1970 *Present :* **Sirimane, J., and Weeramantry, J.**

M. PATHMANATHAN and 2 others, Appellants, *and*
E. E. C. THURAISINGHAM and another, Respondents

S. C. 317–318/66—D. C. Jaffna, 602/T

Administration of estates—Judicial settlement—Incapacity of Court to hear disputed claims of creditors—Immovable property of testator situated outside Ceylon—Sale proceeds or income brought into Ceylon—Liability of executor to account for such money—Last Will—Description therein of executor as " executor and trustee "—Whether the Will creates a trust—A legatee's renunciation of a portion of his legacy during life time of testator—Validity—Civil Procedure Code, ss. 540, 720, 721, 726, 728, 729, 731, 740.

(i) Disputed claims cannot be adjudicated upon in an inquiry relating to the judicial settlement of the accounts of executors and administrators under Chapters 54 and 55 of the Civil Procedure Code. In such proceedings, therefore, a legatee cannot claim as a creditor that a certain sum of money is due to him from the estate of the testator, if the claim is disputed by the executor. Such a disputed claim can only be made by way of a separate action.

(ii) When a testator dies leaving certain immovable property situated outside Ceylon, his executors who are granted probate in Ceylon primarily are liable to account in Ceylon for the proceeds of sale of, or the income derived from that property if such proceeds or income have been brought into Ceylon by the executors.

(iii) Where a testator appoints a person as his executor and clearly entrusts him with all the duties that an executor must perform, the mere description of him in the Will as " executor and trustee " does not create a trust resulting in the position that any claim by the legatees against the executor must be made by way of a separate action under the Trusts Ordinance.

(iv) Where, after a Will has been executed and during the life time of the testator, a legatee executes a deed by which he renounces his rights under the Will to the value of a certain sum of money as he has already received assets to that extent in advance, the deed of renunciation is valid. It cannot be contended by him in the testamentary proceedings following the testator's death that the deed is inoperative on the ground that it is an amendment or variation of the Will.

APPEALS from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *E. R. S. R. Coomaraswamy, C. Chakradaran,* and *S. C. B. Walgampaya,* for the 2nd and 3rd citees-appellants in Appeal No. 317, and for the 3rd and 4th citees-respondents in Appeal No. 318.

C. Chellappah, for the 1st citee-respondent in Appeal No. 317 and for the 1st citee-appellant in Appeal No. 318.

H. W. Jayewardene, Q.C., with *C. Ranganathan, Q.C., P. Somatillakam, B. J. Fernando* and *D. C. Amerasinghe,* for the executors-respondents in both Appeals.

Cur. adv. vult.

December 7, 1970. SIRIMANE, J.—

By a joint Last Will executed in Ceylon dated 1.2.37 Albert Edward Clough, and his wife Clara Meenachchi bequeathed all their property and assets after the death of both of them to four of their five children, namely, Balasingham (1st citee), Ernest Emmanuel (1st executor), Rose Alagamany (2nd executor) and Maheswary (2nd citee) in equal shares. The fifth child Millie was left out as she had been dowried earlier.

Both the testators died in Ceylon in 1937, leaving assets movable and immovable in Ceylon and Malaya. The executors applied for and were granted probate in 1938. The testators had left a very valuable rubber estate called Karainagar Estate in Malaya, and the probate was resealed there.

On 22.2.43 a " Final Account " of the administration was filed by the executors and the Court called for a report from the Secretary. Despite the fact that there is no provision for a Final Account in the Civil Procedure Code, it is the usual practice followed in our Courts. Thereafter, for some reason which Counsel could not explain to us, the record seems to have been forgotten by all concerned, but the executors remained in charge of all the assets of the estate. They did not, nor did the legatees, move for a judicial settlement.

