1939 *Present :* **Soertsz A.C.J., de Kretser and Wijeyewardene JJ.**

USOOF JOONOOS *v.* ABDUL KUDDOOS.

159—D. C. Colombo, 47,499.

Costs—Action by administrator—Decree for costs—Liability to pay costs—Property of intestate not liable to be seized—Civil Procedure Code, s. 474.

An executor or administrator who brings an action in right of the testator or intestate is personally liable to pay the costs of the defendant, should the action be dismissed, unless the Court otherwise orders. In such a case property belonging to the estate of the deceased is not liable to be sold in execution of the decree for costs.

***Edirishamy v. de Silva* (2 N. L. R. 242) followed; *Nonnohamy et al. v. Podisingho et al.* (23 N. L. R. 319) not followed.**

CASE referred by Moseley and Soertsz JJ. to a Bench of three Judges.

The question referred was whether the property of an intestate was liable to be sold on an order for costs made in favour of a defendant against a plaintiff who sues on behalf of the intestate in the capacity of an administrator.

C. Thiagalingam (with him *E. B. Wikremanayake* and *S. Mahadeva*) for defendant, appellant.—The question to be decided is how far the estate of an intestate is liable where the administrator is ordered to pay the costs of an action brought by him. This question cannot arise in the English Courts. Under the English law, when a person dies, his estate is at an end and vests in the Probate Court which delegates to the executor or administrator certain functions. In the Roman-Dutch law, on the contrary, the estate is an entity which has an existence even after the death of the deceased—*Sohm's Roman Law (3rd ed.) p. 501; Lee on Roman-Dutch Law (1915 ed.) p. 285.* Section 69 of Chapter 6 (Courts Ordinance) and the Charter of 1833, no doubt, introduce the English law. But to what extent ? Section 69 of the Courts Ordinance vested in the Courts only the right to appoint executors and administrators. This was interpreted in *(1863-8) Ramanathan's Reports 265* and *Vanderstraaten's Reports (1869-71) 273* as introducing into Ceylon the English law of executors and administrators. It is not necessary to challenge the correctness of those decisions. But that does not mean that the concept of an estate as a juristic person should be abandoned. It is in that view that section 474 of the Civil Procedure Code came in and confirmed the liability of the estate for costs. Section 474 clearly assumes that the rule is that the estate is liable for costs and merely provides for an additional remedy against the executor or administrator. Where, therefore, an administrator brings an action as administrator and is ordered to pay costs, the defendant may seize the property of the intestate in execution of his decree for costs—*Nonnohamy et al. v. Podisingho* [1]; *Wessel's History of Roman-Dutch Law p. 535. Nanayakkara v. Juan Appu* [2] is not applicable because, in that case, the administrator entered

[1] *(1922) 23 N. L. R. 319.*

[2] *(1920) 21 N. L. R. 510.*

into a personal contract. *Fernando v. Fernando*[1] recognizes the settled rule in Ceylon regarding the liability of the estate. Section 474 is designed merely to prevent rash and hasty litigation on the part of the administrator—*Nugara v. Palaniappa Chetty*[2]. In *Edirishamy v. de Silva*[3], the judgments of the two Judges do not appear to be in accord. *Charles Boynton v. George Boynton*[4] would have been dealt with differently in our Courts. It illustrates the difference between the English law and our law. There is no section like section 396 of the Civil Procedure Code in English practice.

The party to the action is the estate. We have to apply the Roman-Dutch law concept of the estate as a juristic person. *Nonnohamy et al. v. Podisingho* (*supra*) represents the correct view to be taken regarding section 474.

S. J. V. Chelvanayagam (with him *A. Muttucumaru*), for second plaintiff, respondent.—The estate of a deceased person is not a juristic person. No authority has been cited to support that proposition. As soon as a person dies, his estate vests in the heirs.

The question is more one of procedure than of substantive law.

The English law of executors is applicable in Ceylon—*Vanderstraaten's Reports* (*1869-71*) *273*. On the general question as to what extent an administrator can make the estate liable, see *Farhall v. Farhall*[5]. The parties that are liable are the parties before the Court—*Joseph Pitts v. Edward la Fontaine*[6]; *Boynton v. Boynton* (*supra*).

C. Thiagalingam, in reply.—Section 474 of the Civil Procedure Code should be read along with section 472. *Iragunathar et al. v. Ammal*[7] is in my favour.

Cur. adv. vult.

July 3, 1939. SOERTSZ A.C.J.—

The short point referred to us for decision is whether the property of an intestate is liable to be sold on an order for costs made in favour of a defendant against a plaintiff acting in right of the intestate in the capacity of an administrator.

My brother Moseley and I referred this question to a Divisional Bench not because we ourselves had any doubt in regard to it, but because in view of the conflict between earlier decisions on it, an authoritative ruling seemed desirable.

