

GL. 62 21, 1961

IN THE PRIVY COUNCIL

No. 3 of 1960

UNIVERSITY OF SINGAPORE
INSTITUTION OF LEGAL STUDIES

O N A P P E A L
FROM THE SUPREME COURT OF CEYLON

B E T W E E N

63688

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1. AHMED REFAI BIN ADHAM SALIH of "Salonica",
Galle Road, Colpetty
 2. ZUBAIRE SALIH BIN ADHAM SALIH of "Salonica",
Galle Road, Colpetty
 3. ADHAM BIN MOHAMED SALIH of "Salonica",
Galle Road, Colpetty
- 2nd, 3rd and 4th Defendants-Appellants

- and -

VALLIYAMMAI ATCHI of No. 247, Sea Street, Colombo
Plaintiff-Respondent

THE SECRETARY OF THE DISTRICT COURT OF COLOMBO,
Administrator de Bonis Non of the Estate and
Effects of Hadjie Ibrahim Bin Ahamed, deceased
1st Defendant-Respondent

CASE FOR THE PLAINTIFF-RESPONDENT

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1. This is an Appeal from a judgment and decree of the Supreme Court of Ceylon (Basnayake C.J. and Pulle J.) allowing an Appeal by the Respondent from a judgment and decree of the District Court of Colombo (Mr. G.M. de Silva, District Judge).

2. The Respondent (Plaintiff in the original proceedings) instituted the present action against the Appellants by his plaint dated the 22nd May, 1953.

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3. The accrual of the cause of action was thus stated in the plaint :-

"2. The plaintiff is the duly constituted executrix of the estate and effects of KM. N.

SP. Natchiappa Chettiar, deceased, and probate of the Last Will of the said deceased issued to the plaintiff in Testamentary Case No. 8802 of this Court.

3. The 1st defendant is the Secretary of this Court and was in the said capacity appointed administrator De Bonis Non of the estate and effects of Hadjie Ibrahim Bin Ahmed, deceased in Testamentary Case No. 5686 of this Court.

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4. By this Bond or writing obligatory bearing No. 2402 of the 21st May, 1935 and attested by N. M. Zaheed of Colombo, Notary Public, one Ahmed Bin Ibrahim, as executor of the Last Will and Testament of the said Hadjie Ibrahim Bin Ahmed, deceased (which said last Will and Testament was admitted to Probate in Testamentary Case No. 5686 of this Court) with the leave of Court granted to him in the said Testamentary case on the 10th April, 1935, became held and firmly bound unto the said KM. N. SP. Natchiappa Chettiar in the sum of Rs. 30,000/- lent and advanced to him the said Ahmed Bin Ibrahim as executor as aforesaid.

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5. The said Ahmed Bin Ibrahim, as executor as aforesaid after reciting that he had bound himself and his successors in office to repay the said sum of Rs. 30,000/- to the said KM. N. SP. Natchiappa Chettiar, his heirs, executors, administrators and assigns on demand and until such repayment to pay interest on the said sum of Rs. 30,000/- at or after the rate of 12 per cent. per annum payable monthly on the 15th day of each and every month, as security for the payment of the aforesaid principal and interest, in and by the said Bond and with the leave of the Court granted as aforesaid specially mortgaged and hypothecated with the said obligee and his aforewritten as a first or primary mortgage the several lands and premises with the buildings standing thereon and in the Schedule thereto fully described.

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6. The said Ahmed Bin Ibrahim as executor as aforesaid paid to the said KM. N. SP. Natchiappa Chettiar a sum of Rs. 5,000/- on account of the principal due and secured by the said Bond and the said KM. N. SP. Natchiappa Chettiar at the request of the said Ahmed Bin Ibrahim, as such

executor, and in consideration of the said payment released the two lands and premises with the buildings standing thereon described in paragraphs 3 and 4 of the Schedule to the said Bond.

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7. The said Ahmed Bin Ibrahim died on or about the 5th November, 1940, without having fully administered the estate of the aforementioned Hadjie Ibrahim Bin Ahmed and the 1st defendant was accordingly appointed administrator De Bonis Non of the said estate as averred in paragraph 3 hereof.

8. The plaintiff instituted action No. 2565/M.B. of this Court against the 1st defendant as administrator of the said estate of Ibrahim Bin Ahmed for the balance amount due on the said Bond.