After the lapse of some eighteen years, i.e., on 4.11.61, the 2nd and 3rd citees who are husband and wife, presented a petition to Court under section 726 of the Civil Procedure Code naming the two executors as respondents, and alleging, *inter alia*, that both before and after 1943 the executors had received large sums of monies due to the estate, sold immovable property belonging to the estate, and not accounted for the monies so received. They prayed for a judicial settlement. When notice of this application was served on the executors—(not without some difficulty)—they themselves filed a petition dated 16.5.62 under sections 728 and 729 of the Civil Procedure Code, moving, at long last, for a judicial settlement of the estate. In para. 5 of the petition they alleged that the three citees were " persons interested in the estate ". On 18.9.62 the citees filed objections to the petition. There is no specific provision for filing such objections, but this again is a practice adopted by our Courts for the sake of convenience, in order to pin-point the matters which the citees dispute, with reference to the account filed by the executors together with the application for a judicial settlement.

In consequence of certain orders made by the Court thereafter, which it is unnecessary to consider, the executors filed another petition dated 9.3.64 with an account, praying for a judicial settlement, and this appeal is against certain orders made at the inquiry into that application.

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Some 49 issues were raised at this inquiry, and the Court was invited to decide what were termed " Preliminiary Issues " at the outset. These issues related to four disputes between the parties, and may be stated as follows :—

(1) An estate called Balarajah Estate in which the 2nd citee owned shares had been sold by one of the testators (the husband) and the proceeds kept by him. A sum of Rs. 74,000 represented the amount due to the 2nd citee as her share of the proceeds. She claimed this sum from the executors as a debt due to her from the estate.

The executors took up the position that such a claim could not be made in these proceedings but only by way of a separate action. Issues 9 *(a)* and 9 *(b)*, 30 and 31 relate to this dispute.

(2) A half share of the estate called Karainagar Estate in Malaya was sold by the executors, a quarter for 175,000 Malayan Dollars which is the equivalent of roughly one and half times that sum in Ceylon rupees. Another one quarter share was sold for 302,632 Malayan Dollars. The greater part of the proceeds of the sale had been brought into Ceylon and the executors paid two sums of Rs. 75,000 and Rs. 15,000 in Ceylon money to the 2nd citee. The citees asked for an accounting of the rest of the proceeds of sale, and so much of the income, from the balance left of the estate, which was brought into Ceylon. The executors took up the position that the land being situated in Malaya, they were not liable to account in Ceylon for the proceeds of sale or the income. Issues 16 *(a)* to 16 *(c)*, 45, 46 and 49 relate to this dispute.

(3) The executors took up the position, that because the Last Will appointed them " executors and trustees " all the assets of the deceased vested in them as trustees, and the citees, if they had any claims in respect of those properties, should sue them in a separate action as trustees. Issues 23 and 24 appear to relate to this dispute.

(4) The 2nd executor had received as dowry a certain property to the value of Rs. 100,000 during the life time of one of the testators—her father. She executed deed C1 by which she renounced her rights under the Last Will to the extent of Rs. 100,000 as she had already received a dowry of that value. The 2nd executor took up the position that this deed was inoperative, for certain reasons which I shall refer to when dealing with this dispute.

Issues 12, 12 *(a)*, 37 *(a)* and 39, as amended later, appear to relate to this dispute.

The learned District Judge held against the citees on all four of these disputes, and the appeals are against that order. These were the four matters which were argued before us and I shall deal with these disputes in the order set out above.

The 2nd citee seeks to establish a claim *as a creditor*. It is not a dispute between the accounting party and a legatee under the Will. Chapter 54 of the Civil Procedure Code deals with " aiding, supervising and controlling of executors and administrators ", and under section 720 of that chapter a creditor may present a petition for payment of his debt due to him. But, when for instance, in such a case the executor denies liability the Court must dismiss the claim under section 721. Counsel for the Appellants pointed out that proceedings for a judicial settlement commence under Chapter 55 where there is no such statutory bar to a creditor presenting a disputed claim. He relied on sections 731 and 740 (3) in that Chapter. Section 731 entitles a creditor or a person interested in the estate to make himself a party to the proceedings for a judicial settlement, and section 740 deals with decrees for payment and distribution, when an estate is judicially settled. Sub-section 3 of section 740 reads as follows :—

