

ORIGINAL CIVIL.

Before Panckridge J.

MACDONALD

v.

WILSON*.

1939

July 21, 24.

Jurisdiction—*Originating summons—Accounts against agents—Letters Patent, 1865, cl. 12—High Court Rules (Original Side), Ch. XIII.*

The Court has no jurisdiction to entertain an Originating Summons unless it would have jurisdiction to make an administration-decree with regard to the estate in respect of which relief by Originating Summons is sought.

Where the will of a testator was executed outside the jurisdiction and the assumption by the executors was registered at Edinburgh, in the absence of leave obtained under cl. 12 of the Letters Patent, the High Court will not entertain an Originating Summons to determine questions arising out of the will.

A claim for accounts by a beneficiary or trustee against the agents of trustees cannot be determined by an Originating Summons.

Semble. Questions of overcharges and debits made by trustees against the trust estate can be properly dealt with in a common account between the trustees and beneficiaries and may therefore be raised by Originating Summons.

ORIGINATING SUMMONS.

The facts of the case appear fully from the judgment.

Isaacs for the trustee respondents. The Court has no jurisdiction to entertain this Summons. It is well settled that proceedings by Originating Summons are suits within the meaning of cl. 12 of the Letters Patent. *Provas Chandra Sinha v. Ashutosh Mukherji* (1) and *Vedabala Debee v. Official Trustee of Bengal* (2). See also the general provisions of Chap. XIII of the Original Side Rules.

*Originating Summons in Suit No. 288 of 1938.

(1) (1929) I. L. R. 56 Cal. 979, 984. (2) (1935) I. L. R. 62 Cal. 1062, 1065.

This is really in the nature of an administration-suit by a more summary procedure. Williams on Executors, 12th Ed., pp. 1259-60; Annual Practice, notes to O. 55, r. 3. It is not a suit for land and the Court has jurisdiction to try it if the cause of action arose wholly or partly within the jurisdiction. *Nistarini Dassi v. Nundo Lall Bose* (1) which was affirmed on appeal (2) and later approved by the Privy Council (3); *Srinivasa Moorthy v. Venkata Varada Ayyangar* (4) which also was affirmed by the Privy Council (5); *Krishnadoss Vithaldoss v. Ghanshamdoss* (6); *Vedabala Debee's case* (*supra*).

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In this case the trustees all reside outside the jurisdiction and therefore the Court has no jurisdiction upon that basis. *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (7).

In this case the testator was domiciled in Scotland and died at Harrogate, probate was granted in Scotland, all moveable assets are in Scotland or in England, and no immoveable property is within the jurisdiction and the administration of the estate is being carried out in Scotland. Hence no part of the cause of action arose within the jurisdiction and the Court will not entertain the Summons. *Re Fuller*. (8)

As against Barry & Co., these proceedings are entirely misconceived, as they are only agents to the trustees and any relief against them must be under the contract of agency. Therefore the allegations against them cannot found any jurisdiction.

Alternatively, some essential parts of the cause of action arose outside the jurisdiction and leave

(1) (1899) I. L. R. 26 Cal. 891.

(2) (1902) I. L. R. 30 Cal. 369.

(3) (1905) I. L. R. 33 Cal. 180;
 L. R. 32 I. A. 193.

(4) (1906) I. L. R. 29 Mad. 239.

(5) (1911) I. L. R. 34 Mad. 267;
 L. A. 38 I. A. 129.

(6) [1925] A. I. R. (Mad.) 1034.

(7) (1874) 13 B. L. R. 91.

(8) (1853) 2 E & B. 573;
 118 E. R. 882.

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under cl. 12 of the Letters Patent has not been obtained. Therefore, the Court has no jurisdiction to entertain this Summons.

