1924.

Present: Bertram C.J. and Schneider J.

DE ZOYSA *v.* DE ZOYSA.

67—D. C. Colombo, 4,975.

Judicial settlement—Nature and scope of inquiry—Claim against executor for money not recovered through his default—Correctness of inventory challenged—Abandonment of debts—Discretion of executor—Civil Procedure Code, chap. LV., ss. 718 and 739.

Where the heirs of an estate took over certain properties in pursuance of an auction held among themselves, subject to the condition that the inequalities of the shares should be adjusted,—

Held, that such an adjustment can only be secured by an action for contribution among the heirs. An executor is under no obligation to make such an adjustment.

Proceedings under chapter LV. of the Civil Procedure Code for a judicial settlement of an estate provide no means by which it is possible to charge an executor in respect of a hypothetical sum which he might have received had he administered the estate with greater foresight and diligence.

The correctness of an inventory filed by an executor should be challenged under section 718 of the Code.

An executor has a discretion to abandon a debt due to an estate; but where he abandons a mortgage debt, he is bound to give some *prima facie* evidence in explanation of his action in foregoing the debt.

Section 738 seems to indicate that an executor may be made accountable in a petition for judicial settlement for negligence in the collection of debts.

The nature and scope of proceedings for the judicial settlement of an estate explained.

APPLICATION for the judicial settlement of the estate of John Geogory Perera Amerasekera who died leaving a last will dated November 14, 1913. Probate was obtained on June 9, 1914. On February 28, 1916, the heirs executed a deed with reference to certain immovable properties. It had been arranged that an auction should be held of these properties among the heirs. Various properties were allotted to the heirs as a result of this auction, each heir being debited with the amount which he or she bid in respect of the properties assigned to him or her, and the deed gave effect to this arrangement by mutual conveyances. In pursuance of an order made by the District Judge, the executors filed comprehensive accounts for the purpose of a judicial settlement. In the accounts filed the executors reported the distribution of the immovable properties, and stated that the remaining properties

were held in common. Certain objections were filed against the accounts by one of the heirs; among them being that the executors had not taken steps to adjust the inequalities in the shares enjoyed by the heirs resulting from the distribution of properties refered to. Various other objections were raised which are fully stated in judgment of the Chief Justice. The learned District Judge overruled them.

Elliot, K.C. (with him *Jayasooriya*), for appellants.

H. J. C. Pereira, K.C. (with him *Samarawickreme* and *Ameresekere*), for respondents.

September 9, 1924. BERTRAM C.J.—

The questions to be decided in this case arise out of a judicial settlement of the estate of John Gregory Perera Amerasekera, who died on February 10, 1914, leaving property valued at over Rs. 500,000. By his last will dated November 14, 1913, he left the whole of his property to his five children, subject to two special bequests of Rs. 1,000 each, appointing his son, Mr. John Finguer Perera, and his son-in-law, Mr. Francis de Zoysa, his executors. The only material passages in the will are as follows: " I do hereby desire that all the movable and immovable property now belonging to me, as well as those to which I may hereafter become entitled, wheresoever they may be situated, shall, after my death, devolve share and share alike on my five children, who can do whatever they please therewith . . . . I do hereby appoint my eldest son-in-law, Advocate Francis de Zoysa, and my eldest son, John Finguer Perera, to perform the duties concerning the properties belonging to my estate."

Probate was obtained on June 9, 1914, but the estate was administered with that leisureliness which is unfortunately all too common in Ceylon. On February 28, 1916, the heirs executed a deed of a somewhat peculiar description with reference to certain of the immovable properties. It had apparently been arranged that an auction should he held of these properties among the various heirs. Various properties were allotted to the heirs as a result of this auction, each heir being debited with the amount which he or she bid in respect of the properties assigned to him or her. The deed gave effect to this arrangement by mutual conveyances. A similar arrangement was made with respect to a certain quantity of the movable property. After long delays, the District Judge, the late Mr. Wadsworth, on September 2, 1920, made a comprehensive order with reference to the part ·ular of the final account to be submitted by the executors for the purpose of a judicial settlement. After further delays that order was complied with, and comprehensive accounts were filed. All parties c ,cerned, however, seemed

to show an indisposition to tackle the accounts thus filed. Attempts were made to get them examined by chartered accountants, but this proposal fell through. Finally, one of the heirs, Mrs. Valentine de Zoysa, and her husband, filed certain objections, and on March 6, 1924, certain issues were framed. Meanwhile, the principal executor who had actual charge of the administration of the estate, Mr. J. F. Perera, died, and Mr. Francis de Zoysa remained as sole executor.

