1942 *Present :* **Howard C.J. and Soertsz J.**

RAMALINGAMPILLAI *v.* ADJUWAD *et al.*

292—D. C. Colombo, 4,458.

Administration—Estate closed—Property in possession of devisees—Right of creditor to sue heirs in possession—Contingent debt—Roman-Dutch Law.

Where the administration of an estate has been completed and the heirs are actually in possession of the property devised to them, a creditor, whose debt fell due after the estate was closed, is entitled to sue the heirs in possession in proportion to the extent to which they have benefited from the estate. Minor heirs in possession of the property devised to them may be sued by a creditor under such circumstances.

The judgment of Bonser C.J. in *Pattiman v. Kanapati Pulle (1 Browne 118)* explained.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment of Soertsz J.

N. Nadarajah, K.C. (with him *H. W. Thambiah* and *V. K. Kandasamy*), for the plaintiff, appellant.—The finding of the District Judge is that the administration of the estate had been *de facto* completed. On that finding the defendants would be liable to the extent of the property that had passed to them. It has been held in *de Silva v. Rambukpota*[1] that the property of a deceased person vests in the administrator for purposes of administration. In the present case the shares due to the defendants had been already conveyed to them by the executor. The moment an executor executes a deed of conveyance to the devisees or heirs he loses title to the properties belonging to the estate and relinquishes all claims to the properties as being necessary for the purpose of administration. He is then in a position to plead *plene administravit* when claims are made thereafter by creditors. It is not obligatory on an administrator to obtain a formal judicial settlement before the plea of *plene administravit* can be taken. *143—C. R. Colombo, 72,628*[2] is exactly in point. See also *Arunasalam Chetty v. Mootatamby*[3] and *Don Nicholas v. Mack*[4].

H. V. Perera, K. C. (with him *S. J. V. Chelvanayagam*), for the defendants, respondents.—As long as there is a single debt of the estate remaining unpaid the executor cannot be said to have completed his administration.

[SOERTSZ J.—By virtue of the adiation of the estate by the heirs, cannot the heirs be sued ?] According to section 472 of the Civil Procedure Code the proper party to be sued is the executor. A person can cease to function as executor in three ways, (*a*) by death, (*b*) by obtaining an order of discharge from court, (c) on completion of administration. Before there can be completion of administration all debts of the estate must be paid—*Williams on Executors (11th ed.) p. 1077 et seq.* Independently of any arrangements between the executor

[1] *(1939) 41 N. L. R. 37.*
[2] *S. C. Minutes of 26.3.42*
[3] *(1906) 2 A. C. R. 90.*
[4] *(1891) I. C. L. Rep. 81.*

and the heirs, the executor is always liable for the debts of the estate. No handing over of the assets by the executor to the heirs affects the rights of a creditor to sue the executor.

[SOERTSZ J.—On the basis of *Silva v. Silva*[1], cannot the heirs be sued ?] The creditor would have two concurrent remedies, but the statutory provision of section 472 of the Civil Procedure Code makes only one action available when there is an executor. For the purpose of payment of debts title which has already vested in heirs goes back to the executor.

Even if heirs who have adiated can be sued, they should not be minors. A minor cannot adiate an inheritance and is not liable to be sued for the debts of the ancestors, *Robert v. Abeywardene et al.*[2]. At the date of the present case the defendants were minors.

N. Nadarajah, K.C., in reply.—The proposition that minors cannot adiate an inheritance is not true in all cases. *Grotius' Introduction to Dutch Jurisprudence, p. 158 (Maasdorp's Translation)* is in conflict with *Robert v. Abeywardene et al. (supra)*. See also *Lee's Introduction to Roman-Dutch Law (3rd ed.) pp. 365-366. Robert v. Abeywardene* was a case of intestacy. In the present case, however, there was a will under which the title vested in the minors. Parties who have taken benefit under a last will cannot escape liability—*Vol. 2 of Williams on Executors (11th ed.) p. 1129.*

Cur. adv. vult.

June 19, 1942. SOERTSZ J.—

This case came before a Divisional Bench of this Court on another occasion, and it was then remitted on certain terms to the trial Court in order to give the plaintiff an opportunity to state and establish the grounds upon which he sought to fix the defendants with liability. He was suing them to recover the loss he had sustained in consequence of his having suffered judicial eviction, after due notice of that action had been given to the defendants, from a share of a land which the defendants' father had sold to him. On that occasion, the Divisional Bench pointed out that the sole fact that the plaintiff had established and was relying upon, namely, that the defendants were the children of his deceased vendor, and were, with their mother, the devisees named in his last will, was not sufficient to render them liable on the breach of the covenant to warrant and defend title which the vendor had given in his own name and on behalf of his heirs, executors and administrators. For such a liability to attach to the defendants, the plaintiff had to show that the administration of the estate left by his vendor had been completed by his executors, and that property of that estate had passed into the hands of the defendants. In that event, the defendants would be liable each to the extent of the property that had passed to him or to her.