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9. Decree was entered by this Court dated 7th December, 1951, and it was ordered and decreed that the said 1st defendant as such administrator do pay to the plaintiff the sum of Rs. 45,431/- together with interest on Rs. 23,522/97 at the rate of 8 per cent. per annum from 22nd November, 1949, to date hereof and thereafter on the aggregate amount of the decree at 5 per cent. per annum until payment in full.

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10. The plaintiff as she lawfully may, duly applied for execution of the said decree by seizure and sale which application was duly and in force of law allowed by order of this Court.

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11. This Court issued writ of execution of the said decree and the Deputy Fiscal, Colombo, duly caused the property and premises described in the Schedule hereto to be seized. The said property and premises formed and forms part of the estate of the said Hadjie Ibrahim Bin Ahmed, deceased, and the same is liable to be sold in execution of the said decree in the plaintiff's favour.

12. The 2nd and 3rd defendants acting by and through their father the 4th defendant as Next Friend preferred a claim in respect of the said property and premises and applied to have the same released from the said seizure.

13. On the 18th day of May, 1953, order was made upholding the said claim.

14. The plaintiff pleads that the said property and premises are liable to be sold in execution of the said decree in the plaintiff's favour and a cause of action has accordingly accrued to the plaintiff."

4. On the application of the Respondent the 4th Defendant-Appellant was appointed Guardian-ad-litem over the 2nd and 3rd Appellants minors, who are his sons. 10

5. The Appellants in their answer dated the 25th September, 1953 stated :-

"1. Answering paragraph 1 of the plaint the 2nd, 3rd and 4th defendants admit the averments therein contained save and except that a cause of action has accrued to the plaintiff as alleged in the plaint.

2. These defendants admit the averments in paragraph 2 of the plaint. 20

3. These defendants deny the averments in paragraph 3 of the plaint.

4. These defendants admit the averments in paragraphs 4 and 5 of the plaint.

5. These defendants are unaware of the averments in paragraph 6 of the plaint and therefore denies them.

6. Answering paragraph 7 of the plaint these defendants admit that Ahmed Bin Ibrahim died on or about 5th November, 1940, but deny the rest of the averments in the said paragraph. 30

7. Answering paragraph 8 of the plaint these defendants admit that the plaintiff instituted action No. 2565/M.B. of this Court and purported to do so against the Secretary of the District Court of Colombo as administrator De Bonis Non of the estate and effects of Hadjie Ibrahim Bin Ahmed, deceased, but the defendants specially deny that the said action was against any duly appointed legal representative of the estate of the deceased. 40

10 8. The defendants deny the averments in paragraph 9 of the plaint but admit that a decree was entered in the said action purporting to be against the Secretary of the District Court of Colombo as administrator De Bonis Non of the estate and effects of Hadjie Ibrahim Bin Ahmed, deceased, in the terms set out in the said paragraph. These defendants specifically deny the validity of the said decree and/or that it is valid or binding upon or against the estate of the deceased Hadjie Ibrahim Bin Ahmed. These defendants further state that the said decree is void in law and of no force or avail as against the estate of the said Hadjie Ibrahim Bin Ahmed inter alia for all or any of the following reasons :-

10 (a) The estate of the deceased Hadjie Ibrahim Bin Ahmed was not duly or validly represented in the said action.

20 (b) Although the plaintiff instituted the above action as a hypothecary action, the above action ceased to be such upon the withdrawal or waiver by the plaintiff of the hypothecary reliefs; in the circumstances and/or otherwise the entering of a decree absolute in the first instance ex parte is irregular and void in law.

30 (c) The said decree was entered irregularly and without a valid and proper ex parte hearing, and was therefore entered without jurisdiction.

(d) The decree was entered per incuriam on a prescribed bond or debt.

40 9. Answering paragraph 10 of the plaint these defendants admit that the plaintiff applied for execution of the said decree and that the application to execute the decree was allowed. These defendants deny the rest of the averments in the said paragraph.

10. Answering paragraph 11 of the plaint these defendants admit :-

(a) that the Court issued the said writ and

(b) that the Deputy Fiscal caused the property referred to therein to be seized.

These defendants deny the rest of the averments in the said paragraph.

