail to understand why they have not been summoned to give evidence in the first instance itself in this case. It is also in evidence that Philomena made an entry at the Police Station when she went to reside with the Yapas. Again I fail to understand why this entry made at the Police Station has not been produced. This would have shown clearly the date on which Philomena left the house of her parents."

It is difficult to reconcile the learned District Judge's action in refusing to permit the calling of the Yapas, the production of a certified copy of the entry made by the petitioner at the police station, and the calling of an expert on handwriting, with his action in commenting in his judgment on the absence of the very evidence he had disallowed. In our opinion the learned District Judge not only placed himself at a great disadvantage when he disallowed the petitioner's application to place that evidence before the Court, but he also acted contrary to law.

The procedure laid down in section 721 of the Civil Procedure Code is of a special nature and is not the "regular" procedure, and the provisions of sections 121(2) and 175 are not therefore applicable to proceedings thereunder. The learned Judge's disbelief of the petitioner therefore is based on a situation which he himself created by disallowing counsel's application to call those witnesses. His judgment on facts is therefore vitiated by this inherent defect. There is another important aspect of this case which has not received sufficient consideration at the trial. The petitioner was at all material times a minor. When the deceased died, she was about 14 years of age. She reached the age of 18 years on 8th August 1958 and even at the time she filed this petition she was a minor. Section 553 of the Civil Procedure Code provides—

> "Every executor and administrator shall file in the District Court, on or before the expiration of twelve months from the date upon which probate or grant of administration issued to him, a true account

of his executorship or administration, as the case may be, verified on oath or affirmation, with all receipts and vouchers attached, and may at the same time pay into court any money which may have come to his hands in the course of his administration to which any minor or minors may be entitled."

In the instant case the final account had not been filed till 27th November 1958 although according to the Code they should have been filed before 29th November 1956. The question that arises for decision is whether the executor's obligation to pay the petitioner the sum of Rs. 5,000 was legally discharged by their payment by a cheque for Rs. 5,000 to her, a minor. The circumstances surrounding this payment as stated above are not satisfactory and one important feature that the executors have not explained satisfactorily is why they paid by cheque despite the letter she wrote to them through their Proctors requesting them not to pay the money to her father and expressing her wish to get this sum of money deposited in the Post Office Savings Bank. It would appear from R12 that the petitioner had the impression that the money was in the custody of the Court and that her father was making arrangements to withdraw it from there and utilize it for his own purposes. The apprehension expressed in her letter gains support from the fact that the executors state that both the father and the mother were present when they handed the cheque to her. The receipt that was produced as having been furnished by the petitioner acknowledges the receipt of a cheque bearing number A/2–813119 dated 12th September 1958 for Rs. 5,000. Even assuming that she went with her parents to the executors and received the cheque referred to in the receipt, she was at the time under the influence of the parents whom she alleged were making arrangements to withdraw her money and utilize it for their own purposes. The question is, even assuming that the cheque was handed to the petitioner, whether there has been a legal discharge of the debt, and if not, whether the petitioner is entitled to the remedy she seeks.

Voet states the Roman-Dutch Law on this point thus (Voet's Commentary 1, Book IV, Title 4, section 22)—

"... But if payment has been made to a minor of what was either owned naturally to him or both naturally and civilly together, and if indeed the guardian's authority and a decision of a judge support it, the acceptance of payment by the minor will so far avail the debtor towards a complete discharge that no remedy or restitution against it need be feared.

But if on the other hand guardian's consent and order of judge are wanting, then *ipso jure* and short of any relief from the praetor a release does not befall the debtor further than in so far as the minor appears to be the richer from such payment. (*Inst.* 2, 8, 2 : Hugo Grotius, Introduction, 3, 30, nn. 33, 34).

But if the magistrate's order were neglected and only the authority of tutor or curator were attached, then payment made after that fashion did indeed *ipso jure* release a ward's debtor, yet the fullest security did not accrue thereby to the debtor, but after a hearing of the cause on proof of damage the relief due to age was vouchsafed against the payment. An exception was when rents and annual returns not going beyond a limit of two years and an amount of one hundred gold pieces had been so paid. And to that exception many add also a second in the case of the restoration of a fideicommission which was due to the minor; for they think that it was provided in the law cited below that that may be done without an order of court.

. . . . . .

Meantime the truer view is that in modern law that ordinance of Justinian, by which the intervention of a judicial decision was required for the safe making of a payment to minors has almost lapsed into disuse. The result is that nowadays a complete release befalls a ward's debtor, if only he has paid the actual guardian of a minor creditor. An exception is when payment of a debt of very heavy amount is in question. In that case they require an order of the Orphan Chamber, lest he who paid should be forced to pay over again in a case where the ward at the end of the guardianship cannot on account of the guardian's poverty recover what was paid."

Whatever may be the common law liability of a debtor other than an executor who pays a debt due to a minor direct to the minor, an executor's liability is prescribed by the Civil Procedure Code and he is bound to observe what is required by the Code. Section 553 requires that any money to which any minor or minors may be entitled which may have come into the hands of an executor should be paid into Court and unless that is done within a year after probate or administration granted under section 554 an executor becomes liable to pay interest on the money out of his own funds unless he can show good and sufficient cause for detaining such money. This aspect of the law has not been considered at the inquiry.

In our opinion the petitioner is entitled to the decree she asks for on the ground that there has been no legal payment. We therefore allow the appeal and direct that decree be entered as prayed for directing the executors to pay the petitioner a sum of Rs. 5,000. As the petitioner has not claimed interest on the money as provided in section 554 and as the matter was not put in issue between the parties in the lower Court we make no order as to interest.

The appellant is entitled to costs both here and the Court below.

G. P. A. SILVA, J.—I agree.

Appeal allowed.