TESTAMENTARY JURISDICTION.

Before Mr. Justice Latham.

1883
July 14.

IN THE MATTER OF THE INDIAN TRUSTEES' AND MORTGAGEES' ACT XXVIII OF 1866 AND IN THE MATTER OF THE GOODS OF SAMUEL MARIE BRERETON, DECEASED.

Indain Trustees' and Mortgagees' Act XXVIII of 1866. *Sec.* 43—*Administrator General—Taking opinion of Court on question respecting the administration—Questions affecting rights of parties inter se—Refusal of Court to express opinion.*

The Administrator General of Bombay having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of one A. B., deceased, and having a balance in his hands to the credit of the said estate after having fully administered the same, was applied to by G. B., the brother of the said A. B., deceased, who had taken out letters of administration in England to the estate of his deceased brother, to hand over to him, the said G. B., the balance in question,—the said G. B. claiming to be the administrator of the domicile of the deceased, and, as such, to be entitled to all the personal assets of his estate wheresoever situate.

Being in doubt as to whether he might safely accede to the request, the Administrator General of Bombay, by petition under section 43 (1) of the Indian Trustees' and Mortgagees' Act XXVIII of 1866, submitted the question to the High Court for its opinion, advice and direction.

Held that the question being one of considerable difficulty and importance, and involving, moreover, in its decision questions which might seriously affect the rights of parties *inter se*, it was not a question such as was contemplated by section 43 of the Indian Trustees' and Mortgagees' Act XXVIII of 1866, nor one upon which the Court ought to give any opinion merely on an *ex-parte* petition of this character.

THIS was a petition to the High Court presented by L. W. G. Rivett-Carnac, the Administrator General of Bombay, under section 43 of the Indian Trustees' and Mortgagees' Act XXVIII of 1866, for the opinion, advice and direction of the said Court under the circumstances set out in the said petition.

(1) Section 43.—Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate. Such application shall be served upon, or the hearing thereof shall be attended by all persons interested in such application, or such of them as the said Judge shall think expedient. The trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application: provided nevertheless that this Act shall not extend to indemnify any

1883

In re SAMUEL MARIE BRERETON.

The petition stated as follows :—

"That one Samuel Marie Brereton died at Baghdad, at which place he was Residency Surgeon, on the 9th of June, 1880, intestate, and on the 29th of January, 1881, letters of administration to all and singular the property and credits to the said deceased at the time of his death in anywise belonging or appertaining throughout the Bombay Presidency were granted to the petitioner in his official capacity of Administrator General of Bombay.

" 2. That, in pursuance of such letters, the petitioner realized all the property and credits of the said deceased within the Presidency of Bombay, and has paid all the lawful debts of the said deceased of which he has had notice, and there now remains in the hands of the petitioner a net cash balance to credit of the estate of Rs. 1,027-6-8.

" 3. That on the 8th day of March, 1883, letters of administration of all and singular the personal estate and effects of the said deceased were granted from the Principal Registry at Dublin of the High Court of Justice in Ireland to George Brereton, the lawful brother and one of the next of kin of the said deceased. The said letters of administration were also on the 14th day of April, 1883, sealed with the seal of the Principal Registry of the Probate Division of the High Court of Justice in England. A true copy of the said letters of administration is hereto annexed.

"4. That, under the authority of the said letters of administration, the said George Brereton has applied to the petitioner to pay over to him the net balance in his hands to credit of the estate of the deceased in the Bombay Presidency, claiming to be the administrator of the domicile of the deceased, and, as such, to be entitled to all the personal assets of his estate wheresoever situate.

" 5. No evidence has been furnished to the petitioner of the domicile of the deceased other than that administration has

trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

been granted from the Principal Registry at Dublin of the High Court of Justice in Ireland to his next of kin, but the petitioner believes that the domicile of the deceased at the time of his death was Irish.

"6. The petitioner applies for the opinion, advice and direction of this Honourable Court as to whether he can, under the circumstances above stated, lawfully pay over the net balance in his hands to credit of the estate of the said Surgeon S. M. Brereton to Mr. George Brereton as administrator of the domicile of the deceased, or whether the petitioner is bound himself to complete the administration of the Indian estate, and distribute the surplus in his hands amongst the next of kin according to law."