11. These defendants admit the averments in paragraphs 12 and 13 of the plaint.

12. The defendants deny the averments in paragraph 14 of the plaint."

6. In paragraph 13 of the said Answer the Appellants stated :- 10

- "(a) that the property described in the schedule to the plaint was specifically devised by the last will codicil of the deceased to Ahmed Bin Ibrahim;
- (b) by Deed No. 2908 dated the 13th December, 1938, and attested by N.M. Zaheed, Notary Public, the executor of the said Last Will and Testament of the said deceased Hadjie Ibrahim Bin Ahmed conveyed the said property to the said Ahmed Bin Ibrahim personally; 20
- (c) the said Ibrahim by Deed No. 2909 dated the 13th December, 1938, and attested by the same Notary conveyed the said property to Mohamed Ghouse;
- (d) the said Mohamed Ghouse by Deed No. 1079 dated 21st December, 1944, and attested by M. M. A. Raheem, Notary Public, conveyed the same to Sithy Nafeesathul Zabeediya; 30
- (e) the said Sithy Nafeesathul Zabeediya by Deed No. 2682 dated 9th May, 1952, conveyed the same to the 2nd and 3rd defendants. The 2nd and 3rd defendants are thus the owners of the said property;
- (f) the 2nd and 3rd defendants and their predecessors in title have been in undisturbed and uninterrupted possession of the said property for a period of over 40

ten years by a title adverse to and independent of all others and the 2nd and 3rd defendants have thereby acquired a prescriptive title to the said property."

7. In paragraph 14 of the said answer the Appellants stated :-

10 "(a) that the plaintiff is not entitled in any event to have the said property sold in execution of the said decree without excussing the properties specifically mortgaged by the said bond;

(b) the plaintiff's claim if any is prescribed."

8. The Appellants therefore prayed that the Respondent's action be dismissed with costs.

9. At the trial of the action the following issues were raised and answered as under :-

ISSUES.

ANSWERS.

20 1. Was the decree entered in plaintiff's favour in case No.2565/M.B. of this Court against the estate of Hadjie Ibrahim Bin Ahmed which is being administered in case No.5686/T. of this Court.

Yes.

2. Is the property described in the Schedule to the plaint liable to be seized in execution of the decree entered in case No. 2565/M.B. ?

No.

30 3. (a) Is the Secretary of the District Court the duly appointed administrator De Bonis Non of the estate of Hadjie Ibrahim Bin Ahmed.?

Yes.

(b) Was the appointment, if any, of the Secretary of this Court as administrator made without jurisdiction ?

No.

40 4. (a) Was the said action No. 2565/M.B. of this Court instituted against the duly appointed legal representative of the estate of the deceased ?

Yes.

(b) Was the estate of the deceased duly and validly represented in case No. 2565/M.B. ?

Yes.

ISSUES contd.

ANSWERS
contd.

5. Was the decree in case No. 2565 entered against any duly appointed legal representative of the estate of the deceased ?

Yes.

6. Is the said decree binding on the estate ?

Yes.

7. Is the decree entered in the said action void and to no force or avail against the estate for all or some of the reasons stated in paragraph 8 (b) and (c) and (d) of the answer ?

Does not
arise. 10

8. Did the property described in the Schedule to the plaint form part of the estate of the deceased at the date of the seizure ?

Yes.

9. Was the said property specifically devised by the last will and codicil of the deceased Ahmed Bin Ibrahim ? (This issue is admitted by Mr. Chelvanayagam. It is also admitted that the executor of the last will conveyed the premises by Deed No. 2908 of 13.12.38 to Ahmed Bin Ibrahim).

Yes. 20

10. Did the title of the executor pass to the 2nd and 3rd defendants on the title set out in the answer ?

Yes.

11. If so are 2nd and 3rd defendants entitled to the property ?

Yes. 30

12. Are 2nd and 3rd defendants entitled to the said property by prescriptive possession ?

No.

13. In any event is plaintiff entitled to have the property sold in execution of the decree without discussing the property specifically mortgaged by bond No. 2402 of 31.5.35 ?

No.

14. Was the decree in the said action obtained by fraud and collusion among all or some of the parties and by all or any of the things stated in paragraph 15 (a) of the answer ?

No. 40

ISSUES contd.

ANSWERS
contd.

