ORIGINAL CIVIL.

Before Mr. Justice Jardine.

1886. *May* 4; *June* 14, 18.

AMIR JA'N, *NA'IKIN*, PLAINTIFF, *v.* L. W. J. RIVETT-CARNAC, ADMINISTRATOR GENERAL OF BOMBAY, AND OTHERS, DEFENDANTS.*

Administrator General—Act II of 1874, *Sec.* 18—*Costs—Conflicting claims to property in possession of Administrator General under order of Court—Costs of Administrator General in a suit to recover such property, how paid—Expenses of taking care of such property incurred by Administrator General.*

The plaintiff and defendants Nos. 2, 3, 4 and 5, were the daughters of one S., who died in Bombay on the 9th November, 1885. Shortly after the death of S. the plaintiff went to Delhi, leaving certain ornaments and other valuables belonging to her locked up in a box, which also contained certain property which had belonged to her mother S. The box remained in the house in which the plaintiff had resided with S. The key of the box was taken by the plaintiff to Delhi. During the plaintiff's absence, one of her sisters, (defendant No. 3), presented a petition to the High Court, alleging that all the property in the said box belonged to her deceased mother S., and was in danger of being misappropriated by the plaintiff. Upon these allegations the Court on the 16th January, 1886, made an order, under section 18 of Act II of 1874, directing the Administrator General to "take possession of the property of S., and hold the same, subject to the further order of the Court." Pursuant to this order the Administrator General took possession of the box and all its contents. The plaintiff, admitting that some of the ornaments in the box had belonged to the estate of S., sued to recover the remainder of the ornaments therein, which she alleged belonged to herself, and which she specified in a separate list. Defendant No. 3 denied her claim, and contended that all the property belonged to the estate of S. The other sisters of the plaintiff (defendants Nos. 2, 4 and 5) admitted the plainti[illegible] claim. The Court held that the plaintiff had proved her claim, and directed th[illegible] her property should be delivered over to her by the Administrator General.

Held, as to costs, that the Administrator General was in the position of a interpleading plaintiff, and that he was entitled, in the first instance, to recover his costs from the losing claimant (defendant No. 3). Failing recovery from defendant No. 3, he was entitled to be paid his costs out of the estate of S. and, if and in so far as that estate proved insufficient, he was entitled to recover them out of the property which was the subject-matter of the suit.

Held, also, that the costs of the Administrator General included the expenses incurred by him in taking care of the property entrusted to him by the order of the Court; such expenses to be apportioned according to the amounts respectively belonging to the estate of S. and to the plaintiff, and to be paid accordingly out of the said estate and out of the property of the plaintiff.

THE plaintiff sued the defendants to recover certain property, consisting of ornaments and other moveables, which had been

*Suit No. 76 of 1886.

taken possession of by the first defendant as Administrator General under an order of Court dated the 16th January 1886.

The plaintiff and the second, third, fourth and fifth defendants were *náikins* residing in Bombay. The plaintiff and defendant No. 5 had resided with their mother, Sukiná, until her death; the other sisters had long lived separate. The plaintiff, as she alleged, had earned considerable sums of money in the exercise of her calling as *náikin*. These she converted, for the most part, into ornaments, which, together with any ornaments, &c., her mother had, were kept in a large box in the house in which she and her mother resided.

Sukiná died on the 9th November, 1885, leaving property, as the plaintiff alleged, of the value of Rs. 386 only, consisting of ornaments and a few articles of household furniture. Shortly after her mother's death, the plaintiff left Bombay on a visit to Delhi, leaving her ornaments and other valuables, together with those which had belonged to her mother, Sukiná, locked up in the said box, the key of which she took with her to Delhi.

During the plaintiff's absence from Bombay, Nur Jahán, one of her sisters, (defendant No. 3), presented a petition to the High Court, alleging that she was entitled to a share in the estate of her deceased mother, Sukiná ; that all the property in the said house, including that contained in the said box, was the property of the said Sukiná ; and that it was in danger of being misappropriated by the plaintiff, who was about to return to Bombay. The Court upon these allegations made an order on the 16th January, 1886, under section 18 of Act II of 1874, directing the Administrator General "to take possession of the property of Sukiná, and hold the same subject to the further order of the Court." Pursuant to this order, the Administrator General took possession of all the property in question.

The plaintiff accordingly filed this suit to recover her property, which she specified, and alleged to be of the value of Rs. 2,200. She admitted that some of the articles in the hands of the Administrator General, (which were mentioned in a separate list), were the property of her mother, Sukiná. The defendants to the

1886.

AMIR JÁN v. L. W. J. RIVETT-CARNAC.

suit were the Administrator General and the four sisters of the plaintiff. Her sisters appeared at the hearing, and with the exception of Nur Jahán, (defendant No. 3), admitted that the property claimed by the plaintiff belonged to her. Nur Jahán, however, contended that the whole of the property in question belonged to the estate of Sukiná. The Court held that the plaintiff had proved her claim, and directed that her property should be delivered over to her by the Administrator General.

Anderson (with *B. Tyabji*) for the plaintiff.

Russell for the Administrator General.

The other defendants appeared in person.