> *740 (3)* " Where the validity of a debt, claim, or distributive share is not disputed, or has been established, the decree must determine to whom it is payable, the sum to be paid, and all other questions concerning the same. And such decree shall be conclusive with respect to the matters enumerated in this section upon each party to the special proceeding who was duly cited or appeared, and upon every person deriving title from such party. "

One has to bear in mind that it is practically impossible for a Testamentary Judge to hear disputed claims by creditors in proceedings for a judicial settlement of accounts. Even a single disputed claim may involve a complicated trial. Learned Counsel for the Appellants submitted that in such a case the Testamentary Judge would have a discretion to refer the alleged creditor to a separate action. But, on a reading of that Chapter (Cap. 55) as a whole, I am inclined to agree with the submission made by Mr. Jayewardene for the executors, that a " creditor " (section 731) whose " claim has been established " (section 740) means, one who has already established his claim. It does not mean that a creditor whose claim is disputed can seek to establish that claim in the proceedings for a judicial settlement.

The sections of our Code relating to Judicial settlements of Accounts have been taken over almost verbatim from the Code of Civil Procedure of the State of New York.

Sections 2742 and 2743 correspond to our section 239, and the third limb of section 740 reproduced above, is referred to as the third sentence in Throop's Commentary on the New York Code.

Commenting on section 2742 he refers to the fact that there has been much controversy by the Courts on the question whether a creditor could prove his debt at a judicial settlement, and says at page 630 :—

"The statutes provide sufficient and convenient means, for determining disputed claims against an executor or administrator, namely,

by an action, in which either party may have a regular and formal trial, and the other advantages of that mode of proceeding; or by a reference, if the parties desire to avoid the expense and delay of an action. If this Code had granted to the creditor a third remedy, he would always have had his election to pursue it; while the executor or administrator would have had no corresponding election, to compel him to resort to it. Again, the surrogates courts ought not to be unnecessarily burdened with the trial of such issues. "

Having regard to the practice and procedure adopted by our Courts, I am of the view that disputed claims should not be adjudicated upon in an inquiry relating to a judicial settlement, and I think that the learned District Judge was right when he held that the 2nd citee should establish her claim in a separate action.

I pass on to the second point in dispute.

It is true that Karainagar Estate being situated in Malaya, the Malayan Courts would have jurisdiction on questions relating to that immovable property. Even if it was sold the Malayan law would apply to the proceeds of sale; if, for example, there is a charge on the immovable property such as a mortgate or a sum due to the revenue of that country. But, that is not the question which arises here. A share of the immovable property has been sold by the executors and the proceeds brought into Ceylon. They (the executors) have continued to take the income from the rest of the estate and brought at least a part of it into Ceylon—one executor is resident here. The legatees under the Last Will who are entitled to a share of that estate, want to know what the executors have done with the proceeds of sale of part of that estate, and the income derived from the balance which they have brought into Ceylon. The executors object to disclosing anything at all regarding the proceeds of sale or the income *brought into Ceylon*. In regard to *income* Mr. Jayewardene contended that it is something which came into existence after the testators' death and is therefore not a portion of a deceased person's property within the meaning of section 540 of the Civil Procedure Code on which he strongly relied.

Section 540 is as follows :—

" If no limitation is expressed in the order making the grant, then the power of administration, which is authenticated by the issue of probate, or is conveyed by the issue of a grant of administration, extends to every portion of the deceased person's property, movable and immovable, within Ceylon, or so much thereof as is not administered, and endures for the life of the executor or administrator or until the whole of the said property is administered, according as the death of the executor or administrator, or the completion of the administration, first occurs. "

It is beyond question that an executor in Ceylon takes charge of the income derived from property *in Ceylon* under the provisions of this very section, and that he is liable to account for such income at the judicial settlement. It cannot possibly be argued that an executor cannot take charge of the income or rents derived from immovable property on the ground that those assets come into being only after the testator's death.

What then is the position in regard to income derived from a property situated outside Ceylon, which is brought into Ceylon ?

