1937 *Present :* **Maartensz and Koch JJ.**

ZAIN *et al. v.* SHERIFF.

208—D. C. Kalutara, 2,539.

Judicial settlement—Application to include asset in final account—Third party interested—Separate action.

Proceedings for a judicial settlement are not appropriate for the purpose of deciding a question which could not be finally determined without other persons who are not parties to the testamentary suit.

Holsinger v. Nicholas (*20 N. L. R. 417*) referred to.

APPEAL from an order of the District Judge of Kalutara.

H. V. Perera, K.C. (with him *M. T. de S. Amarasekere*), for appellants.

N. Nadarajah (with him *L. A. Rajapakse*), for respondents.

October 11, 1937. MAARTENSZ J.—

The respondent is the administrator of the estate of his deceased brother.

The appellants are the heirs of the intestate. They allege in their petition of appeal that the respondent, the deceased and another brother, Abdul Hamid Marikar, carried "on business in partnership under the name, style and firm of Marikar Brothers".

The Commissioner of Stamps valued the goodwill of this business at Rs. 30,000, and the intestate's share of the business at Rs. 15,259.16. The administrator has brought to the credit of the case the sum of Rs. 15.259.16, but in his Final Account he did not enter a one-third share of the goodwill as an asset, nor did he account for the profits earned by the business between the date of the intestate's death and the date on which the sum of Rs. 15,259.16 was paid into Court.

The appellants objected to the correctness of the account on account of the omission of these items and moved for a judicial settlement.

The administrator submitted that the capital of the partnership exceeded Rs. 1,000 in value and that as there was no agreement in writing as required by section 21 (4) of Ordinance No. 7 of 1840 for the Prevention of Frauds and Perjuries, the appellant could not claim either a share of the profits or a share of the goodwill.

The administrator also submitted that the question whether the intestate was a partner was not one which could be decided in these proceedings as Abdul Hamid Marikar, the other brother, was not a party to the action.

The District Judge upheld this submission and referred the appellant to a regular action. The appeal is from this order.

The appellants' Counsel contended that under the provisions of section 736 of the Civil Procedure Code, which enacts as follows: "Upon a judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by his testator or intestate, provided that a concise statement of such debt with an intimation of the petitioner's intention so to prove the same has been inserted in the petition. 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"—, the District Judge was bound to try and determine the contest between the administrator and the appellants in these proceedings.

I am unable to agree, I do not think that the section ever contemplated that proceedings for a judicial settlement should be adopted for the purpose of deciding a contest which could not be finally determined without other persons who were not parties to the testamentary suit.

Clearly a decision in this case will not be binding on Abdul Hamid Marikar who is not a party to it.

The case of *Holsinger v. Nicholas*[1], where Bertram, C.J. said, at page 424, "It may very well be that in the course of a judicial settlement a matter may come up as to which the judge may think that it is a matter of such complication and importance that it can only be inquired into by a regular action. In such a case the Judge might reasonably either suspend the settlement until that matter had been determined by a regular action, or conclude the settlement subject to the determination of that matter" is authority for the proposition that a District Judge may in an appropriate case direct a matter to be inquired into in a regular action.

I think this is an appropriate case for such an order, and I would dismiss the appeal with costs.

As regards the cross objections filed by the administrator against the District Judge's order as to costs, I do not think we can interfere with the order made by him. The objections are dismissed but without costs.

KOCH J.—I agree.

Appeal dismissed.

[1] *(1918) 20 N. L. R. 417.*