15. If all or some of the issues 3 to 14 are answered in favour of 2nd 3rd and 4th defendants can plaintiff maintain this action ? No.
16. Did Mohamed Ghouse by Deed No. 1079 of 1941 convey the property in question to Zabeediya in consideration of her marriage ? Yes.
17. Did Zabeediya obtain the conveyance bona fide ? Yes.
18. Is it open to 2nd, 3rd and 4th defendants to question the validity of the decree in case No. 2565 on the grounds set out in issues 7, 13, 14, or any of the said issues ? No.
19. Is the plaintiff's claim prescribed ? No.
- 20 10. In the course of his Judgment the learned District Judge (Mr. G. M. de Silva) stated :-
- 30 "It is submitted that the Secretary of the District Court who was sued in the mortgage bond action was not a properly appointed legal representative of the estate of Hadjie Bin Ahmed, and the decree entered in that case does not bind the estate. This submission is made on two grounds; first that no letters of administration at any time had been issued to Mr. Palliaguru to clothe him with the authority of an administrator, second, that in any event, Mr. Palliaguru should have been sued in his personal and not in his official capacity. Section 520 of the Civil Procedure Code empowers a Court to appoint the Secretary of the Court as administrator where there is no fit and proper person to be so appointed. The question arises when a Secretary is appointed administrator whether every successor of his in office should be appointed administrator over again and fresh letters of administration issued to him or such successor automatically becomes administrator by virtue of his office. The answer to this question
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depends on whether it is the individual who holds the office of Secretary who is appointed or the person who is functioning as Secretary for the time being in his official capacity. This question came up before the Supreme Court in Samarasekere vs. The Secretary District Court, Matara (51 N.L.R. 90) where it was held that Section 520 of the Civil Procedure Code contemplates the appointment as administrator of the Secretary of the Court and not of the individual holding the office, Basnayake, J. in the course of his judgment states :-

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'Although the Secretary of the Court is not a corporation sole in the true sense of the term, having regard to the fact that the Civil Procedure Code provides for the appointment of the Secretary of the Court as administrator, it may safely be assumed the legislature intended that the Secretary of the Court should possess all such attributes of a corporation sole as are necessary for the proper discharge of all functions qua administrator'.

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The case reported in 14 N.L.R. 100 cited by counsel for the defendants does not in any way conflict with this view. In this view of the matter when once the Secretary of the Court has been appointed administrator and letters of administration issued to him his successor in office automatically takes his place as administrator and no fresh letters need be issued to him. In this case Mr. Kolandavelu was the first official administrator and letters were issued to him on 12.10.44. Although letters have been addressed to him as individual it must be deemed that they were addressed to the Secretary of the District Court as contemplated in Section 520 of the Civil Procedure Code. There was no necessity for a fresh appointment after his retirement and fresh applications and appointments made after the retirement of each Secretary must be considered redundant. The Secretary of the District Court, Colombo, was the administrator De Bonis Non of this estate when the mortgage action was instituted and the action against him, therefore, is properly constituted and the decree entered in the case binds the estate."

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11. The learned District Judge went on to say -

10 "It is pointed out that when the plaintiff in the mortgage action agreed to release all mortgage property and abandoned his claims for a hypothecary decree a Decree Nisi and not a Decree Absolute should have been entered in the first instance as provided for by Section 85 of the Civil Procedure Code. Therefore the decree entered in the mortgage action is bad. Lord Justice James in Gavin vs. Hadden, a case decided by the Privy Council, states as follows:-

'It is not the province of a fresh suit to show irregularity or error of judgment or of law in another suit. Otherwise there would be no end of litigation.' (Moore's Reports Vol. 8, p. 116).

20 In my view the entering of a decree absolute in the mortgage action is only an irregularity and cannot be made the ground of a collateral attack on the decree. It would be otherwise if fraud in obtaining the decree is alleged."

12. The learned District Judge went on to say :-

30 "The next question is whether the property seized is liable to be sold in execution of the decree entered in the mortgage action. This property is situated at Keyzer Street, Pettah, now bearing assessment No. 238, and by codicil of 21.1.35 it was specially devised by the testator to his son Ahmed Bin Ibrahim, the executor. He by Deed No. 2908 (2D29) of 13.12.38 as executor, conveyed the property to himself. About this time he had granted conveyance of other lands to the other beneficiaries to whom they were specially devised. The Testamentary proceedings had commenced in 1931 and by 1938 they had almost come to an end. Only the final account of the executor had to be filed. Ahmed Bin Ibrahim gifted this property by Deed No. 2909 of 40 13.12.38 to his son Mohamed Ahmed Ghouse. Ahmed who on the occasion of the marriage of his sister, Zubaida, with Mohamed Sally gifted the same to his sister 2D32 of 1941.