Further, the facts complained of in this Summons are failure to pay income to the *cestui que* trust by reason of improper deductions and overcharges against the income. These, if established, amount to breach of trust for which the appropriate remedy is by suit and the Originating Summons is not maintainable. In re *Weall. Andrews v. Weall* (1); *Dowse v. Gorton* (2).

K. B. Bose for the respondent Barry & Co. Quite apart from the question of jurisdiction, Barry & Co. are merely agents of the trustees and any relief against them, for any act, of omission or commission, must depend upon the contract of agency and cannot be determined by means of an Originating Summons. These proceedings are entirely misconceived.

As a beneficiary the plaintiff can have no claim against the agents of trustees.

Barwell for the plaintiff. The Court has ample jurisdiction to try this case as the whole of the cause of action arose within its jurisdiction. The debits and overcharges complained of were made in Calcutta, inspection of accounts can be and ought to be given in Calcutta and money is payable to the plaintiff out of funds in Calcutta.

The overcharges and deductions complained of are made in the books of Messrs. Barry & Co. and therefore they are proper parties to this Summons.

Whether such deductions are permissible in law can properly be determined by an Originating Summons. *Vide* Original Side Rules, Chap. XIII, r. 1(g).

(1) (1889) 37 W. R. (Eng.) 779.

(2) [1891] A. C. 190, 202.

PANCKRIDGE J. This is an Originating Summons taken out by Mrs. Anne Kerr Macdonald, the widow of Robert Hampton Macdonald, who died at Harrogate, England, in 1922, leaving a will dated March 8, 1920. The testator was domiciled in Scotland, and in the concluding passages of his will he declared that it should be construed and given effect to according to the law of that country.

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By the will, the testator appointed the plaintiff a trustee in conjunction with three other persons, the defendant, Alexander Maurice Wilson, who is described as an advocate residing at Aberdeen, the defendant, Erskine Macdonald Aird, residing at Glasgow, and the defendant, Robin Hampton Erskine Aird, described as a tea planter of Rupai Estate, Doom Dooma, Upper Assam.

The testator, after directing payment of his debts and funeral expenses, and after giving certain pecuniary legacies, directed the trustees to hold his estate in trust for payment to the plaintiff, should she survive the testator, of the free income of the rest, residue and remainder of his estate, heritable and moveable, during all the days and years of her life. There are directions as to the division and disposition of the estate on the death of the plaintiff.

The testator and the plaintiff were residing at Harrogate at the time of his death, and the plaintiff thereafter continued to reside there for some time.

The testator's estate comprises a tea garden in Assam known as the Titadimoro Tea Estate. Of that estate the defendants, Messrs. Barry & Co., are Managing Agents, but I am told that there is no written Managing Agency Agreement. The fact is that they managed the estate during the testator's lifetime, and have continued so to do after his death.

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The Summons was presented and filed on February 20 of this year, as was also plaintiff's affidavit in support.

The plaintiff states that between 1931 and 1938 her co-trustees have by a majority sanctioned the carrying out of various works upon the Titadimoro Tea Estate, which she regards as being in the nature of capital expenditure, and have also sold certain machinery being part of the trust property, and purchased new as well as other machinery, and arbitrarily forced her to share in meeting all this expenditure by means of deductions from the income payable to her under the terms of the trust.

She also complains that on various occasions one or other of her co-trustees has visited her while she has been living at Harrogate, and that they have unjustifiably debited their travelling expenses against her income, although the business of the trust did not require them to make the journeys in respect of which the expenses were incurred.

She also complains that in 1936 the defendant, Robin Hampton Erskine Aird, travelled from Assam to Calcutta and met her there on her arrival. She says that the other trustees are now debiting her with Mr. Aird's travelling expenses from Assam although she did not request him to come to Calcutta to meet her, and indeed had purposely refrained from acquainting him of her intention to visit India, because she desired to see things for herself.

Finally, she complains that the defendants, Messrs. Barry & Co., although she has requested them to provide her with an opportunity and all proper facilities for inspection of the accounts of the tea estate, have consistently refused to do so.