Counsel applied that the costs of the Administrator General should be provided for.

Anderson for the plaintiff :—The Administrator General is not entitled to his costs out of the property, which is now found to belong to the plaintiff. He should, on the contrary, be ordered to pay the plaintiff's costs. He acted at his own risk in taking possession of it, and the Court has held that he took it wrongfully. The order made by the Court does not justify him, for it only authorized him to take the property of Sukiná, which this is not. He may be entitled to his costs out of that, but he can have no claim against the property of the plaintiff. He had two courses open to him: either to have at once given up the plaintiff's property to her when she claimed it, or, if he refused, he should have obtained an indemnity from Nur Jahán, at whose instigation he acted—*Bevis* v. *Turner*(1); *Ex parte Angerstein*(2); *Pitts* v. *La Fontaine*(3).

On what ground can any one, who has taken wrongful possession of property, claim to retain his costs out of it before restoring it to the true owner, who admittedly has not been in any way in fault? The Administrator General may be allowed to recover over from Nur Jahán, or possibly from the estate of Sukiná, or from both —*Bevis* v. *Turner*(4); *Ex parte Angerstein*(5). This is

(1) I. L. R., 7 Bom., 484.
(2) L. R., 9 Ch. Ap., 479.
(3) L. R., 6 Ap. Ca., 482.
(4) I. L. R., 7 Bom., 484.
(5) L. R., 9 Ch. Ap., 479

not a case where property in danger has been preserved; there are cases of that sort in which the Administrator General has been allowed his costs out of the property so preserved, but they are not in point here.

Russell for the Administrator General:—The Administrator General is in the position of a stake-holder. He did not know the facts, and could not act otherwise than as he did. It is not alleged he acted otherwise than *bonâ fide* and with due care and caution. In the great majority of cases in which the Administrator General is compelled to act, an indemnity, such as is suggested, would be impracticable, as the parties moving him are generally in very poor circumstances.

JARDINE, J.:—One Sukiná, mother of the plaintiff Amir Ján and of Nur Jahán, (defendant No. 3), died in November last; and in January, on the petition of Nur Jahán, an order was made, under section 18 of the Administrator General's Act II of 1874, authorizing and enjoining the Administrator General to collect and take possession of the property of Sukiná, and to hold the same subject to further order of the Court. Nur Jahán's petition described the property as consisting of gold and silver ornaments, furniture, wearing apparel, &c., of the value of Rs. 5,000.

After the Administrator General took possession, Amir Ján, who had returned to Bombay from Delhi, claimed, as her own property, the articles specified in list C. Nur Jahán denied the claim, and informed the Administrator General that the property had belonged to deceased, and was not the property of plaintiff. Under these circumstances the Administrator General declined to part with the property, but referred the claimants to a suit.

One of the defendants, daughters of Sukiná, by name Chanda, being a minor and not represented, has been struck off with consent of the plaintiff's counsel. The other defendants, excepting Nur Jahán, (defendant No. 3), admitted the claim.

As regards the question whether the property specified in list C belonged to Sukiná or to Amir Ján, I find in favour of Amir Ján. She has corroborated her own testimony by the mouths of other witnesses, whereas Nur Jahán has no evidence except her

1886.

AMIR JÁN v. L. W. J. RIVETT-CARNAC.

own statement. Her later cross-examination by Mr. Anderson showed that it is improbable that Sukiná accumulated so much property. I, therefore, award the property in list C to the plaintiff, and direct defendant Nur Jahán to pay the costs of the plaintiff and the other defendants.

I have had to consider, as regards the matter of costs, whether the Administrator General as an unsuccessful defendant ought to be made liable for plaintiff's costs, and also whether his own costs should be provided for, and how.

Mr. Anderson has cited *Bevis* v. *Turner*(1), in which Mr. Justice Scott applied the cases of *Ex parte Angerstein*(2) and *Pitts* v. *La Fontaine*(3) to the case of the Official Assignee. The head-note is as follows:—

"If the Official Assignee defends a suit, he is liable, in the event of failure, to be ordered to pay the plaintiff's costs, in the same way as any other defendant; and if the estate be insufficient to pay the costs, he will have to bear them personally. It is for him to protect himself by getting a guarantee of indemnity from the parties who set him in motion."

The case of *Appleby* v. *Duke*(4) overruled several earlier cases. The head-note of that case is as follows:—

"The provisional assignee of the Insolvent Court, made a defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs as the insolvent debtor himself would have been, and, therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs from the plaintiff."

The ground of the decision was that the provisional assignee stands in the same position as the insolvent, and that the mortgagee is not the proper party to pay the provisional assignee the costs of protecting the insolvent's estate. It was contended that "the provisional assignee is a public officer, and in that capacity

(1) I. L. R., 7 Bom., 484.
(2) L. R., 9 Ch. Ap., 479.
(3) L. R., 6 Ap. Ca., 482.
(4) 1 Hare, p. 303.

is a defendant in numerous suits in which he is necessarily ignorant of the value of his rights, and cannot venture to disclaim all title until he has time to make inquiries, without endangering the interests of the creditors whom he represents. His costs must be borne by the parties for whose benefit he is brought before the Court; or in this case, as in many others where there is no estate belonging to the insolvent, such costs would fall on himself personally—a consequence against which the Court will protect him."

