1964 *Present :* **Sirimane, J., and Manicavasagar, J.**

H. F. P. C. FONSEKA, Appellant, and **B. 0. FONSEKA** and others, Respondents

S. C. 240-D. G. Panadura, 394/T

Administration of estates-Payments into Court of money belonging to heirs-Mode of making such payments by cheques-Duty of administrator to be prudent-Trusts Ordinance (Cap. 87), s. 16-Judicial settlement of accounts-Appropriation of payments.

(i) Where the administrator of a deceased person's estate issues a cheque for the purpose of paying into Court money due to an heir he should as a prudent man draw the cheque in favour of the Government Agent who is the head of the Kachcheri where monies brought to Court are paid. In such a case, if the administrator draws the cheque in favour of his Proctor, and the Proctor misappropriates the money, the administrator must bear the loss.

A person administering the estate of his deceased wife had in his hands a sum of money (Rs. 18,343-42) due to his children (minors) from the deceased. It was conceded that, as administrator, he was in the position of a trustee in regard to the money. When a deposit-note for the payment of the money into Court was obtained from the Judge, the administrator made out a cheque payable to his Proctor personally, instead of following the usual practice of making such a cheque payable to the Government Agent. The Proctor misappropriated the money.

Held, that the administrator should have as a prudent man made the cheque payable to the Government Agent and not to the Proctor. In such a case, if the administrator dies, his own estate must bear the loss.

(ii) A person gifted two properties to his two minor children. After he died it was discovered that some money representing the rent from those properties which had come into the hands of the deceased had not been placed by him to the credit of the minors. At the judicial settlement of accounts of the estate of the deceased it was contended by an opposing party that the deceased had taken out two insurance policies which would benefit the minors and that he was entitled to utilise the rent from the two properties to pay the premia on the insurance policies.

Held, that the insurance policies and the income from the properties were two separate and distinct benefits which the minors were entitled to claim for themselves.

APPEAL from an order of the District Court, Panadura.

H. V. Perera, Q.G., with C. Q. Perera and D. G. Amarasinghe, for the Petitioner-Appellant.

C. G. Weeramantry, with N. S. A. Goonetilleke and G. A. Amerasinghe for the 1st, 5th, 6th and 7th Respondents.

Cur. adv. vult.

November 25, 1964. **SIRIMANE, J.-**

The Appellant is the executor of the estate of one C. E. Fonseka. At a Judicialsettlement of accounts of the estate the 1st respon dent (who is the widow of the deceased) objected to 5 items appearing in the accounts filed. They are :-

(1) A sum of Rs. 18,343'42 which had been charged to the estate, as the deceased had failed to deposit this sum to the credit of D. G. Colombo 13410 T.

(2) A sum of Rs. 3,109 alleged to be due to the 4th respondent.

(3) A sum of Rs. 1,127-50 alleged to be payable to the 2nd respondent,

(4) A sum of Rs. 4,470 alleged to be payable to the 3rd respondent.

(5) A sum of Rs. 6,150 alleged to be due from the 1st respondent to the estate.

The learned District Judge held against the appellant in respect of ell five items, and this appeal is from that order.

The appeal was not pressed in regard to items 2 and 5 set out above, and I see no reason to disturb the findings of the learned District Judge on those two items.

It is convenient to deal first with items 3 and 4.

The deceased had gifted two properties to the 2nd and 3rd respondents who are his minor children by a former marriage.

The two sums referred to in these items represent the rent from those properties which admittedly came into the hands of the deceased and which he had not placed to the credit of the minors.

It was argued for the 1st respondent that the deceased had taken out two insurance policies which would benefit the 2nd and 3rd respondents, and that he utilised the rent ,room these properties to pay the premia on those policies.

In my view the insurance policies and the income from the properties were two separate and distinct benefits which the minors are entitled to claim.

