1942 **Howard C.J. and de Kretser J.**

DE SARAM *et al v.* VANDER POORTEN.

233—D. C., Kandy, 636.

Executor—Agreement to pay costs of application—Promissory note in personal capacity—Liability—Roman-Dutch law.

Where executors make a promise other than in an expressly representative capacity, the liability is personal and each is liable for his share of the debt *pro-rata*.

***Gunasekere v. Gunasekere* (43 N. L. R. 73) referred to.**

APPEAL from a judgment of the District Judge of Kandy.

This was an action to recover a sum of Rs. 1,267.35 against the three defendants. The claim arose out of certain disputes, which arose in D. C., Kandy, Testamentary No. 50, of which the defendants were executors and which were settled.

After the settlement, the plaintiffs and the 1st and 2nd defendants, who were dissatisfied with the settlement, filed applications for *restitutio-in-integrum*.

Another settlement was thereafter arranged and it was alleged that at the settlement the 1st and 2nd defendants had agreed to pay the plaintiffs the costs of the application for *restitution*. The 2nd and 3rd defendants did not contest the claim.

The learned District Judge held that the 1st and 2nd defendants undertook to pay the costs of the plaintiffs as executors and that they were liable jointly and severally.

H. V. Perera, K.C. (with him *J. A. L. Cooray*), for the 1st defendant, appellant.—Where executors make a promise other than in an expressly representative capacity the liability is purely personal, even though they may describe themselves as executors. It cannot be said in this case that the consideration for the promise of the executors was a contract or transaction with the testator. See *Farhall v. Farhall*[1]. The appellant is in the position of a co-debtor and would, in the absence of special agreement be liable only in respect of his rateable share—*Lee's Introduction to Roman-Dutch Law (3rd ed.)*, *p. 289*.

J. E. M. Obeyesekere (with him *H. W. Jayewardene*), for the plaintiffs, respondents.—It may be conceded that if an executor promises as executor he cannot bind the estate and would be liable personally.

The executors in this case are in the position of co-debtors.

[HOWARD C.J. drew attention to *Gunasekere v. Gunasekere*[2]]—The evidence in the present case is that there was *one* promise which was indivisible. Each of the promisors would be liable to pay the whole debt. As between themselves there may be right of contribution.

Cur. adv. vult.

[1] *(1871) L. R. 7 Ch. 123 at 126.*

[2] *(1941) 43 N. L. R. 73.*

July 10, 1942. HOWARD C.J.—

This is an appeal by the 1st defendant from a judgment of the Additional District Judge of Kandy, entering judgment for the plaintiffs against all three defendants in the sum of Rs. 1,267.35, with costs in the Class under Rs. 900, as the appellant had deposited Rs. 409 in Court. The learned Judge made further order that the appellant should pay the plaintiffs their costs and to the 2nd and 3rd defendants a sum of Rs. 21 as their costs. The case arose out of testamentary disputes after the death of the late A. J. Vander Poorten. These disputes were settled in D. C., Kandy, Testamentary 50. The executors of the estate were the defendants. The plaintiffs and the 1st and 2nd defendants were dissatisfied with the settlement and in consequence of such dissatisfaction the plaintiffs with the approval of the 1st and 2nd defendants filed papers for *restitutio-in-integrum*. Subsequently, the 1st and 2nd defendants also filed an application for *restitutio-in-integrum*. After consultation with lawyers, another settlement was arranged, the terms of which were embodied in order ID2 of the Supreme Court dated July 15, 1939. Prior to this settlement there was a consultation between the plaintiffs and the 1st and 2nd defendants and their lawyers, Mr. Ebert and Mr. de Vos. At that consultation, according to the case put forward by the plaintiffs, the 1st plaintiff raised the question of the expense the plaintiffs had incurred in connection with the application for *restitutio-in-integrum*. The 1st defendant thereupon said: "Dont worry, we will pay you." The 2nd defendant, who was present, approved of this undertaking. The 1st plaintiff was persuaded by Mr. Ebert not to insist on an undertaking in writing with regard to these expenses as there were so many witnesses. The plaintiffs then agreed to the settlement and the applications for *restitutio-in-integrum* were withdrawn. The plaintiffs' case is that the 1st and 2nd defendants when they undertook to pay their expenses of the application for *restitutio-in-integrum* did so as executors of the estate of the late Mr. Vander Poorten. As the defendants, and particularly the 1st defendant, have refused to pay these expenses, which they maintain amount to Rs. 1,475.35, they have been forced to come to Court. The 2nd and 3rd defendants did not contest the claim of the plaintiffs. The appellant, however, contested this claim on the two following grounds:—

(*a*) The obligation to pay the plaintiffs their costs incurred on account of the *restitutio-in-integrum* proceedings was a personal one and not as executors. Hence he is not liable jointly and severally for the whole amount but only for his share.

(*b*) He was only prepared to concede that a sum of Rs. 818 was incurred by the plaintiffs as legal costs incurred on account of the *restitutio-in-integrum* proceedings. As he was not aware that the third defendant, who was not present when the agreement was made, was prepared to share the costs, he brought a sum of Rs. 409 as his share.

