M.R.O. 1—59,000—16-10-23.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 95 Press Mis.—

153. 154 Dated 17-1- 19 1865

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Not to be folded or roughly handled

No. 153. Read the following letter from the Honorable J. B. NORTON, Advocate General; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George, dated 9th December 1864.

With reference to the opinion which I expressed on the 16th July 1863, *in re* the right of the Administrator General to retain the assets of the late Mr. Thomas Brass's estate for the satisfaction of his own debt, I have now the honor to state, for the information of the Honorable the Governor in Council, the result of a suit (No. 239 of 1864) brought by Mr. Arthur M. Ritchie and another, on behalf of themselves and all other creditors of the late Mr. Brass, against Mr. Stokes and Mr. Miller as Administrators General respectively.

2. Mr. Ritchie was appointed Administrator General in April 1860, and held the office till May 1861. During his incumbency of office, Brass embezzled Rupees 6750; but this defalcation was not discovered till some time after, as his defalcations during the incumbency of Mr. Miller, and Mr. Ritchie did not re-place this amount until the 28th January 1864.

3. Mr. Miller, who claimed to be a creditor for Rupees 38,593, recovered on account of Brass's estate Rupees 42,958 before he left for England on the 28th May 1863. He paid off all specialty debts, after which there remained a balance out of which he appropriated Rupees 19,000 in part payment of the amount he had re-placed on account of Brass's defalcations.

4. After Mr. Miller's departure Mr. Stokes collected further assets of Brass's estate, which Mr. Miller on resumption of office obtained possession of, and retained to the extent of Rupees 12,000 in further satisfaction of his own demand.

5. The issues settled by Mr. Justice Bittleston were as follows:—

1*st.*—Whether Mr. Miller had a right to retain out of the assets collected by himself.

2*nd.*—Whether he had a right so to retain out of the assets collected by Mr. Stokes.

3*rd.*—Whether he had a right to retain on behalf of Mr. Ritchie.

6. The case came on for hearing before the Chief Justice and Sir A. Bittleston, on the 29th November. Mr. Mayne appeared for the plaintiff, and I for Mr. Miller.

7. Mr. Mayne admitted the right of an ordinary Administrator to retain for his own debt, but contended that the Administrator General was not in the position of an ordinary Administrator; that he was an officer created by Statute, whose sole remuneration was his commission of 5 per cent; that the policy of the Act was opposed to his being allowed to retain; that the Act gave him an advantage over all other *creditors*, by taking away their right to apply for administration; and that to allow him to retain would make him indifferent to the honesty of his subordinates.

8. As to the assets collected by Mr. Stokes, he argued that Mr. Miller could have no right to them, even if he had a right to retain out of assets collected by himself; that Mr. Stokes was not the Agent of Mr. Miller, but an independent Officer, and in fact to all intents and purposes the Administrator General for the time being; that he ought not to have handed the funds over to Mr. Miller, because they came to his own hands clothed with a trust; and that as they were paid over after the present suit was instituted, with full knowledge on the part of Mr. Stokes, such payment could not affect the right of the general creditors.

9. On the third issue he submitted that the Administrator General was a corporation sole, who never died, and that if Mr. Miller had a right to retain for himself precisely similar to his own, he was bound also to retain for his predecessor, whose debt arose out of circumstances.

10. On the other hand, I argued that there was no distinction between the position of Mr. Miller and that of any other Administrator; that though the Act gave him his *locus standi* to apply for administration, it was only by virtue of the letters of administration which the Court granted him in each particular estate that he had any power or authority as Administrator in that estate; that the commission of 5 per cent. given by the Statute was no innovation; that executors and administrators in India had by custom, expressly recognized by judicial decisions, always been permitted to retain 5 per cent; that the history of the Administrator General's act was perfectly well known; that the Legislature must be taken to have had full knowledge of the common law right of an executor or administrator to retain; that if it had been intended to take away that right, it would have been so expressly provided; that common law rights can be taken away by Statute only by express words or necessary implication; that the supposed policy of the Act could not prevail against its provisions; that though the present case had probably never suggested itself to the Legislature, if it had, there would have been an express power given to the Administrator General to recover monies taken away as these were; that the monies were public; that Brass's creditors were not damnified; for if his estate was only increased by the precise amount of which he had defrauded the various other estates in the office, and that the idea of a right of retainer, making the Administrator General indifferent to the operations of his subordinates, was purely fanciful.