Even if one assumes that the deceased paid the premia on the policies out of the rent, he would still not be absolved from the liability of holding the rent for the minors. The learned District Judge had found on the facts, that the deceased had not utilised the rent to pay the premia but that he had appropriated the rents himself; and then proceeded to hold that the minors were not entitled to those rents. I think he was clearly in error in reaching this conclusion. Our attention was drawn to a record kept by the deceased (which counsel called a " log book ") in which he had expressed the desire that after his death the 2nd respondent should utilise the rents due to him to keep alive the policy which benefits him ; but that is a matter which hardly affects the question of the deceased's liability for the rents received by him during his lifetime.

The appeal in respect of items 3 and 4 must succeed and I hold that the 2 sums mentioned in those items are due to the 2nd and 3rd respondents.

The main dispute is in respect of item No. 1. When the deceased's first wife died he had in his hands a sum of Rs. 18,343.42 due to bis children the 2nd and 3rd respondents from their mother. Her estate was administered in the District Court of Colombo, Case No. 13410 T in which the deceased was the administrator.

The deceased had failed to bring this sum into the testamentary case to the credit of the minors. The appellant has since paid this sum from the estate.

It is contended for the 1st respondent that the liability of the deceased had ceased as he had handed over the money to his proctor in that case (one C. M. G. de Saram) who had apparently misappropriated this sum. It is not quite clear as to how and when the deceased paid the money to his proctor, but the argument proceeded on the footing that he had made out a cheque payable to the proctor.

It is conceded that the deceased was in the position of a trustee where this money is concerned.

Under Section 15 of the Trusts Ordinance (Chapter 87) a trustee is bound to deal with trust property as carefully as a man of ordinary prudence would deal with his own property.

The deceased had in his hands money belonging to minors. He was required to deposit this money in Court. It is well known that monies which have to be brought to Court are paid to the Kachcheri, the head of which is the Government Agent of the province. When payments are made by cheque such cheques are usually made payable to the Government Agent. If the deceased had followed this course the money would have been effectually brought into Court and no one could have misappropriated it. But he had made the cheque payable to the proctor personally.

A person who holds in his hands money belonging to minors should, I think, adopt the safest course in dealing with that money.
On behalf of the 1st respondent it was pointed out that de Saram was the deceased's proctor in the testamentary case, and that payments into Court could only be made through the proctor on record according to rules relating to payments into Court. (See payment into Court order 1939.)

Payments into Court are made on a deposit-note obtained from Court. It is the proctor (if there is one on record) who has to apply to Courts for such a note. But it is the client who provides the money ; and when a fairly large sum has to be deposited as in the present case the usual practice is to draw up a cheque in favour of the Government Agent. The proctor is merely an agent through whom the money is transmitted.

In this instance there were two courses open to the deceased; either to draw the cheque in favour of the proctor, or in favour of the Government Agent. In adopting the former course he took an unnecessary risk, which placed the minors in peril.

In the case of Speight v. Gaunt[1 (1884) 9 Appeal cases 1] a trustee employed a broker for purchasing securities authorised by the trust, and paid the purchase money to the broker. The broker gave the trustee a bought-note on the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never purchased the securities but appropriated the money to his own use, and later became insolvent. The form of the bought-note would have suggested to some experts that the loans were to be direct to the Corporations, but there was nothing in them to excite suspicion in the mind of an ordinary prudent man.

One has to bear in mind that a broker does not as a rule disclose his principal. In the circumstances of the case it was held that the trustee was not liable as he had followed the usual course of business in purchases on the London Exchange.

But the Earl of Selbourne pointed out that if the broker had represented to the trustee that the contracts were with the Corporation for loans direct to them from the trustees, he would not have been justified in paying the money to the broker, for in such a case there would have been no moral necessity or sufficient practical reason for doing so. In this instance the deceased had with him money belonging to minors. He knew where that money had to be sent and to whose credit it had to be placed.

If he did not, (which I find it difficult to believe), he could quite easily have apprised himself of these facts. There is some evidence which shows that he was an Engineer and a person with some experience in business affairs.