At the trial held in accordance with the order of the Divisional Bench, further evidence was led and, after consideration, the trial Judge found that the legatees under the will (that is, the defendants and their mother) have been taking the rents and profits from the premises devised to them. In another part of his judgment, he held that this was the state

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

[2] *(1912) 15 N. L. R. 323*

of things from January 18, 1934. He also found that, at the date of this action, which he held must be regarded as instituted on June 26, 1935, the administration of the estate " had been *de facto* completed .

But, despite these findings in favour of the plaintiff, the trial Judge dismissed his action because " although the administration of this estate had been *de facto* completed, it was not *de jure* completed." He took this view on the interpretation he gave of the case of *Valipulla v. Ponnusamy*[1], that is to say that it meant that a judicial settlement on the lines indicated in the judgment of Pereira J. is *sine qua non* for the completion of administration proceedings. But that interpretation is, clearly, erroneous. If authority is needed, I would refer to *Arunasalam Chetty v. Mootatamby*[2]; *Suppramaniam Chetty v. Palaniappa Chetty*[3]; and recent and unreported case *S. C. No. 143—C. R. Colombo 72,628*[4]. But Counsel for the respondent said he could not support that finding of the trial Judge. He conceded that the question whether the whole of a deceased person's property has been administered or not is as much a question of fact as a high English authority has said is the state of one's digestion.

Counsel for the respondents, however, supported the dismissal of the action on the ground that, as a matter of fact, there cannot be said to be completion of administration proceedings so long as a debt of the testator remains unpaid. He also contended that for the recovery of a debt of a deceased person his executor or administrator was the only person that is liable to be sued. Lastly, he submitted that the defendants were minors at the date of the action and that, therefore, they could not adiate an inheritance and were not liable to be sued as heirs in possession.

In regard to the first point, as I have already observed, the trial Judge found that, in fact, the whole of the deceased's property had been administered, because, as he pointed out, " inventory and final account were both filed and passed as being in order on September 12, 1928. Thereafter, there is an interval of seven years without anything happening. Then, on February 5, 1935, the first defendant asked for an order of payment. On March 19, 1935, some further orders of payment were issued to the heirs and since then there has been no further action in the testamentary case up to this day, an interval of six years or more." The orders of payment, it must be observed, were made on the basis of the final account filed in 1928. The defendants do not say that there are any assets unadministered in the hands or under the control of the executors.

In this state of things, it is clear that the executors and the devisees have long since treated the actual administration as completed. The question then is what is the position in law where a party seeks to recover what was only a contingent debt at the time of the testator's death? Under the English system, it is now well settled law that it is the duty of the executor to bear in mind and provide for even a contingent debt such as one that might arise from a covenant of the testator and that, if disregarding such a possible liability, he makes payment of legacies, he would be liable to answer the damages *de bonis propriis*, although as

[1] *17 N. L. R. 127.*
[2] *2 A. C. R. 90.*
[3] *3 Bal. 57*
[4] *S. C. M. 19 3. 42.*

against the legatees he may, in certain circumstances, claim repayment (*William's Law of Executors, Vol. II., p. 1079, 10th Ed.*). Under the older practice, the Court of Chancery sought to minimize this risk to the executor or administrator by requiring the legatee to give security to refund if debts should afterwards appear, but after it had ceased to be the practice to exact such security, creditors were allowed in Courts of Equity to follow assets in the hands of the legatees as well as of the Executor (*Ibid pp. 1081-2*). It would therefore, appear, that in the circumstances of the present case, it is open to the creditor, that is to say the plaintiff, to go after the assets in the hands of these defendants who are devisees, if he chooses to do so.

The next question is whether in order to get at those assets, the plaintiff must, as a matter of procedure, sue the executors and may not sue the devisees. That is Counsel's contention, and that that is the only 'open sesame' for the plaintiff. But it seems to me that the answer to this question must depend upon the facts of each case. If, for instance, the administration is in course in such a way as to enable it to be said as approximately as it could possibly be said under our system of law that the property of the estate is "vested" in the executor or administrator, and that the devisees, legatees, and heirs are only "beneficially interested" in that property, the person liable to be sued would be the executor or administrator. But in a case like the present where, on the facts as found, and rightly found, the devisees are actually in possession of the property devised to them, it would be extremely unreal to describe them merely as "persons beneficially interested" in that property. In that view of the matter, section 472 of the Civil Procedure Code, which Counsel invoked, has no application. It is open to the plaintiff to sue the devisees themselves.