In deciding ground (*a*) in favour of the plaintiffs the learned Judge has relied on the evidence of Mr. Ebert. He states that he accepts the latter's evidence that the 1st and 2nd defendants agreed to pay the

plaintiffs' expenses as executors of the estate of the late Mr. Vander Poorten. The learned Judge, moreover, thinks that this must be so as the defendants were all along acting as executors and not in their personal capacity. The evidence was that the executors filed papers for *restitutio-in-integrum* and in the settlement were acting as executors. It is necessary to scrutinise Mr. Ebert's evidence rather closely. In examination-in-chief he states that he is quite certain that the 1st defendant agreed on behalf of the executors that they would pay the plaintiffs' expenses. The 2nd defendant was present and he did not disagree. They undertook to pay the full expenses and they knew what the expenses were. Again, in re-examination, he said that the 1st and 2nd defendants did not undertake to pay the expenses personally. They undertook to pay the legal expenses as executors. The evidence of Mr. Ebert on this point is also corroborated by that of the 2nd defendant. On the other hand, in cross-examination, Mr. Ebert states that the promissory note IDI signed on February 15, 1940, after the discussion about the legal expenses, was made by the 1st and 2nd defendants in their personal capacity.

I am of opinion that there was no evidence on which the learned Judge could base his finding that the 1st and 2nd defendants undertook to pay the expenses incurred by the plaintiffs in the *restitutio-in-integrum* proceedings as executors. The 1st and 2nd defendants were not authorized to burden the estate with this obligation. The consideration for the promise given by the 1st and 2nd defendants was not a contract or transaction with the testator. Hence they could not bind the estate, *vide Farhall v. Farhall*[1]. Moreover, one of the executors, that is to say the 3rd defendant, was not present. From the fact that IDI was a personal obligation the inference may be drawn that the undertaking to pay the expenses was also personal. Counsel for the respondent, however, whilst conceding that the undertaking was given personally and not as executors, maintains that it is indivisible and imposed on the defendants a joint and several liability. The law with regard to co-debtors is dealt with in the *Third Edition of Lee's Introduction to Roman-Dutch Law at p. 289*, where the following passage occurs :—

> "The position of co-debtor must be distinguished from that of a surety. Each co-debtor is liable as principal. The liability of the surety, as such, is merely accessory and secondary. To constitute the relation of co-creditor or co-debtor, as above defined, it is not enough that two or more persons should stipulate for or promise the same thing, unless they do so with the intention of becoming each entitled or each liable in respect of the whole debt. In the absence of evidence of such intention, the parties, even in the earlier civil law, were not *correi* but were each entitled or liable only in respect of his rateable share. In the Roman-Dutch Law, following herein the latest Roman Law, a co-debtor cannot as a rule be made liable *in solidum* unless there is a special agreement to that effect. Thus if William, Thomas and James jointly contract to pay a hundred aurei to Rudolph, in the absence of special agreement, each of them is liable only for one-third of the total. Apart from agreement, there are cases in which the

[1] *(1871) L. R. 7 Ch. 123 at 126.*

law creates, or presumes, a solidary liability, where no contrary intention is expressed. Such is the case of partners in business contracting in relation thereto ; and persons who become joint parties to a bill of exchange or promissory note, whether as drawers (makers), acceptors, or indorsers, are similarly liable. Supposing a solidary obligation validly created whether by act of party or by operation of law one co-debtor who is sued for the whole debt may still claim the benefit of division if he has not renounced it, provided that the other co-debtors are solvent and within the jurisdiction."

I would also refer to my judgment in *Gunasekere v. Gunasekere* [1], in which I formulated the law as laid down in this passage. In my opinion there is no evidence in this case of an agreement to create a solidary liability nor is such a liability created or presumed by law. Ground (*a*) must therefore be answered in favour of the appellant.

With regard to ground (*b*), the learned Judge has found that the plaintiffs can reasonably claim as expenses a sum of Rs. 1,475.35 demanded in the plaint. The undertaking given by the 1st and 2nd defendants was, according to Mr. Ebert, to pay the expenses of the plaintiffs. In paragraph 7 of the plaint the plaintiffs claimed the entire expenses incurred by the plaintiffs in connection with the application made by them to the Supreme Court for relief by way of *restitutio-in-integrum*. The testimony of Mr. Ebert and the 2nd defendant established that the 1st and 2nd defendants as well as the plaintiffs were interested in this application. In consequence, the 2nd defendant, on the instructions of the appellant, paid to Mr. Ebert a sum of Rs. 715 towards the expenses incurred by the plaintiffs in connection with the application. This sum must be deducted from Rs. 1,267.35 paid as the expenses of the plaintiffs. A balance sum of Rs. 552.35 is therefore, owing for which sum the appellant is liable to pay one-third, namely, Rs. 184.12. As he has already paid into Court a sum of Rs. 409, the decree of the District Court must be set aside so far as he is concerned and judgment entered for him with costs in this Court and the District Court. As the appellant is willing to pay such sum the plaintiffs are declared entitled to the sum of Rs. 409 deposited by the appellant in Court. No order is made with regard to the amount to be paid by the 2nd and 3rd defendants.

DE KRETSER J.—I agree.

Appeal allowed.