11. As to the second point, I argued that if Mr. Stokes took the assets clothed with a trust, it was only the ordinary Administrator's trust to "administer in a due course of Law;" that though he might have distributed the assets during Mr. Miller's absence he had not done so; that on Mr. Miller's resuming office these funds came to his hands as Administrator of Brass's estate, and that his right of retainer attached; that the pending of a suit could not affect the question; as the cases showed that an Administrator might retain for his own debt up to final Decree.

12. On Mr. Ritchie's right I contended that it was impossible he could be paid, since *he* had never been *Administrator of Brass's estate*, which character alone gave the right to retain.

13. At the close of my argument the Court requested me to address myself to a point which had struck the Judges during the argument, namely, whether this was a debt due at the time of Brass's decease. Mr. Miller had not paid until after Brass's death, and it was questionable whether any debt was due to him from Brass until Mr. Miller had actually paid.

14. I replied that though the defalcation was not discovered till after Brass's death, Mr. Miller's right of action arose the moment each sum had been subtracted; and had the matter come to light during the life-time of Brass, who was Miller's private servant, Miller might have suit forthwith for the recovery of the money.

15. The Court took time to consider the case.

16. It will be remembered that I advised that, in my opinion, Mr. Miller had a perfect right to retain; that it was not a case for the interposition or notice of Government; and that it ought to be left to the creditors, if so disposed, to raise the question. Neither the right of retainer out of assets collected by Mr. Stokes, or the claim of Mr. Ritchie had then arisen.

Proceedings of the Madras Government, Judicial Department,
17*th January* 1865.

17. I have now the satisfaction of submitting to the Honorable the Governor in Council a copy of the written judgment delivered by the Chief Justice on the 7th December (dismissing the suit), from which it will be seen that the course pursued by the Administrator General is fully borne out on all points.

JUDGMENT.

We see no ground in this case for doubting that if Mr. Miller had been simply an ordinary Administrator of Brass's estate, under letters of Administration granted to him by the Ecclesiastical Court whether as creditor or otherwise, he would have been entitled to retain assets in his hands for the satisfaction of his debt due from that estate under the admitted circumstances of this case.

2. The intestate was bound to account and pay over to Mr. Miller as Administrator General all sums of money received by him, and was therefore in fact at the moment of his death indebted to Mr. Miller in the amount which had been misapplied by him, and the subsequent payment of that amount by Mr. Miller under his obligation to the Government places him in no worse position.

3. Brass's estate was still indebted to him as it had been before, and even if the estate was not indebted before it would then have become indebted to him. The right of retainer is not confined to debts due to the Administrators by the intestate at the time of his death; if, after the death, he pays debts due by the testator out of his own money in due course of administration, he becomes a creditor for the amount so paid, and may retain assets to pay himself—*2nd Fonbl. on Equity* 413, *and case there cited.*

4. We think also that the pending of the present suit is no bar to the right of retainer; and the question in the case is therefore narrowed to this, whether the Administrator General is standing (as respects this right of retainer) in any different position from that of an ordinary Executor or Administrator.

5. We have looked carefully through Act VIII of 1855, and the previous legislation which led up to that Act. By the XL Geo. III, Ch. 79, Section 21, as well as under the Charter of the late Supreme Court issued thereon, the Court was required to grant to the Ecclesiastical Registrar in the absence of next of kin or creditors, letters *ad colligenda bonâ* or of administration; by virtue whereof the Registrar was to collect the assets and account to the Court in the same manner as when assets were vested in an officer by the equitable jurisdiction of the Court.

6. Then by Act VII of 1849, for the appointment of Administrator General in Bengal, it was provided that in the absence of next of kin or Executors willing to prove, the Court shall grant to the Administrator General letters of administration or *ad colligenda bonâ*, by virtue whereof he shall collect the assets and act as therein directed. The Act also provided that, as Administrator General, he should not be an officer of the Supreme Court *nor* otherwise accountable to it than any ordinary Executor, Administrator or grantee of letters *ad colligenda bonâ*.