She has now transferred this property to her two children the 2nd and 3rd Defendants in the case. The first question is whether the

estate of Hadjie Bin Ahmed is liable for the debt incurred by the executor in the course of the administration of the estate. Money had not been raised on the mortgage bond for his personal use. The affidavit P3a submitted by him with his application for the Court's sanction to raise this loan negatives such a suggestion. The attestation clause in the mortgage bond shows that the entire consideration of Rs. 30,000/- was deposited to the credit of case No. 42566 of this Court which had been instituted by a creditor of the testator. Thus there cannot be any doubt that this Rs. 30,000/- went to pay the debts of the testator. The Privy Council in Gavin vs. Hadden, already referred to, has held that for the moneys borrowed bona fide by executor or administrator for the purpose of the estate a suit may be sustained against him in his representative character and to have judgment and execution against the testator's estate. It is a well-established principle of our law that an heir of a deceased person or a devisee of property under his Last Will inherits or takes such property subject to the payment of debts of the estate. A transferee of property from an heir or a devisee takes a defeasible title. In Suriagoda vs. Appuhamy (43 N.L.R.8), Soertsz, J. held that the transfer of property by the heirs of an estate is subject to the payment of debts of the estate if without recourse to the property transferred the debt cannot be satisfied. In Albert Perera vs. Mariamulla Kanniah (45 N.L.R. 335), Kretser, J. also expressed the same view except that he was of opinion that a creditor had the right to have recourse to any land of the estate he chooses."

13. The learned District Judge referred to the action of the Respondent in seeking the declaration asked for in the plaint in the following terms :-

"It seems to be unfair that the plaintiff should give up his right to sell the lands hypothecated to secure his debt and go after other lands which at one time belonged to the estate but has since passed into other hands. The question is not the fairness or unfairness of the matter, but whether the law allows it. A creditor who holds a hypothecate over immovable property of his debtor has two actions available to him; an action in rem and

an action in personam. He could combine both these actions in one suit and having done so it is open to him to ask for a decree on the personal action only and a money decree will be entered in his favour. He would then be entitled to discuss any property of the debtor. Whereas, if he had obtained a hypothecary decree he would have had to discuss the mortgage property first before he could have recourse to other property of the debtor. Still the question remains whether a creditor who deliberately releases the mortgage property can seek to discuss a land which a testator had specially devised to the executor and whose title had now vested in a third party. The facts of this case are different from those of Albert Perera vs. Mariamulla Kanniah where Kretser, J. held that the creditor of an estate may follow lands sold by an heir even when there are other assets of the estate. There the creditor was an unsecured creditor. Here, there were other assets available and they were hypothecated to the plaintiff to secure his debt. In the 43 N.L.R. case Soertsz, J. states as follows :-

'It is settled law that transfers by the heirs of an estate are subject to debts of the estate if without recourse to lands transferred the debts cannot be satisfied.'

This dictum applies with greater force in this case where the creditor was entitled to seek satisfaction of his debt by discussing the two lands specially secured by the mortgage bond. In my judgment the plaintiff having released the mortgage property cannot now seek to sell the land seized which has vested in the 3rd and 4th defendants."

14. The learned District Judge next dealt with the issue of prescription :-

"It was also suggested that the 3rd and 4th defendants have acquired title to this land seized by prescriptive possession. One can acquire prescriptive title to a land against a person who is entitled to it. In this case the 3rd and 4th defendants are the owners of the land and they cannot therefore acquire prescriptive title to their own land."

15. The learned District Judge held that the land seized and described in the Schedule to the Plaint was not liable to be sold under the Writ issued in case No. 2565 and he therefore dismissed the Respondent's action with costs.

16. The Respondent thereupon appealed to the Supreme Court of Ceylon on the following grounds :-

"(a) The said judgment is contrary to law and against the weight of evidence adduced in the case. 10

(b) The learned Judge is wrong in holding that the plaintiff having released the mortgaged property could not now seek to sell the land seized. The plaintiff as obligee on the mortgage bond sued on was entitled to a money decree with or without adding a hypothecary decree. The release of the mortgage property does not in any way reduce the plaintiff's rights under the money decree which she has obtained against the estate. 20

(c) The plaintiff's decree being against the estate of Ibrahim Bin Ahmed, it was executable against the property that was seized which formed part of the said estate. In any event the defendants in this case have not acquired any right whereby they could prevent the said execution."