In these circumstances it is impossible to say that there was " a moral necessity or sufficient practical reason " for drawing up the cheque in favour of the proctor.

The facts in the case of The Oriental Commercial Bank v. Savin [2 (1873) 16Equity cases 203.]a relied on by counsel for the 1st respondent are in my view somewhat different from those in the present case and can be distinguished. There, one of three executors employed a Solicitor (who had been employed by the testatrix in her lifetime on various matters, who had drawn up her will, and who was also employed for proving the will) to negotiate for the compromise of a debt due from the estate. The money paid for this purpose was misappropriated by him.

The Court held that the Executor had " Done just what any prudent man would think himself safe in doing ". There was no question in that case in dealing with money belonging to minors or the piudent course to be followed, when called upon to bring such money into Court.

I am of the view that the Executor was right in charging the amount due to the 2nd and 3rd respondents from the deceased to the estate.

The order of the learned District Judge in respect of items 1, 3 and 4 is varied as set out above. I think it also fair that the executor should be paid the cost of this litigation both here and below out of the estate.

MANICAVASAGAR, J.-

I have had the advantage of reading the judgment of my brother, Sirimane J, and I agree with the conclusions he has reached in regard to items 1, 3, and 4 which are numbered items 66, 71 and 72 respectively in the accounts filed by the executor-appellant.
I desire however to add a few words on the question of the liability of the deceased-administrator, Fonseka, towards his children, the 2nd and 3rd respondents, in regard to item 66.

Fonseka was the administrator of his wife's estate in Testamentary suit 13410 of the District Court of Colombo ; the 2nd and 3rd respondents who are minors were entitled as intestate heirs of their mother to Rs. 18,343.42. The District Judge had ordered that this money should be brought by the administrator to the credit of the Testamentary action, and directed that a Deposit-note should issue to enable this to be done : the money was not so brought, though Fonseka had issued a cheque for the amount in favour of de Saram, his proctor in the testamentary action : de Saram had misappropriated the money; Fonseka is dead, and his executor, the appellant, had debited Fonseka 's estate with the amount.

Is Fonseka' s estate liable to pay this money to the two respondents ? Fonseka as administrator held a position of trust; our law demands that a trustee should in dealing with trust property exercise the care of a man of ordinary prudence. The question which arises for determination is

whether Fonseka fell short of this standard. I think he did ; because, he could have, and should have as a prudent man made the cheque out in favour of the Government Agent with whom the money is deposited in the Kacheheri. It was submitted that de Saram was at the time a proctor of good repute, and it was not unusual to do what Fonseka did, and therefore he cannot be held liable.

A trustee is entitled to select a proctor to perform professional duties, which he (the trustee) is not competent to do : as long as he selects a person properly qualified he cannot be made responsible for his intelligence or for his honesty in regard to acts within the ambit of his duties as a professional man ; but he ought not to entrust him with tasks which fall outside his professional duties, though the proctor may be willing to undertake it: it was no part of de Saram's professional duty to deposit the money at the Kacheheri, and even if he was willing to undertake it, Fonseka should not have made out his cheque in de Saram's

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favour because there was an element of risk, the possibility of misappropriation by the proctor. When two courses of action are open to the trustee, one fraught -with risk, and the other rot, ordinary prudence must dictate to him the latter course of action : he cannot be heard to say " I trusted my proctor but he has cheated me ". A man of ordinary prudence will not incur an unnecessary risk : that is to say a risk which the law does not compel him to take or in the words of the Earl of Sel-bourne L. C. (9 A.C. 1884 page 1) for which there is " No moral necessity or sufficient practical reaton, from the usage of mar kind or otherwise ". If he does take that risk and incurs loss thereby, the loss must fall on him and not on the innocent party. Fonseka did take an unnecessary risk, and his estate must bear the loss.

I also agree that the costs of this enquiry here and in the original Court should be borne by the estate.

Order varied.

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