7. The intention of the legislature appears very clearly throughout these Acts to be, that the Administrator General should derive his authority as Administrator of each estate from the letters of administration committed to him by the Court, and should have all the ordinary rights and be subject to all the ordinary liabilities of Administrators, except so far as the same are expressly altered or qualified.

8. Then Act VIII of 1855, the Act now in force in each of the three Presidencies, expressly provides by Section 24, that the letters of administration shall authorize the Administrator General *to act as Administrator* of the estate to which such letters shall relate. That is the statutary definition of his authority. And though the Act provides that the authority so given shall pass upon his death, removal, or resignation to his successor in office, that provision is in no

degree inconsistent with the notion that the person who is Administrator General at any particular time, and as such is made the Administrator of each of several estates, should during that time have all the authority of an ordinary Administrator.

9. Again, Section 27 declares that the commission to which the Administrator General shall be entitled, 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*, and the right of retainer for his commission is declared to be a distribution in due course. This, as well as other Sections refers the Administrator General to the ordinary course of administration according to law, and places his responsibility on the same footing as that of an ordinary Administrator, unless of course special provisions to the contrary are found in the Act.

10. The only special provision of that nature is contained in Section 23, which qualifies in some respects the general law as regards the duty and responsibility of the Administrator General in the payment of debts.

11. According to the general law an Administrator is bound to take notice of all debts of record whether he has actual notice or not, and this distribution, as well as all question as to whether in the case of other debts the notice should not be by suit, is got rid of by Section 23, which provides that any payment or delivery of assets by the Administrator General after one year, from the grant of the letters of administration, shall be allowed to him as against all creditors and other claimants of whose debts or claims he shall not have had notice, and that no notice shall affect him unless proceedings to enforce the debt or claim be commenced within one month after notice and prosecuted without delay.

12. These observations in effect dispose of the three issues raised. With respect to the first issue, the result is that, in our opinion, Mr. Miller had and has a right to retain any part of the assets collected and received by him as Administrator of Brass's estate, in satisfaction of the debt due to him from such estate.

13. With respect to the second issue, we think he is also entitled to retain the assets collected by Mr. Stokes and handed over to him on his resuming charge of the office of Administrator General. In our view, whilst Mr. Stokes held the office he was clothed with the ordinary rights and responsibilities attached to administration of Brass's estate by virtue of the letters of administration issued by this Court, and might have distributed the assets which came to his hands in payment of debts in due course of administration ; but instead of doing so he handed over to Mr. Miller the assets which he had collected, and which then became assets in Mr. Miller's hands as Administrator for distribution. Then as to the third issue, we think it is a fatal objection to any claim of retainer out of Brass's estate on the part of Mr. Ritchie that he never was Administrator of that estate. He stands on the same footing as any other simple contract creditor, and could gain no preference except by suit and decree, or judgment ; or by the act of the Administrator General in office if he thought proper as Administrator of the estate to pay him.

14. The issues being disposed of in favor of the defendant, Mr. Miller, there appears to be no ground or necessity for administering the estate under the decree of this Court, and therefore the suit will be dismissed. As regards costs, there appears to be no estate out of which costs could be paid, and we think the case is one in which the parties respectively should bear their own costs.

No. 154. ORDER THEREON, 17th January 1865, No. 95.

To be recorded.

(True Extract).

A. J. ARBUTHNOT,
Chief Secretary.

Exd. J. Tulloch.

Pro. 10th Sept. 3/64 to 24th Sept. 87.

Pro. 18th Dec. 1865.
From
The Advocate General
to Madras

Dated 9th Dec. 13th } Dec. Pro.

Rec.

No. 2619

Communicating the result of O.S. No. 239 of 1862 of Arthur Jn. Ritchie & others, versus Woltoke, Administrator General, & J. Miller, late Administrator General, in the High Court.

No. 95. 17 January 1865.

To be recorded.

W.H. J.P.

153. 154.