1942 *Present :* **de Kretser J.**

RAMALINGAM *v.* KAILASAPILLAI *et al.*

143—C. R. Colombo, 72,628.

Administrator—Action by creditor—Burden of proof—Plea of plene administravit.

In an action on a promissory note by a creditor against the administrator of the deceased maker the burden is upon the plaintiff to show that the adminstrator has assets of the deceased in his hands.

It is not necessary for an administrator to obtain the judicial settlement of an estate as a preliminary to a plea of *plene administravit.*

Arunasalem Chetty v. Mootatamby (*2 A. C. R. 90*), followed.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. Nadarajah, for defendants, appellants.

P. Navaratnarajah, for plaintiff, respondent.

March 26, 1942. DE KRETSER J.—

Plaintiff sued the appellants as administrators of the estate of one Kandiah, for the sum of Rs. 77.15 due on a promissory note dated May 12, 1938. Kandiah died on May 18, 1938. This action was brought on February 6, 1941. In the meantime, the estate of Kandiah had been administered and the assets distributed. The second defendant was one of the heirs of Kandiah and in that capacity received a share of the estate.

In reply to plaintiff's claim the defendants put plaintiff to the proof of the debt of which they said they were unaware, and further took the plea of *plene administravit.* The learned Commissioner held that there was no evidence to prove that the defendants were aware of the indebtedness of the deceased to the plaintiff but that the plea of *plene administravit* could not succeed as there had been no judicial settlement of the

estate. He added that the defendants had been guilty of *laches* in that they had made no formal call for claims—of which fact the only evidence on the record is that of the plaintiff that he saw no such notice published. The learned Commissioner gave judgment for the plaintiff, holding that the defendants as heirs were in possession of the assets of the estate of Kandiah.

Much elaborate argument was advanced at the hearing of this appeal: for example, that section 222 of the Civil Procedure Code amounted to a statement that a plea of *plene administravit* could only be taken after execution had issued, and that therefore judgment must be entered for the plaintiff for what it is worth. In support of this proposition I was referred to the case of *Tamiz Bano v. Nand Kishore*[1]. That case was decided on different grounds and the two Judges who composed the court expressed contrary opinions. Mukerji J. adopted the view put forward by the respondents while Ashworth J. was of a contrary opinion. I prefer the view taken by the latter.

The points taken by the learned Commissioner are covered by local authority. In *Arunasalem Chetty v. Mootatamby*[2] it was held that it was not necessary for an administrator to obtain a formal judicial settlement as a preliminary to such a plea. In *Supramaniam Chetty v. Palaniappa Chetty*[3], Layard C.J. expressed the opinion that even where there had been a judicial settlement an administrator may be sued and it may be proved that he had not duly administered the estate.

There is no provision in our law making it imperative to call for notice of claim. That, however, would be a very wise step for an administrator to take. The point seems to have been raised in *Arunasalem Chetty v. Mootatamby* (*supra*), for Middleton J. said—"It may be true that the defendant can maintain no release from the fact of advertisement; but the fact that he has done so makes his position a stronger one."

It seems to be a question of fact in each case whether the estate has been duly administered or not. The burden is on the plaintiff to show that the administrator has assets—vide *Williams on Executors, (1930 Edn) II.1240,*—that is, he must have assets in his capacity of administrator. In this case, I am satisfied that the estate has been duly administered and that the plaintiff's action ought to be dismissed with costs. This will not prevent the plaintiff from suing the heirs, if so advised. and it may be that it is open to him to apply for a judicial settlement of the accounts himself under section 720 of the Code. In either case all persons who are now the legal representatives of the deceased will be before the court.

In the testamentary case, the judge of his own motion noticed interested parties, including a claimant, and when all matters had been adjusted declared the estate closed. It is not clear that that did not amount to a judicial settlement and that is why I express some doubt as to plaintiff's alternative remedy.

The appeal is allowed with cost. The decree entered is set aside and plaintiff's action dismissed with costs.

Appeal allowed.

[1] *A.I.R. (1927) All 459.* [2] *2 A. C. R. 90.* [3] *3 Bal. 57.*