So far as the last point taken by Counsel is concerned, he makes that submission on the strength of the judgment in the case of *Robert v. Abeywardene*[1]. In that case de Sampayo J. observed as follows:—"the second defendant is a minor and is joined as a defendant on the footing of his being an heir, but a minor cannot adiate an inheritance and is not liable to be sued for the debts of an ancestor. The first defendant is the widow of the deceased and there is evidence that she intermeddled with the property of the deceased's estate and so made herself an executrix *de son tort*". The contrast drawn, in this passage, between the minor son and the widow is highly significant. The widow is made liable not as an heir but as an executrix *de son tort*, in other words, as a *tortfeasor*; the minor is exempted because the sole ground on which it was sought to make him liable was that he was an heir. It was not alleged, and there was nothing to show that he had either intermeddled or that he was in possession of any assets of the deceased. It is true that de Sampayo J. says, without any qualification, that "a minor cannot adiate an inheritance and is not liable to be sued for the debts of the ancestors," but when that observation is regarded in its context, there is implied in it that it is meant to apply in the circumstances of that case in which, as I have already pointed out, liability was imputed to the minor solely because he was an intestate heir. The

[1] *15 N. L. R. 323.*

observation itself is, more or less, a quotation from the judgment of Bonser C.J. in *Pathinan v. Kanapati Pulle*[1] in which he says "minors cannot adiate an inheritance, and they cannot be said to be in possession of the land". It is clear that when the learned Chief Justice said that he meant that, in that case again, the plaintiff was seeking to fix the minor with liability because he was an heir, and the first part of the statement that "minors cannot adiate an inheritance" is concerned to refute that attempt by pointing out that the mere fact of heirship is insufficient in our law. As was pointed out in the case of *Oosthuysen v. Oosthuysen*,[2] the phrase "adiate an inheritance" is survival from the Roman Law and really has no meaning in our law. On this point, I would refer particularly to the judgment of Connor J. at pages 61-64. Under our law, there is nothing to prevent a mionor being sued through a guardian ad litem in order to reach assets of a deceased person in his hands. And that is precisely what Bonser C.J. said in the second part of the statement I have quoted, "and they cannot be said to be in possession of the land", that is that, in the case he was dealing with, there was nothing to show that they (that is the minors) were in possession of the land (that is the mortgaged land). It is important to bear in mind that the Chief Justice was dealing with an action on a mortgage bond in which the plaintiff was seeking relief "not only against the hypothecated property, *but against the heirs personally*" on the bare allegation that they had adiated the estate. Two of these heirs were minors, and according to Grotius (*Grotius' Introduction 2.21.6*), the position of minors was that, unlike majors, they are not irrevocably bound by an act of adiation and may claim *restitutio in integrum*. Majors once they had adiated, were *personally* liable where the claim exceeded the assets in their hand. But, in the law, as it obtains to-day, even major heirs would be liable only to the extent of the assets of the estate in their hands.

In passing, I would respectfully point out that such misapprehension as there appears to be in regard to minors not being able to adiate an inheritance and to be sued is probably due to the statement at page 187 of *Walter Pereira's Laws of Ceylon, Vol. II.*, "Minors cannot adiate an inheritance and cannot be sued *as heirs in possession*". The authority quoted by the learned writer in support of that statement is Bonser C.J's observation already quoted by me from the case of *Pathiman v. Kanapathi Pulle*. The words "cannot be sued as heirs in possession" are an erroneous paraphrase of "they cannot be said to be in possession of the land," meaning, as already observed, that the minors in that case were not shown to be in possession of the mortgaged land.

On the facts in this case, it is clear that the property in the hands of each of the defendants exceeds in value the amount of the plaintiff's claim which, by agreement, has been fixed at Rs. 11,954.17. The plaintiff is suing, in this action, the two minors devisees, and for some reason that does not appear at all has left out their mother, the other devisee, who was also an executrix under the will, and, to say the least, it is equitable that he should be restricted to a third of the sum agreed upon, as against each of the defendants, that is Rs. 3,984.72 against each. I would, therefore, set aside the judgment of the trial Judge

[1] *1 Br. 118.* [2] *Buchanan's Reports (1868) p. 51.*

and direct that decree be entered, giving the plaintiff judgment for Rs. 3,584.72 against each of the defendants. For the recovery of that amount the plaintiff may not proceed against any property other than the houses devised directly to each of them. Plaintiff is entitled to his costs in both Courts.

HOWARD C.J.—I agree.

Set aside.