

ORIGINAL JURISDICTION (a)

Ecclesiastical Side.

In the Goods of SIMPSON deceased.

Where letters of administration which has been granted to the Administrator General of Madras were recalled, and he had merely taken manual possession of cash, Government promissory notes and the title-deeds of leaseholds belonging to the deceased, the High Court, under section 22 of Act VII of 1855, allowed him commission, at the rate of 2½ per cent., on the cash and the value of the notes, but refused to allow it on the leaseholds.

MAYNE moved under section 21 of Act VIII of 1855, that an order might be made, revoking the letters of administration to the estate and effects of Aitken Megget Simpson, formerly of Madras, but late of 9 Merchiston Park Edinburgh, deceased, granted to the Administrator General of Madras ; and that letters of administration to the said estate and effects of the said A. M. Simpson, (with his will annexed) within the jurisdiction of this Court might be granted to James Short, Esq., as the attorney of the trustees and executors in the said will named.

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The following facts appeared from Mr. Short's petition on which the motion was grounded.

Mr. A. M. Simpson, formerly of Madras, a British subject residing in Edinburgh, died there on the 3rd of July 1862, having by his will, dated the 28th of June of 1862, appointed four persons sole general disponees in trust and execution thereof.

The testator left property to be administered within the ordinary original jurisdiction of this Court, consisting of cash, Government promissory notes, leasehold lands and stock in trade.

In October 1862, the Administrator General of Madras, Mr. J. Miller, applied for letters of administration to Mr. Simpson's estate, and thereupon received notice from Messrs. Binny and Co. of Madras, that Mr. Simpson had left a will, that they had been requested to administer to the estate, and that they had sent home the instructions necessary to enable the executors to empower them to do so.

(a) Present Scotland, C. J. and Bittleston, J.

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Mr. Miller, however, told Messrs. Binny and Co. that he was bound by the Act to proceed, and did not withdraw his application ; and on the 3rd of November 1862 letters of administration to Mr. Simpson's estate and effects were granted by this Court to the Administrator General.

The trustees and executors reside in Scotland ; and by a deed-poll, dated the 8th November 1862, they constituted the petitioner Mr. James Short of Madras their attorney to establish proper titles in their persons as general disponees and executors as aforesaid to the lands, hereditaments, debts, chattels and effects, real and personal, which belonged to the testator.

On the 11th of December 1862, Messrs. Ritchie and Shaw, Mr. Short's proctors, gave notice to the Administrator General that they had in their possession the testator's will and intended to apply immediately for the order now moved for. They also intimated that Mr. Short would pay all costs thitherto incurred by the Administrator General.

Nothing however, resulted from this notice ; and on the 24th of January 1863, Mr. Ritchie, of the firm of Ritchie and Shaw, addressed the following letter to the Administrator General :—

MADRAS, 24th January 1863.

MY DEAR SIR,

With reference to any conversation with you yesterday on the subject of Mr. Short's application for the revocation of the letters of administration granted to you in Simpson's estate, and with a view to save the expense of taking in counsel on each side on this application, he will agree to your retaining 2½ per cent. commission on the Government Promissory Notes and cash recovered by you and in your hands, but no commission on the lands and other estate.

If you agree to this, please say so at once : if not I am instructed to withdraw this offer, and the question of your commission in this case must be left to the Court.

Your's faithfully.

(Signed) A. M. RITCHIE.

J. Miller, Esq.

The Advocate General, Norton, and Branson for the Administrator General.

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The argument turned altogether on the construction of the following sections of Act VIII of 1855 ("An Act to amend the law relating to the office and duties of Administrator General."):—

XXI. If an executor or next of kin of the deceased, who shall not have been personally served with a citation, or had notice thereof, in time to appear in pursuance thereof, shall establish to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator General, any letters of administration which shall be granted by virtue of this Act to the Administrator General, may be recalled and revoked, probate may be granted to such executor, or letters of administration granted to such other person as aforesaid. Provided that no letters of administration, which shall be granted to the Administrator General, shall be revoked or recalled for the cause aforesaid, except in case in which a will or codicil of the deceased shall be proved, unless the application for that purpose shall be made within one year after the grant to the Administrator General, and the Court shall be satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application shall be made.

XXII. If any letters of administration, which shall be granted to the Administrator General in pursuance of this Act, shall be revoked, the Court may order the costs of obtaining such letters of administration and the whole or any part of any commission which would otherwise have been payable under this Act, together with the costs of the Administrator General in proceedings taken to obtain such revocation, to be paid to or retained by the Administrator General out of any assets belonging to the estate.