The Summons asks for the decision of the Court on various questions, amongst others whether the

trustees are at liberty to meet capital expenditure upon the trust property so as to impose on the life-renter or tenant for life a diminution of income without her consent or the sanction of the Court, and she asks similar questions with regard to the travelling expenses with which she has been debited.

She also asks whether she as beneficiary or trustee is entitled to examine the accounts maintained by the defendants, Messrs. Barry & Co., and whether she is entitled to inspect the tea estate.

There is a prayer for a direction on the trustees to furnish full and proper accounts, and a prayer that the trustees and Messrs. Barry & Co. may be directed to give her inspection of the relative books.

Mr. Isaacs appearing for the defendant trustees has urged, first, that the Court has no jurisdiction, and secondly, that the Summons is not maintainable.

With regard to the question of jurisdiction I have come to the conclusion that Mr. Isaacs' contention is well founded. It is now settled that Chap. XIII of the Rules and Orders of the Original Side, which governs the procedure with regard to Originating Summons, must be read subject to the provisions of cl. 12 of the Letters Patent, and it follows that the Court has no jurisdiction to entertain an Originating Summons unless it would have jurisdiction to make an administration-decree with regard to the estate in respect of which relief by Originating Summons is sought.

Accordingly, unless either the cause of action in the hypothetical administration-suit can be said to arise wholly within the local limits of the jurisdiction, or, in the alternative, unless part of the cause of action arises therein and leave of the Court is obtained, the Originating Summons must be dismissed. In this case no leave under cl. 12 was obtained.

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The definition of "cause of action" as the bundle of facts which the plaintiff must prove in order to succeed is well known, and where it is sought to have the estate of a deceased person administered by the Court in terms of that person's will, the execution of the will and the grant of probate both appear to me to be essential constituents of the bundle.

In this case the will was executed outside the jurisdiction, and the assumption by the executors, including the plaintiff herself, was registered at Edinburgh on July 31, 1929. I assume that this registration of assumption is under the law of Scotland the equivalent of a grant of probate.

Accordingly it seems that there are at least two facts, which took place in Great Britain outside the jurisdiction of the Court, and which it is necessary for the plaintiff to prove before she can succeed.

As no leave has been obtained under cl. 12, the circumstance that a part of the cause of action arose outside the jurisdiction is fatal. I do not express an opinion whether any part of the cause of action can be said on the affidavit in support of the Summons to have arisen within the jurisdiction. It may be necessary to decide that hereafter.

With regard to Messrs. Barry & Co. Mr. Bose has adopted Mr. Isaacs' arguments on the jurisdiction, and he has also submitted that as regards his clients an Originating Summons cannot be maintained. In my opinion that submission is justified, because I do not think that against Messrs. Barry & Co. the plaintiff can be said to have a claim either as a trustee or as a beneficiary. As she is one of the trustees, Messrs. Barry & Co. are her agents, but her relation to them is that of a principal to an agent, not of a trustee to a *cestui que* trust, or of a *cestui que* trust to a trustee.

Mr. Isaacs has also argued that as against his client these proceedings are not maintainable as an Originating Summons. Without deciding that

question I feel bound to say that his arguments fail to convince me, because I am disposed to think that these questions of overcharges and debits against the income are matters which can be properly dealt with in a common account between the trustees and the beneficiary; but in my view the question of jurisdiction is fatal, and the Summons must accordingly be dismissed with costs.

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There will be one set of costs for the trustee defendants to be recovered by them in the first instance out of the estate.

Messrs. Barry & Co. will also be entitled to their costs.

All the parties undertake not to object to the affidavits filed being used again in case a fresh Summons is taken out by the plaintiff.

Summons dismissed.

Attorneys for applicant: *A. P. Roy & Co.*

Attorneys for respondents: *Orr Dignam & Co.,*

T. C. Hornby.

S. M.