In *Nonnohamy v. Podisingho*[8] Ennis and Porter JJ. held that section 474 of the Civil Procedure Code only provides an *additional remedy* against the executor or administrator personally, and that it is open to the defendant to seize the property of the testator or intestate in execution of his decree for costs. Ennis J. sought to distinguish the case before him from the case of *Edirishamy v. de Silva*[9], but so far as I understand the earlier case, it is a direct authority on the point that arose in the case before Ennis and Porter JJ., and that arises now in this case. In that case, Bonser C.J. and Lawrie J. held that on an order for costs made

[1] (*1916*) *3 C. W. R. 328.*
[2] (*1911*) *14 N. L. R. 327.*
[3] (*1896*) *2 N. L. R. 242.*
[4] (*1879*) *L. R. 4 A. C. 733.*
[5] (*1871*) *L. R. 7 Ch. A. C. 123.*
[6] (*1880*) *L. R. 6 A. C. 482.*
[7] (*1937*) *9 C. L. W. 142.*
[8] *23 N. L. R. 319.*
[9] (*1896*) *2 N. L. R. 242.*

against an executrix, she was personally liable and the "Fiscal therefore could not sell or the petitioner buy more than the personal interests of the executrix". He also said "the English law does not allow a defendant to recover his costs from the estate of the deceased . . . . and in my opinion that law should govern this case". The case before Bonser C.J. was one in which the sale occurred prior to the passing of the Civil Procedure Code, and commenting on that fact, the learned Chief Justice said, that "since the passing of the Civil Procedure Code", it was clearly the law that an administrator was personally liable for costs "for section 474 expressly provides in the case of an action brought by an executor or administrator in right of his testator or intestate, the plaintiff is to be liable as though he were suing in his own right upon a cause of action accruing to himself and the costs are to be recovered accordingly". We respectfully agree with that view which, in our opinion, is the correct interpretation of section 474 of the Civil Procedure Code.

Counsel for the appellant was at great pains to emphasize that under the Roman-Dutch law the estate of a deceased person was liable *qua* estate for costs resulting from litigation undertaken by an executor or administrator. That, however, is a proposition we were always willing to concede, subject to the qualification that the litigation was undertaken *bona fide*. But we are unable to follow him when he deduces from that liability the further proposition that whenever an order for costs is made against an administrator or executor, the judgment-creditor is entitled *ipso facto* to take out writ and sell property belonging to the estate. In our view section 474 enables a Court to exempt an executor or administrator from personal liability for costs and to make an order that costs shall be paid out of the estate, but that, of course, is a power which a Court will exercise in appropriate cases where all the parties interested in the estate are before it. But where a Court does no more than say that a plaintiff executor or administrator shall pay the defendant's costs, the estate of the deceased is not automatically involved in that order. In such a case the administrator or executor is personally liable to pay the costs. He may later in proper proceedings seek to be reimbursed out of the estate. In the sixth edition of *Daniell's Chancery Practice,* vol. II., part I. at page 1175, it is stated on the strength of a number of judicial decisions that "the general rule which gives the costs of the suit to the victorious party, and throws them on the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit,* and to those in which they are *sui juris*".

In the case of *Nugara v. Palaniappa Chetty* [1], Lascelles C.J. and Middleton J. held that an executor or administrator who is on the record as plaintiff or defendant is liable personally for costs in the same way as any other person, and "that the question whether he is entitled ultimately to recover the amount of the costs which he is ordered to pay from the estate is a totally different matter". In *Nanayakkara v. Juan Appu* [2], Bertram C. J. and de Sampayo J. followed the ruling in *Nugara v. Palaniappa Chetty* (*supra*) and added "the fact that a judgment-debtor has a right of indemnity against athird party does not entitle a judgment-creditor to sell the property of that third party under a judgment against his debtor.

[1] *14 N. L. R. 327.* [2] *21 N. L. R. 510*

An order of Court is clearly always necessary where it is sought to make the assets of such a third party available". In an earlier case, *Fernando v. Fernando*[1], Wood Renton C.J. and de Sampayo J. had taken a similar view adopting the rule laid down in *Nugara v. Palaniappa Chetty*. Wood Renton C.J. said, "the point is clearly covered both by Statute Law and by Judicial decisions. Section 474 of the Civil Procedure Code provides that even when an executor brings an action in right of his testator he is himself personally liable to pay the costs of the defendant should the action be dismissed, unless the Court makes an order to the contrary and that in all other cases the executor is liable for the defendant's costs if the action fails just as if he was suing upon a cause of action accruing to him personally".

We agree with Counsel for the appellant that there is an "*in terrorem*" element in section 474, but what he fails to appreciate is that that element will disappear if his contention is sound, for in that case it will be open to an executor or administrator to fritter away the estate by wasteful or dishonest and collusive litigation.

We, therefore, hold that on the order for costs made in this case, the land sold by the Fiscal was not liable to be sold. In this view, the appeal fails and must be dismissed with costs.

Appeal dismissed.