17. The appeal in the Supreme Court was heard by Basnayake, C.J., and Pulle, J. 30

18. In the course of his Judgment Pulle, J. stated:-

"The learned trial Judge relied on the case of Albert Perera vs. Marimuttu Caniah (1) for the view which he has expressed that had the debt been an unsecured one he would have had no difficulty in holding with the appellant. It was submitted at the argument before us that this case was conclusive against the 2nd and 3rd defendants and that the circumstances that in the course of action No. 2565/M.B. the lands numbered 1 and 2 had been released did not affect the appellant's undoubted right to obtain a money decree on the mortgage bond and to exercise the right of seizing and selling 40

the property in question which formed part of the estate of the testator. That a creditor of the testator, as opposed to a creditor of the executor can in certain circumstances exercise such a right is not challenged. The authorities reviewed in *Albert Perera vs. Marimuttu Caniah* (1) established that position. De Kretser, J., said at p. 338 of a creditor,

10 'In the deceased's lifetime he could
levy against any of his properties and
there is no reason why his rights should
diminish because of the deceased's death.'

20 If the proposition be correct that if, for
example, the executor had for purposes of paying
the debts of the estate borrowed money on a
promissory note and the appellant had obtained
thereon a money decree, the 2nd and 3rd
defendants could not have resisted the sale of
the property seized to satisfy the decree,
there was no reason why she should be denied
the same right of execution on a money decree
obtained on a bond. Learned counsel who
appeared for the 2nd and 3rd defendants
evidently appreciated the force of this
argument and submitted to us that the position
on which it is based is erroneous. His main
contention was that the bond did not as between
the estate and the mortgagee create the
relationship of debtor and creditor and the
rights acquired by the mortgagee under it were
to sell only the properties hypothecated or to
proceed against the executor personally or
against his legal representative. Mr. Nadesan
also referred to certain transactions relating
to the property in suit subsequent to the
mortgage which in his submission rendered it
inequitable that it should be made liable for
the debt."

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40 19. Pulle, J. next referred to the liability arising
out of act of borrowing made by an executor after
the death of the testator :-

"Reliance was placed on the following passage
in volume 16 (3rd ed.) of Halsbury's Laws of
England, p. 368, para. 713 :

'The remedy of a creditor for a debt
contracted after the death is against the
personal representative and not against the

estate; but the creditor is in equity entitled to stand in the place of the personal representative and to claim the benefit of his right to an indemnity.'

The passage quoted occurs under the heading "Power to Carry on the Business of the Deceased" and an authority relied on is Farhall vs. Farhall (2). In this case Mellish, L.J., stated the proposition as follows :-

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'It appears to me to be settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator.'

In this case the London and County Bank claimed to prove against the estate of one Richard Farhall the sum of £987 being part of the money lent to his widow in her capacity of executrix. Admittedly a large part of the money which was borrowed by the executrix from the Bank on the security of deeds relating to the testator's estates had been misapplied by her. On the facts the position here is different. The money was raised with the express approval of the Court and there cannot be any doubt that the entirety of the amount was used to discharge a part of the liabilities of the estate. In the mortgage bond it is recited that the sum of Rs. 30,000/- was borrowed by the obligor in his capacity "as the Executor of the Last Will and Testament and Estate of Hadjie Bin Ahmed." It also recited "And for further securing unto the said obligee his heirs executors administrators and assigns the payment of all moneys payable under by virtue or in respect of these presents I the said Obligor do hereby with the leave of Court granted to me on the tenth day of April, 1935, in the said Testamentary Proceedings No. 5686 of the said District Court of Colombo specially mortgage and hypothecate to.....etc."

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20. Pulle, J. continued :-

"It seems to me to be unreal to attempt to maintain that in the transaction that resulted

in the execution of the mortgage bond the executor incurred only a personal liability which exposed his properties to be sold up in the event of the mortgagee obtaining a money decree. Did the executor in his transaction in question indubitably represent the estate? If the answer is in the affirmative, I fail to see any convincing reason why the estate should not be liable in the first instance to satisfy a debt incurred for the purpose of getting rid of some of its liabilities. Natchiappa Chettiar by lending Rs. 30,000/- acquired in full measure the right of a mortgagee who could in one and the same action obtain both a money and hypothecary decree. Provided he did not act fraudulently or collusively with any one benefiting under the testator he was perfectly free to release from the mortgage any of the properties hypothecated and to content himself with only a money decree. It seems incongruous that if the mortgagee had obtained both a money and hypothecary decree, it should be deemed that the money decree is one enforceable against the executor personally while the hypothecary decree should bind the estate."