For the purpose of understanding these issues, a recital of further facts is necessary. In their accounts rendered to the Court, the executors reported the distribution of the immovables above referred to, and stated that the remaining properties were possessed in common. They made a similar report with regard to the movables. The principal immovable property so possessed in common was known as the Kannagama estate, which was valued in the inventory at Rs. 250,000, or nearly one-half of the whole of the testator's property.

In the distribution of immovables above referred to, no attempt was made to equalize the shares of the various heirs. Each heir appears to have bid for such properties as he or she desired, and these properties were duly conveyed to the various bidders. The total values of the properties so assigned to the respective heirs were Rs. 38,800, Rs. 25,600, Rs. 11,800, Rs. 30,100, and Rs. 22,200. Mrs. Valentine de Zoysa, the heir on whose behalf the present contest is raised, only selected property to the value of Rs. 11,800. It appears to have been assumed that something would be done at some later stage to equalize the position of the various heirs, but nothing in fact was done. There were similar inequalities with regard to the movables.

The objections raised by the contesting heir and her husband, which were subsequently embodied in the issues, may be conveniently summarized in the following order:—

(1) That the executors ought to have taken steps to adjust the inequalities in the shares enjoyed by the heirs resulting from the distribution of immovables and movables above referred to.

(2) That during the time the executors had control of the estate of the deceased they had mismanaged it by neglecting and allowing immovable properties to run into jungle, and that the estates had thereby suffered damage.

(3) That the executors had not properly accounted for certain payments made in respect of the liabilities of the estate.

(4) That the executors had not properly accounted for the income derived from the various properties comprised in the estate during the period for which these properties were in the hands of the executors.

(5) That the executors had not exercised due diligence in getting in the amounts due to the estate, and, in particular, that they had not put in suit a considerable number of mortgage bonds, and had not enforced several judgments.

(6) That certain lands had been improperly omitted from the inventory.

(7) That the executors had not properly accounted for various articles of movable property—live stock including cattle, goat, elephants, &c., and stocks of rice, paddy, and grain.

With regard to these objections and issues, it must be generally observed that the first of them shows an imperfect apprehension of the nature of the title and duties of an executor in Ceylon ; and that the second of them shows an imperfect apprehension of the nature of a judicial settlement. If the true position had been more fully realized, these issues would not have been accepted, and this voluminous case would have been reduced to much more manageable dimensions.

With regard to the first head of the issues as summarized above, the appellants complain that no steps have been taken by the executors to equalize the shares of the properties of the various heirs. It was no part of the duty of the executors to do so. The will does not require them or authorize them to make any distribution of the estate. They are not empowered to assign this property to one heir, and that to another. They are not empowered to sell either the movables or immovables for the purpose of effecting a distribution. All that they are required to do is " to perform the duties concerning the properties belonging to my estate. " That is to say, they are required to pay the debts, discharge the liabilities, give effect to the legacies, and account for the management of the estate so long as it is under their control. Subject to the payment of the debts and legacies, all the property, immovable and movable, under the will vests in the heirs in equal undivided shares.

No conveyance from the executors is necessary for the purpose of vesting title in the heirs. Since the decisions of this Court in *Mohamado Cassim v. Cassim Marikar,* [1] *De Kroes v. Don Johannes,* [2] and *Silva v. Silva,*[3] it must be taken as settled law that the only title which vests in the executor is such title as is necessary for the purpose of the administration of the estate, and that devises and bequests made directly by the testator in favour of the objects of the bounty vest in the devisees and legatees without the necessity of any formal conveyance from the executor. There cannot, under our law, be any distinction for this purpose between immovable and movable property. Nor is there any occasion to consider the

[1] *(1892) 2 C. L. R. 72.*

[2] *(1905) 9 N L. R. 7.*

[3] *(1907) 2 A. C. R. 47.*

1924.

BERTRAM C.J.

De Zoysa v. De Zoysa

question referred to in *De Kroes v. Don Johannes* (*supra*), *namely*, whether the bequest of all a man's movable property is to be regarded as a specific bequest. This is a question which does not arise in this connection. It arises only where there is a contest as between legatees. See the judgments of Lord Selbourne and Lord Blackburn in *Robertson v. Broadbent.* [1]

The result is that, as in the present case, when once the heirs have entered into possession of the properties either in common or in pursuance of any arrangement among themselves, the executors are not further concerned with these properties.

It certainly seems reasonable to suppose that when the heirs took over certain properties in pursuance of the auction held among themselves, it was intended that their shares should ultimately be adjusted, and that the distribution took place on this condition.

It appears to me, however, that such an adjustment can only be secured by an action for contribution among the heirs themselves. An executor is under no obligation and has no power to make such an adjustment.

I now come to the claim for damages for alleged negligence and mismanagement of estates in the hands of the executors. The evidence of this alleged negligence and mismanagement was of the most vague and shadowy description, but it seems to me quite clear that this is not claim that can be entertained in a judicial settlement.