Dicey on the Conflict of Laws, Eighth Edition, at page 577, sets out Rule 90 (2) as follows :—

Rule 90 : " The following property of a deceased person vests automatically in his personal representative by virtue of an English Grant :

(1)..........

(2) any movables of the deceased which after his death are brought into England before any person has, in a foreign country in which they are situated, obtained a good title thereto under the law of such foreign country and reduced them into possession. "

Commenting on this Rule he states later at page 578 :—

" There seems little doubt that if movables of the deceased are brought to England before anyone has acquired a title to them under their *lex situs*, they will vest in the English personal representative. "

It is only a pretence to imagine that these assets have been the subject of administration in Malaya. The complaint of the citees is that they have not been accounted for either here or in Malaya. As far as one can gather the executors have done nothing in the Malayan Courts beyond getting the probate resealed. They do not deny having brought at least a part of the assets into Ceylon.

The principal Court of Administration is the District Court of Jaffna which granted probate. I take the view that once the executors bring into Ceylon proceeds of sale or the income derived from a property situated outside Ceylon such proceeds or income must be accounted for here. These are assets which they got into their hands *as executors* under the colour of the grant issued to them by the District Court of Jaffna.

Williams on Executors, 12th Edition, Volume 2, says at page 1091 :—

" Now if the deceased died domiciled in England the grant of administration in England is deemed the principal or primary one. The English personal representative has, as a rule, a right to apply to the Courts of a foreign country where there are assets for an ancillary grant for himself or his attorney. But if such a grant is

made the new administration thereunder is made subservient to the rights of all creditors whose claims are recognised by the foreign law. It is only the residuum of the foreign assets, after all such claims have been satisfied, which is transmissible and becomes assets in the hands of the English personal representative as such. "

The third and fourth points in dispute need not detain us for any length of time.

A testator appoints as his executor a person in whom he has confidence, and for that reason he entrusts to that person the duty of giving effect to his wishes as expressed in his Last Will. It is in that sense that the word " trustee " is so often used in a Last Will. In this instance the Last Will itself states in para. (2) that the " Executors and Trustees " will " hereafter be called our Trustees ". It is sufficient to say that a reading of the Last Will makes it quite clear that the two petitioners were appointed executors and entrusted with all the duties that executors must perform. There is no dual capacity, one as executors and the other as trustees. I am unable to accept the submission that by using the phrase " executors and trustees " the testator vested all the property in the " trustees ", so that, any claim by the legatees relating to those properties or the income derived therefrom, must be made by way of a separate action under the Trusts Ordinance. The testators did not, in my view, create a " trust " with the children as beneficiaries. Deed C1 to which I shall presently refer, and to which one testator was a party, shows that he intended the children to be legatees under the Will.

Lastly, there is the question of C1. The 2nd executrix had married on 11.8.37 and had been given a dowry to the value of Rs. 100,000. By C1 she renounced the rights which would accrue to her under the Last Will to the extent of Rs. 100,000, as she had already received assets to that extent in advance. I can see nothing wrong in that. I am unable to agree with the submission made on behalf of the executors that deed C1 is inoperative, on the ground that there is an amendment or variation of the Last Will.

It was also submitted that the renunciation was in favour of the testator and not the citees. But, one has to look at the true intention of the 2nd executrix when she executed C1, on receiving property to the value of Rs. 100,000. She was expecting to receive certain properties under the Last Will from her father and she renounced her rights under that Will to the extent of the benefit she obtained while her father was still alive. Though the Notary who executed the deed had used the phrase " In favour of my father ", the deed itself sets out clearly what she renounced as follows :—

" A sum of Rs. 100,000 only, out of the property available for distribution after my father's death as provided for by the said Last Will and testament."

I am of the view that the appeal must succeed on the second, third and fourth points argued before us, and the case will go back for inquiry into the application for a judicial settlement on that basis.

The Citees-Appellants are entitled to one set of costs of appeal against the Executors-Respondents.

WEERAMANTRY, J.—I agree.

Appeal mainly allowed.