XXVI. The Administrator General of each of the said Presidencies under any letters of administration which shall be granted to him in his official character, or under any probate which shall be granted to him of a will wherein he shall be named as executor by virtue of his office; and the

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 Act, shall be entitled to receive a commission, at the follow-
 ing rates respectively; *viz.*

The Administrator General of Bengal at the rate of 3 per cent. and the Administrator General of Madras and Bombay respectively at the rate of 5 per cent. upon the amount or value of the assets which they shall respectively collect and distribute in due course of administration.

XXVII. The commission to which the Administrator General of each of the said three Presidencies shall be entitled, is intended to cover not merely expense and trouble of collecting the assets, but also his trouble and responsibility of distributing them in due course of administration shall be payable to and retained by such Administrator General upon the collection of the assets, and the other half thereof shall be payable to the Administrator General who shall distribute any assets in the due course of Administration and may be retained by him on such distribution. The amount of the commission lawfully retained by an Administrator General upon the distribution of assets shall be deemed a distribution in the due course of administration within the meaning of this Act.

SCOTLAND, C. J. :—We have given this case our best consideration, and have come to the conclusion, that as respects the Government promissory notes and the cash, the Administrator General is, but as respects the leaseholds, he is not entitled to commission. That, substantially, is the result at which we have arrived.

The first question is as to our jurisdiction under section 21 to recall the Administrator General's letters of administration, and to grant probate or letters of administration to the executor or next of kin of the deceased. Our discretionary power to recall letters granted to the Administrator General, where do will codicil if proved, depends on two points—first, whether or not the application to revoke is made within one year after the grant to the Administrator General; and, secondly, whether or not there has been unreasonable delay

in making the application, or in transmitting the authority under which such application is made. But in the present case there is a will, and under the circumstances before the Court it is clear that the letters of administration granted to the Administrator General must be recalled and revoked. Then the 22d section provides that on such revocation we may order the Administrator General's costs of obtaining the letters of administration, and the whole or any part of the commission to which he would otherwise have become entitled under the Act, together with the costs of any proceedings to obtain such revocation, to be paid to or retained by him out of the assets. Then the 27th section, after stating what expenses and trouble the commission is intended to recoup and remunerate, enacts that one-half of such commission shall be payable to and retained by the Administrator General upon the collection of the assets, and the other half shall be payable to the Administrator General who shall distribute assets and may be retained by him upon such distribution. Now, unless Mr. Norton's argument be well founded there can be no doubt that the general jurisdiction given to the Court by the 22nd section continues to exist, though here the Administrator General has retained the commission. Mr. Norton argues that if the Administrator General is in a situation to retain his commission, the Court has no jurisdiction to interfere but it is quite clear, I think, that the discretion given by section 22 applies to cases coming within section 27.

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Then as to the question respecting what was meant by "collecting the assets." There is no doubt that the word "assets" includes leaseholds as well as cash and promissory notes. But then has there been any 'collection' of these leaseholds and notes? It cannot, I think, be reasonably said that there may not be cases where assets have been collected though they have not been realized by sale or by actual receipt or possession. On the other hand, it cannot be doubted that where they have been realized ready for distribution they may equally be said to be collected. It seems to me that under sections 22 and 27 the question is one for the discretion of the court, and that in the present case the claim as regards the Government promissory notes, and as to the leaseholds must be dealt with differently. Now it is import-

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ant to see for what the commission is given. Section 27 declares that it is intended to cover not merely the expense and trouble of collecting the assets, but also his trouble and responsibility in distributing them in due course of administration. It is conceded that if cash or bank notes had been left in the testator's chest, and the Administrator General had done nothing more than open the chest and take them out, he would have been entitled to commission, for as to such assets nothing would remain to be done but to distribute them to the persons entitled. But then it is contended that Government promissory notes are choses in action, and that until they have been realized, no commission can become receivable. I have already said that a 'collection' of assets does not necessarily involve their realization; and I think we must hold that these notes have been collected within the meaning of the section, so as to entitle the Administrator General to commission. There does not appear to have been any 'expense,' but there has been the trouble of applying for and obtaining actual possession of the notes. I cannot see any substantial difference between the case put of taking bank-notes or cash out of a chest and obtaining possession of these Government promissory notes. The commission is resisted on the ground that they had not been converted; but when one looks at their nature and the fact that they can at once be sold in the market, it would be drawing quite too fine a distinction if we made any difference between these notes and the others. I therefore think the Administrator General entitled to the commission of $2\frac{1}{2}$ per cent on the Government promissory notes.