A judicial settlement is a proceeding which was introduced into our legal system by the Civil Procedure Code. It was said to have been derived from the Code of the State of New York. See per Middleton J. in *Mohamado Jan v. Ussen Bebe.* [2] Before it was introduced the only procedure for examining an executor's accounts was an administration action. Note the final words of the judgment in *Silva v. Silva.* [3] " The so-called administration of this estate affords a most unhappy instance of the disastrous results to the beneficiaries of these attempts to attain the ends of a proper administration suit by imperfect, summary, and *ex parte* proceedings in a suit, the true object of which was simply to obtain probate, and which properly came to an end when probate was granted. " I am inclined to think that, to a certain extent, the judicial settlement has displaced the old administration action. At any rate it seems difficult to conceive of an administration action being entertained in a case which has been already the subject of a judicial settlement. There is a difficulty, however, in this respect ; that though primarily in an administration action the executor or administrator was only called upon to account for money he himself had received, and not for what he might have received but for his own default, it was always possible, if a *prima facie* case of " wilful default " was made

[1] *(1883) 8 A. C. 812.*

[2] *(1909) 1 C. L. R. on p. 54.*

[3] *(1878) 1 S. C. C., p. 51.*

out, to obtain a direction that the executor or administrator should account upon the footing of wilful default. And in such a case he could be made responsible, not only for sums which he had received, but for sums which he ought to have received. Subject to one point, which I will discuss later, it seems to me that chapter LV. provides no means by which an executor may be called upon to account on this basis. It is not possible to charge him with a hypothetical sum, which he might have received had he administered estates under his control with greater foresight and diligence. See *Mohamado Jan v. Ussen Bebe (supra)*. Any claim of this nature can only be enforced by an action for *devastavit*, for the principles of which see *Williams on Executors, 10th ed., part IV., bk. 2, chap. II., section 2.*

Another claim made by the appellants, which cannot, in my opinion, be entertained, is the claim that certain properties of the testator have not been included in the inventory. If the correctness of the inventory is to be challenged, it should be challenged under section 718. A judicial settlement is a proceeding of a limited nature. Its scope is indicated by the provisions of the chapter, and in particular by the provisions of section 739. A judicial settlement proceeds upon the footing that the inventory is a full and true inventory of the estate.

The proper scope of the judicial settlement required in this case is thus a comparatively limited one. It is reduced in effect to these points—

(*a*) The discharge of all the liabilities of the estate.
(*b*) The realization of all its assets.
(*c*) The accounting for all income received during the period of management.

With regard to the first of these heads, the proceedings of the executors are not now challenged, and we need not concern ourselves with them.

With regard to (*c*) the accounting for income received during the period of management: I think that the learned Judge has dealt with this matter in rather too summary a manner. The appellants filed a list (R 1) of nineteen properties yielding income in respect of which they alleged that the executors had not accounted. An issue was framed: "Have the executors accounted for the income from all the immovable properties, and, in particular, have they accounted for the income of the following ?" Twenty-six properties are enumerated, besides thirteen leasehold properties. On this issue all that the learned Judge says is: "I find that the executors have accounted for the income of all the immovable properties grouped together as property at Kurunegala and Ragama up to the time of the distribution, and that they are not liable to account for income after the distribution." As I say, I think this is too summary, and

1924.

BERTRAM C.J.

De Zoysa v. De Zoysa

further inquiry is called for. Undoubtedly, the executors are not responsible for the income of any of these properties after they were handed over to the heirs. But probate was granted on June 9, 1914, and the deed of distribution was not executed till February 23, 1916. Mr. Pereira says that the actual handing over of properties was before that date, but he cannot tell us how long before that date. It is alleged, on the other hand, by the appellants that though Kannagama estate was possessed in common from the date of the "distribution," they themselves were prevented from entering it. Unfortunate as it is that these proceedings should be further protracted, I think that the executors should be called upon to render a further account enumerating the immovable properties indicating those which are income-bearing properties and those which are not, setting out the income derived from each property upto to the date when the executors ceased to be in control, and showing how the income so derived is accounted for. It will be open to the executor to show that in fact possession was taken by the heirs at a date earlier than the execution of the deed, just as it will be open to any of the heirs to show that possession was not delivered till a later date. The learned Judge must then allow the appellants an opportunity for challenging any item of this account, and must adjust his final order accordingly.

