1937

Present : **Moseley J. and Fernando A.J.**

IRAGUNATHER *et al. v.* AMMAL.

110—D. C. Jaffna, 9518.

Executor—Power to incur debt for purposes of administration—Liability of estate.

An executor has power to contract a debt for purposes of administration in such a manner as to exclude personal liability ; and when he has done so, the estate is liable to pay the debt.

***Fernando v. Muncherjee* (5 *S. C. C. 141*) referred to.**

APPEAL from a judgment of the District Judge of Jaffna.

S. J. V. Chelvanayagam (with him *Muthucumaru*), for plaintiff, appellant.

S. Natesan, for defendant, respondent.

Cur. adv. vult.

October 20, 1937. FERNANDO A.J.—

The main question that arises on this appeal is whether the defendant who has now been appointed administratrix of the estate of K. Ambalavanar is liable on the promissory note signed by the executor of that estate in whose place she has been substituted some time after the date of the note. This issue of law was raised at the trial and is numbered 3, and the argument of Counsel for the respondent was to the effect that the only person liable on the promissory note was the executor Appasamy himself. The note P 1 has been signed by Appasamy "as executor of the estate of K. Ambalavanar for the purposes of the testamentary expenses". There are some observations made by the learned District Judge with regard to the words as "executor, &c.", which he thought had been added some time after the note was signed, but Counsel for the respondent frankly admitted that he was not in a position to support the learned District Judge's opinion on this point, and on certain references made by him.

Appasamy himself gave evidence and stated that he had to borrow money for the purpose of managing the estate of the deceased and that in the course of his administration, he borrowed this money for the purposes of supplying stamps in the testamentary proceedings, for the expenses of Thudaiman estate and for the purposes of administration. There was no evidence led for the respondent and I do not think there was any material to support the observations of the learned Judge, some of which he admits are based on mere surmises, or to enable him to hold that in fact the money had not been borrowed for the purposes of administration.

It was not denied that under our law, "an executor may raise money by a sale or a mortgage of the property belonging to the estate or even by the pledge of assets". (See *Fernando v. Muncherjee* [1].) If an executor has that power, I do not think it is possible to deny that he also has the power to borrow the money on a promissory note for the purposes of administration and the only question is whether in such a case it is open to him to borrow that money as executor, that is to say, in such manner as to make the estate liable for the repayment of that money, or whether even in a case where, as here, he executes a promissory note as executor of the estate, he nevertheless remains personally liable for the money.

The question whether a trustee can incur a liability in such a manner as to enable the creditor to claim payment out of the trust estate was considered in *Hayley v. Nugawela* [2], Drieberg J. in the course of his judgment cites a portion of the judgment of Bertram C.J. in *Maraliya v. Goonasekera* [3], where Bertram C.J. differentiates the position of a trustee from that of an executor or administrator, and states that a trustee is personally liable on a bond executed by him and adds, "The law knows nothing of the idea of a trustee suing or being sued in his capacity of trustee. He has not a representative capacity like that of executor or administrator". Drieberg J. then refers to certain English decisions on the question whether a trustee by describing himself as such can exclude his personal liability. Referring to the case of *Muir v. Glasgow Bank* [4], he refers to the observation of Lord Cairns that there was nothing to prevent a trustee by appropriate words from stipulating that he will make payment not personally but out of trust funds, "but having regard to the words used in that case, it was held that they did not amount to an exclusion of personal liability". It was pointed out by de Silva A.J. that in that case, Lord Cairns observed that an executor who contracted as executor, and as executor only, had not incurred a personal liability. In these circumstances, I do not think it necessary to examine the English authorities any further and it seems clear to my mind that an executor has full power to contract a debt for the purposes of administration in such a manner as to exclude personal liability, and where he has done so, the estate is liable to pay the debt incurred by him.

Counsel for the respondent suggested that the proper course for a creditor on a note like this was first to sue the executor himself and that the executor having paid the debt may be able to have recourse against the assets of the estate. I cannot understand why the law should require

[1] *5 S. C. C. 141.*
[2] *35 N. L. R. 157.*
[3] *23 N. L. R. 261.*
[4] *(1879) 4 A. C. 337.*

this circuitous process in a case where the executor who represents the estate of the deceased has incurred a debt in the course of administration.

In the case of *In re Watson, Ex parte Philips*[1] it was held that where services had been rendered for the benefit of the estate during the time when there was no personal representative of the deceased, under a contract with someone who subsequently by becoming administrator became authorized to bind the estate, the estate of such deceased person was liable for these services, more particularly because the administrator on being appointed ratified his previous contract. It is clear from this decision that the right of the executor or administrator to bind the estate canot be challenged, and that where he does an act so as to bind the estate, the estate itself is liable for the payment of that debt.

For these reasons I would allow this appeal and enter judgment for the plaintiff as prayed for with costs here and in the Court below.

MOSELEY J.—I agree.

Appeal allowed.