Russell, on behalf of the Administrator General of Bombay, submitted his petition to the Court, and asked for its opinion and advice upon the point stated under section 43 of Act XXVIII of 1866 (Trustees' and Mortgagees' Powers Act, 1866). The point in question is dealt with by Fry, J., in *Eames* v. *Hacon* (1) affirmed on appeal (2), though apparently on different grounds. Fry, J.'s judgment was based on the *dictum* of Lord Westbury in *Enohin* v. *Wylie* (3), but it is to be observed that Lords Cranworth and Chelmsford in that case dissent from Lord Westbury; see also Jarman on Wills, Vol. I, p. 2, note. The principle that the administration of an estate is to be carried on in the country in which possession of it is taken, and held, under lawful authority, is laid down in *Preston* v. *Lord Melville* (4); see also Williams on Executors, 7th ed., p. 431; 8th ed., p. 438; and Story's Conflict of Laws, § 518. *Preston* v. *Lord Melville*, however, left open the question as to which administrator is entitled to the balance of an estate after the claims upon it have been satisfied; see remarks of Lord St. Leonards in *Canon Iron Company* v. *Maclaren* (5). [LATHAM, J., referred to Foote on Private International Law, pp. 197, 198, and to *Blackwood* v. *The Queen* (6).] See also *Re Orr Ewing* (7) and *Stirling Maxwell* v. *Cartwright* (8). The Adminis-

(1) L. R., 16 Ch. D., 407.
(2) L. R., 18 Ch. D., 347.
(3) 10 H. L., 1.
(4) 8 Cl. & Fin., 1.
(5) 5 H. L. at p. 456.
(6) L. R., 8 Ap. Ca., 82.
(7) L. R., 22 Ch. D., 456.
(8) L. R., 11 Ch. D., 522.

1883

In re SAMUEL MARIE BRERETON.

trator General would be liable in Bombay to the claims, if any, of the next of kin if he were to pay over the balance in his hands to the Irish Administrator : see *Chambers* v. *Bicknell* (1) and *Attorney General* v. *Kohler* (2). As regards convenience, the Administrator General would wish to pay over the balance to the administrator of the domicile ; but his power to do so being so far from clear, he desires to first take the opinion of the Court in the matter.

LATHAM, J.—The point is one of considerable importance, and I will take time to consider it.

21*st July*, 1883. LATHAM, J., gave his decision. —I have considered the petition ; and, looking to the nature of the point at issue, I think that it would not be right or proper for me, on a proceeding of this character, to give any opinion on it. I think it is no part of the duty of a Judge, under section 43 of the Trustees' and Mortgagees' Act, to give any opinion on a point on the decision of which may depend questions of right or title ; more especially as, if the opinion were given, there is nothing in that section, or elsewhere in the Act, making it obligatory on the Administrator General to act in accordance with it, or on the administrator of the domicile to accept it. The questions arising in the administration contemplated by section 43 are not questions of the character of the one on which I am asked to express my opinion here. That is clear from the English authorities on the almost identical provisions contained in section 30 of the English Act 22 and 23 Vict., c. 35—an Act to further amend to Law of Real Property and Relieve Trustees. Kindersley, V. C., in *In re Lorenz's Settlement*(3) says in regard to that section : " My understanding of that section of the Act is, that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se;* otherwise the effect would be that a deed

(1) 2 Hare, 536. (2) 9 H. L., 654]

(3) 1 Dr.& Sm., at p. 404.

or will involving the most difficult questions, and relating to property to an amount however large, might be construed, and most important rights of parties decided, by a single Judge, without any power of appeal whatever. This, I am satisfied, the Legislature never intended."

In *In re Mary Hooper*(1) Sir J. Romilly, speaking of the same section, remarked "that the object of this clause was to assist trustees in the execution of the trusts as to little matters of discretion"; and "that, when a question arose as to the effect of a limitation in an instrument, it ought, for the assistance of the Court, to be argued by the opposite parties." I may refer also to *In re Mockett's Will*(2).

From the above authorities it is clear that the Court should not deal, under the power here given, with a point of law, like the present one, on which so much may depend, and which is in itself so full of difficulty.

The point itself, it is plain, is one of considerable difficulty. *Preston* v. *Melville*(3) did not decide the point, but left it open. In *Eames* v. *Hacon*(4), in the Court below, Fry, J. would have decided it authoritatively; the Court of Appeal, however, affirmed his judgment on totally different grounds, and so left open the point that now arises. Story's Conflict of Laws, § 513, shows that some of the American Courts have taken the view that the net balance of the estate should be remitted to the administrator of the domicile, but that there is much to be said on the opposite side. Dicey on Domicile, p. 315, seems to leave the point quite unsettled, and does not refer to any cases. I must refuse, therefore, to give any opinion on the question proposed. The point might well be brought before the Court by a special case; it is a pure point of law.

(1) 29 Beav. at p. 657.
(2) Johnson, 628.
(3) 8 Cl. & Fin., 1.
(4) L. R., 16 Ch. D., 407.