There remains the question of the realization of the debts due to the estate. These comprised a very considerable number of mortgage bonds—fifty-four in all. Seven of these were put in suit, and of these seven, five were marked "not realized." Thirty-two were assigned to a creditor of the estate in respect of goods supplied to the camp at Ragama. The remaining fifteen were not sued upon at all. The executors stated that the non-recovery of these bonds is due to the difficulty of tracing some of the mortgagors, the lack of funds belonging to the estate, and the difficulty experienced in realiznig the amounts lent even after the institution of actions. One of the bonds is for Rs. 1,000, four of them for Rs. 500 each, and the rest for minor sums. It was held in *Mohamadu Jan v. Ussen Bebe* (*supra*) that the administrator has a discretion to abandon a debt due to the estate which, in the exercise of his common sense and judgment, he considers to be irrecoverable. The same principle is laid down by Romilly M.R. in *Clack v. Holland*, [1] and provision is now made to this effect in England by statute. Even accepting this principle, however, it seems to me that where an executor abandons mortgage bonds in this way, he ought to be prepared to give some *prima facie* evidence to explain why it was not worth while to sue upon these bonds. The same remarks would apply to certain judgments obtained in the testator's lifetime which were not enforced. It was declared, however, by Middleton J., with the concurrence of Wendt J. in *Mohamadu Jan v. Ussen Bebe* (*supra*), that "if the parties

[1] *(1855) 1 Beav. 271.*

entitled to a distribution think that he, the administrator, has been negligent in so deciding or fraudulent, they would have their action of *devastavit*. But the Court on a judicial settlement cannot, I think, charge the administrator with moneys that have not yet reached his hands. "

I confess that I hesitate to follow this opinion. As at present advised, I cannot see that it is consistent with the terms of section 739 (3). A judicial settlement under that paragraph is conclusive " that the money charged to the accounting party as collected is all that was collectible at the time of the settlement on the debts stated in the account. " If after a judicial settlement one of the heirs brought an action for *devastavit* in respect of negligence in the collection of debts due to the estate, it appears to me that he will be met by this statutory conclusion. Further, section 738 seems to indicate that, if a debt due to the estate were lost through an executor negligently failing to sue for it until it was prescribed, the executor would be accountable in the judicial settlement. If this reasoning is sound, an executor in a judicial settlement is accountable, not only for money which he actually collected, but also for money which he ought to have collected and failed to collect through his own default. Fortunately it is not necessary for us to give a decision on this point, because the executor has voluntarily undertaken to file further explanations, in so far as it is possible for him to do so, of the reasons why these mortgage bonds were not put in suit or realized and why the judgments referred to were not enforced.

With regard to the complaint raised as to the numerous and miscellaneous articles of movables which belonged to the estate, and the failure of the executors to account for them, I think this was based upon the erroneous supposition that it was the duty of the executors to distribute this property or to sell it and distribute the proceeds. No doubt it is possible that some small earnings may have been derived in the use of some of these articles, but I think it is impossible in a family estate of this description, after the lapse of so long a time, to enter into such questions with particularity. The movable assets of the estate appear to have been appropriated by the heirs with the consent of the executors, and one would assume, to a great extent, by mutual consent. I do not think any substantial case has been made out for any further inquiry on this part of the executors' accounts.

There is one final point to be mentioned. Mr. Elliot seemed to contend that when a Court authorizes a judicial settlement and proceeds " to take the accounts " under section 730, it is itself responsible for the auditing of every item in the account. No Court could sustain such a burden. The manner in which such an account should be taken is fully explained in the final part of the judgment of the Court in *Fernando v. Fernando.* [1] The case in

[1] *(1878) 1 S. C. C., p. 52.*

1924.

BERTRAM C.J.

De Zoysa v. De Zoysa

which the procedure is there explained was an informal administration suit, but the principles there explained are equally applicable to a judicial settlement under our Code.

In my opinion, the case should go back to the learned District Judge for further inquiry with regard to (*a*) the income of the income-bearing properties up to the date when they were handed over to the heirs either severally or in common; (*b*) the mortgage bonds not put in suit or realized, and judgments not enforced, and for any readjustment of his final order which he may think necessary as a result of his inquiries. In making these inquiries the learned Judge will, no doubt, make allowance for the fact that the executor who acted as the principle executor is dead, and that the explanation available may consequently not be so full as they would have been if he had also survived. For the purpose of the final adjustment, the order of the learned Judge should *pro formâ* be set aside.

With regard to the costs, the victory in the Court below was certainly in the main with the executor. Nevertheless, there was certainly good ground for the demand for a judicial settlement. The accounts filed by the executors were only filed as a result of the appellants' agitation, and even after the inquiry which has been held, it cannot be said that they are altogether satisfactory. I think it would be a hardship that the appellants should be required to pay the costs of the proceedings in the Court below. I would make no order as to the costs of the proceedings in the Court below or in this Court, and would leave the costs of further proceedings to the discretion of the learned District Judge.

SCHNEIDER J.—I agree.

Set aside and sent back.