"The execution of the law relating to insolvents of necessity casts the estate upon him; this materially distinguishes him from other assignees or from devisees who can repudiate the trust or disclaim without affecting the interests of others."

If the Administrator General were in precisely the same position as an assignee in insolvency I would feel bound by the authorities. But in the present case the Administrator General was bound to take action, under the orders of the High Court, as to the goods of Sukiná, and there is no suggestion that he acted rashly or without due care in respect to the seizure of the goods, which I now hold to be, not goods of Sukiná, but of Amir Ján. The latter had allowed Sukiná to act as if she was owner. Amir Ján was absent at the time; there were several claimants. It was not unreasonable under all these circumstances that the Administrator General should think that they belonged to Sukiná; when the rival claimants intimated their claims to him after the seizure, he referred them to a suit to substantiate their claims against each other. His counsel, Mr. Russell, has pointed out that he has never moved from his impartial position as a mere stake-holder. He has continued to satisfy the definition in section 470 of the Civil Procedure Code (Act XIV of 1882) of the stake-holder who may institute a suit of interpleader. If the Administrator General had instituted such a suit he would have been entitled to the benefit of section 475, which is as follows:—"When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way." The case of *Burnett* v. *Anderson*[1] shows that if the Administrator

(1) 1 Merivale, 405.

1886.

AMIR JÁN
v.
L. W. J. RIVETT-CARNAC.

General had parted with the specific articles to one claimant or an indemnity, he would have ceased to be entitled to bring a suit of interpleader. The Administrator General has kept the articles He is thus a defendant as it appears to me in the position of an interpleading plaintiff. If he had brought a suit of interpleader against the claimants, section 476 of the Civil Procedure Code (Act XIV of 1882) would have empowered the Court to make suitable provision for his costs in the suit brought against him.

I must now consider what order should be passed. In the first instance, I think the losing claimant ought to pay the Administrator General's costs. *Ex parte Streeter*[1] shows this principle. Failing recovery from the losing claimant I am of opinion that he is entitled to be paid out of the undoubted estate of Sukiná. If and in so far as that property proves insufficient, I will hold him entitled to recover out of the property specified in list C. which my decree will declare to be the plaintiff's. I pass this direction, because I think the Administrator General is really a defendant in the position of an interpleading plaintiff. The mere fact that he appears as defendant has not increased the costs of the suit. The plaintiff has deposed that during her mother's, Sukiná's, life-time she humoured Sukiná by treating her as the owner of the house, and Sukiná for the same reason by will directed payment of Rs. 2,000 for her funeral charges. The Administrator General was justified in supposing that the house was Sukiná's, and the property found there her's. I treat him, then, as a defendant in the position of an interpleading plaintiff. Now, for such a party I take section 476 of the Civil Procedure Code (Act XIV of 1882) to afford the Court some light as to the view recently taken by the Legislature. The case of *Alpin* v. *Cates*[2] appears to be an authority for allowing the Administrator General's costs out of the estate now awarded to plaintiff. The head-note is as follows :—

" P. owed a sum to C., which under a letter of license was payable by instalments, subject to a proviso enabling C. to sue for the whole sum at once on failure in punctual payment of any

(1) L. R., 19 Ch. Div., 216. (2) 30 L. J. Ch., 6.

1886.

AMIR JÁN v. L. W. J. RIVETT-CARNAC

instalment. C. assigned this to A., who afterwards gave notice to P. and called upon him to pay the instalments to him. C. thereupon told P. that the assignment was invalid, and that if P. did not continue to pay to C. he would under the proviso determine the letter of license. *Held,* that P. was justified in continuing to pay C. until A. had obtained an injunction."

Before receiving the property described in list C., plaintiff must satisfy the Administrator General's costs, or such part as has not been satisfied by defendant Nur Jahán, or out of Sukiná's estate.

Treating the case as substantially the same as interpleader I allow the Administrator General's costs as between party and party, and do not allow him commission on the property decreed to the plaintiff.

I am the more disposed to hold that the Administrator General may recover his costs out of the fund decreed to a stranger, as a similar order has been passed by Mr. Justice Scott in one of the cases brought to my notice. See also *Annesley* v. *Muggridge*[1] and *Yates* v. *Farebrother*[2].

Mr. Russell asks to add the expenses of looking after property, bailiff, &c., but does not ask for those of obtaining the order under section 18.

I think the Administrator General is entitled to have his expenses of taking care of the property proportioned according to the amounts respectively belonging to Sukiná and to plaintiff, the latter proportion to be alone treated as payable out of plaintiff's property as if it were costs against her. Excluding these expenses the plaintiff to be entitled to recover as costs from defendant Nur Jahán such amount as she may be obliged to pay the Administrator General as costs.

Attorneys for the plaintiff.—Messrs. *Hore, Conroy and Brown.*

Attorneys for the Administrator General.—Messrs. *Little, Smith, Frere and Nicholson.*

(1) 1 Madd., 593. (2) 4 Madd., 239.