With regard to the leaseholds I think the claim to commission is not brought fairly within the provisions of the 27th section. What 'expense' or 'trouble' has the Administrator General incurred in reference to these leaseholds? The evidence shews that all he did was to take the title-deeds which were handed over to him. He incurred no 'responsibility' by so doing. As regards these deeds he becomes merely a conduit-pipe for the person obtaining probate. I think that in the exercise of our discretion we cannot allow the Administrator General commission in respect of the leaseholds. They cannot be considered as assets in collecting which he has incurred expense or taken trouble.

Then as to allowing the costs of obtaining the letters of administration. It has been urged that the Administrator General knew of the will. No doubt he did: Messrs. Binny and Co. gave him notice that Mr. Simpson had left a will: Mr. Miller replied that he was bound under the Act to proceed; and he did proceed accordingly. I am not prepared to say that strictly he was wrong. By section 11 of Act VIII of 1855 if no person shall within one month after the deceased's death have applied for probate or letters of administration, the Administrator General is *required* within a reasonable time after he shall have had notice of the death, to take proceedings to obtain letters of administration. And section 19 of the same Act expressly provides that no notice of a will shall affect the Administrator General unless within the period of one month from the time of giving such notice proceedings be commenced to prove the will or to cause the letters of administration to be revoked, nor unless such proceedings be prosecuted without unreasonable delay. I have further no reason to doubt that the Administrator General in what he did acted conscientiously; and under the circumstances I think his costs of obtaining administration should be allowed.

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Then as to the costs of this application. Mr. Ritchie's letter of the 24th January 1863 offers the Administrator General exactly what we now give him, and it could hardly have been doubted that this was not a proper case for claiming strictly the $2\frac{1}{2}$ per cent. on the leaseholds. I think Mr. Miller's costs of this application ought not to be paid out of the estate.

BITTLESTON, J.:—Two cases may arise upon this Act, under sections 26 and 27 of which the Administrator General is entitled to his commission at 5 per cent. payable at two different times, one-half upon the collection, the other upon the distribution of the assets. One case is where the assets are not only collected but fully administered; and in that case it is unlikely that any question should arise as to when the collecting could be said to be completed; for of course if he go on and distribute, he must previously have collected, and is entitled to the whole 5 per cent. The other case is where the Administrator General is, before distribution, interrupted by the revocation of the letters. Then it would seem that

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section 22 was introduced for the purpose of enabling the Court to exercise its discretion and to allow the whole or part of such commission as the Administrator General would have been entitled to in case there had been no revocation. Under that section, then, the Court must see, first, what the Administrator General would have had in the absence of revocation, and, secondly, what in the discretion of the Court he should now receive. Then was there a 'collection' of the Government promissory notes? Although I entertain some doubt as to whether they were 'collected' when merely taken into the manual possession of the Administrator General, yet considering their ready convertibility, I think, on the whole, they must be treated like other valuable chattels and therefore as having been 'collected.'

APPELLATE JURISDICTION (a)

Regular Appeal No. 26 of 1861.

KULA NÁGABUSHANAM.....*Appellant.*

KULA SESHÁCHALAM.....*Respondent.*

Where in a suit to recover a sum of money on an award the five arbitrators came to a decision and made, dated and signed a rough draft of their award, and the defendant then withdrew from the submission, and a fair copy was then made, bearing the same date as that of the rough draft, but signed by only four of the arbitrators:—*Held*, that the award was complete at the date of the rough draft, and that its validity was not affected by the subsequent occurrences.

The validity of an award cannot be impeached because the arbitrators afterwards do an act required neither by the law nor the terms of the submission.

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THIS was a regular appeal from the decree of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit No. 104 of 1859. This suit was brought on an award to recover rupees 3,622-2-0, with interest at the rate of 12 annas per cent. per mensem on rupees 1,930-9-0. The Civil Judge, holding the award valid, decreed for the plaintiff.

Mayne (Venkataráyalu Náyudu with him) for the appellant, the defendant.

Branson for the respondent, the plaintiff.

The facts and arguments appear sufficiently from the judgment of the Court, which was delivered by

HOLLOWAY, J.:—This suit was brought to recover a sum of money upon an award.

(a) Present Strange and Holloway, JJ.