21. Pulle, J. next dealt with the case of Theodoris Fernando vs. W.L. Rosalind Fernando submitted by the Appellant :-

"In Theodoris Fernando vs. W.L. Rosalind Fernando et al (6) the property of a testator was transferred shortly after his death by the executrix to their daughter on the day of her marriage in pursuance of a trust alleged to have been created by the Will under which the property was to be given to the daughter on a division of the estate or at marriage. It was held that the transfer was made in consideration of marriage and that it was not liable to be seized and sold for a judgment debt obtained against the executrix in her representative character, inasmuch as the rest of the estate was sufficient to meet the claim. I may say that I cannot reconcile this decision with the case of Albert Perera vs. Marimuttu Caniah (1) which has been cited earlier. I prefer to follow the latter. It throws an undue burden on a creditor who has obtained a decree to enter on an investigation of the financial position of the estate, and further to

determine which of the immovable assets inventorized have been subject to transfers. He would further have to investigate whether valuable consideration had been paid to the transferors without perhaps receiving the slightest assistance from the terms of the transfer. In the present suit the conveyance in the first instance by the executor-devisee to his son 2D30 of 13th December, 1938, was a gift pure and simple and I am inclined to doubt that the Case of Theodoris Fernando vs. W.L. Rosalind Fernando et al (6) assuming it to state the legal principle correctly, can protect the property from seizure." 10

22. Pulle, J. concluded :-

"The mortgage bond was executed in 1935. It is put in suit in 1949 and in the course of the proceedings the appellant agrees with two intervenients to release the only security then left, namely, the lands numbered 1 and 2. Probably, in the belief that the lands originally mortgaged were more than adequate security for the debt of Rs. 30,000/- and interest the executor conveyed the property in suit to his son who in turn gave it as dowry to the executor's daughter, and from the daughter it passed to her children. Fourteen years after the execution of 2D30 the property is seized. In 1938 Natchiappa Chettiar himself lent money to Mohamed Ghouse on the security of the very property in suit and the mortgage was redeemed in 1949. Despite these facts I regret I can lay hold of no principle by which judgment can be given in favour of the 2nd and 3rd defendants. I would accordingly allow the appeal with costs, here and below." 20 30

Basnayake, C.J. agreed with Pulle, J.

23. The Appellant thereupon took steps to Appeal to Her Majesty in Council. Conditional leave was granted on the 2nd of January, 1958 and Final Leave on the 10th March, 1958. 40

24. The Respondent humbly submits that this appeal should be dismissed, with costs, for the following among other

R E A S O N S

- (1) BECAUSE the action was properly constituted;
- (2) BECAUSE the estate of the deceased Ibrahim Bin Ahmed was duly represented in case No. 2565/M.B.;
- (3) BECAUSE there was a valid decree in favour of the Respondent;
- (4) BECAUSE the instant action was one for the execution of the said decree;
- 10 (5) BECAUSE execution was sought to be levied on property which formed part of the estate of the deceased above-named;
- (6) BECAUSE the said property was, legally, liable to be sold in execution of the said decree;
- (7) BECAUSE the judgment of the District Court was wrong;
- (8) BECAUSE the judgment of the Supreme Court is right.

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FRANK SOSKICE.

SIRIMEYAN AMERASINGHE.

No. 3 of 1960

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N

1. AHMED REFAI BIN ADHAM SALIH of
"Salonica", Galle Road, Colpetty
 2. ZUBAIRE SALIH BIN ADHAM SALIH of
"Salonica", Galle Road, Colpetty
 3. ADHAM BIN MOHAMED SALIH of
"Salonica", Galle Road, Colpetty
- 2nd, 3rd and 4th Defendants-
Appellants

- and -

VALLIYAMMAI ATCHI of No. 247, Sea
Street, Colombo Plaintiff-
Respondent

THE SECRETARY OF THE DISTRICT
COURT OF COLOMBO, Administrator
de Bonis Non of the Estate and
Effects of Hadjie Ibrahim Bin
Ahamed, deceased 1st Defendant-
Respondent

CASE FOR THE PLAINTIFF-RESPONDENT

LEE and PEMBERTONS,
11, South Square,
Gray's Inn,
London, W.C.1.