

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and
Mr. Justice Middleton.

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June 28.

HAY v. The Official Administrator of the Estate of the late
R. W. NUNN, deceased.

D. C., Colombo, 22,665.

*Administration—Money in Court—Seizure—Insufficiency of assets—
Rateable distribution—Application by administrator to draw
Money—Civil Procedure Code, ss. 199 and 352.*

Where money realized in execution of a decree against the administrator of an intestate estate was seized by certain creditors of the estate, and the assets of the estate being insufficient to pay all the creditors in full, the administrator moved to draw the said sum of money for the purpose of paying the testamentary expenses and of rateable distribution among all the creditors of the estate,—

Held, that the administrator was not entitled to draw the money, and that it ought to be distributed rateably among the creditors, who, prior to realization, had applied to the Court for execution of their decrees.

THE facts are fully set out in the following affidavit of the defendant, the official administrator of the estate of the late R. W. Nunn:—

" 1. That I am the Secretary of the District Court of Kandy and the administrator of the estate of Robert Whitmore Nunn, deceased.

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" 2. That the said Robert Whitmore Nunn was the lessee and manager of the St. Andrew's Hotel, Nuwara Eliya.

" 3. That the said Robert Whitmore Nunn died at Nuwara Eliya on the 2nd day of January, 1905.

" 4. That letters of administration to the estate of the said Robert Whitmore Nunn, deceased, were granted to the deceased's wife, Minnie Nunn, by the District Court of Kandy in testamentary case No. 2,410 on the 16th March, 1905.

" 5. That about the month of July, 1905, the said Mrs. Minnie Nunn left Ceylon.

" 6. That on the 21st day of August, 1905, the District Judge of Kandy revoked the letters of administration granted to Mrs. Minnie Nunn, and fresh letters of administration were issued to me on the 21st day of September, 1905.

" 7. That when I took over the administration of the estate of the said Robert Whitmore Nunn the only assets were the movable property in the said St. Andrew's Hotel of the value of about Rs. 10,000, subject however to a mortgage in favour of the plaintiff in this case for Rs. 5,000 and interest, and the debts due by the estate amounted to over Rs. 15,000.

" 8. That I advertised the said movable property for sale and the sale was fixed for the 23rd November, 1905.

" 9. That Cargills, Ltd., seized the said movable property under a judgment in District Court, Colombo, No. 22,573, on the 17th November, 1905.

" 10. That on the 24th November, 1905, I moved the District Court of Kandy to decree that the estate be administered under section 199 of the Civil Procedure Code.

" 11. That on the 27th November, 1905, the District Court of Kandy decreed that the estate was to be administered under section 199 of the Civil Procedure Code.

" 12. That the plaintiff, having put his mortgage in suit in this case, obtained on the 30th November, 1905, an order to sell the said mortgaged property.

" 13. That the Fiscal in his return to Court to the said order to sell states that he sold the said property on the 8th January, 1906, under the order to sell and under the writ issued in Cargills, Ltd., action No. 22,573 of this Court; that the said property had also been seized under writs Nos. 17,491 and 17,485 of the District Court, Kandy, and No. 33,597 of the Court of Requests of Colombo; and that there was a balance of Rs. 2,113.45 in his hands after paying the amount due on the mortgage decree in this case and to the landlord for rent in District Court, Kandy, No. 17,491, which

balance sum he had deposited in the Kandy Kachcheri to the credit of this case and of No. 22,573 of this Court.

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" 14. That I am now moving to be allowed to draw the said balance sum to be placed to the credit of the testamentary case and to be used first in payment of the costs of the testamentary case and the balance to be distributed *pro rata* among the creditors of the estate. "

The District Judge (J. R. Weinman, Esq.) made the following order on the application:—

" Robert Whitmore Nunn died at Nuwara Eliya on the 2nd of January, 1905. Letters of administration were issued to his wife in District Court case, Kandy, No. 2,410, on the 16th of March following. Mrs. Nunn left the Island in June, and in August the letters granted to her were revoked and fresh letters issued to the Secretary of the Court on the 28th September. The only assets of the estate, or rather the only assets that came into the hands of the administrator, were certain movable property in St. Andrew's Hotel, subject to a mortgage in favour of Mr. C. S. Hay, the plaintiff in this action, for Rs. 5,000 and interest. The debts due by the estate were over Rs. 15,000. The administrator advertised the sale of the property for the 23rd November, but for some reason or other did not sell. On the 17th of November Cargills, Ltd., seized the property under writ issued in case No. 22,573, District Court, Colombo. The plaintiff in this case put his bond in suit, and on an order to sell made in November caused the Fiscal to sell the property on the 8th January, 1906. As a matter of fact the Fiscal sold both under Hay's as well as Cargills, Ltd., writ. The property had also at the date of sale been seized under writs issued in cases Nos. 17,491 and 14,785 of the District Court, Kandy, and 33,597 of the Court of Requests of Colombo. After paying the mortgagee and the landlord (the plaintiff in District Court, Kandy, No. 17,491) there was a balance of Rs. 2,113.45 lodged to the credit of this case, which the administrator asks should be paid over to him to be distributed *pro rata* among the creditors of the estate. Cargills, Ltd., and the writ-holders, whose writs were in the hands of the Fiscal at the time of sale claim, this balance to be distributed amongst themselves *pro rata*. Now if the matter stood here there could be no question that the fund in Court should be divided rateably among all the creditors who, prior to its realization, applied to the Court for execution. The administrator however, without proceeding to sell the property as he was absolutely entitled to do, paying himself the costs of the administration, and then paying the creditors rateably (the mortgagee however preferentially), applied

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to the District Court of Kandy to decree that this estate be administered under section 199 of the Civil Procedure Code, and this application was allowed. Counsel for Cargills, Ltd., contends that this is a valueless and meaningless order made in misconception of the true purport of that section. Now the estate of the deceased was being administered under Chapter XXXVIII. of the Civil Procedure Code. That chapter makes provision for the administration of the estate of deceased persons by executors or administrators. It refers to testamentary actions which pend before the testamentary side of this Court—actions which in England would naturally pend before the Probate Court. Section 199 refers to testamentary suits—suits which would be brought in Chancery—suits for the administration by the Court of the estate of deceased persons. The Court does not—the administrator does—administer the affairs of the deceased person under Chapter XXXVIII. Administration suits such as are contemplated under section 199 are well known in our Courts, and I need only refer to *Uduma Lebbe v. Kassim* (1), where the Full Court (Phear C.J. and Clarence and Dias JJ.) laid down the form of decree in such cases. I would also refer to *Alwis v. Daniel* (2). Now this section and the preceding one 198 come under Chapter XX. referring to judgments and decrees. Section 198 refers to actions for accounts. Both these sections comprise one section (213) of the Indian Code of Civil Procedure, and no reason is apparent nor suggested why they were split up into two sections. This however is immaterial. The latter part of section 213 of the Indian Code, corresponding to section 199 of our Code, was taken over from the Supreme Court of Judicature Act of 1875 (38 & 39 Vict., c. 77, s. 10), which was passed in England to assimilate the practice in Chancery to that in bankruptcy. In Chancery a secured creditor could in an administration suit prove for the full amount of his debt; in bankruptcy he must realize his security and prove for the balance. It is clear that Chapter XX. refers only to the various forms of decrees. If further proof were necessary that this is so, one has only to refer to the forms of decree under section 213 of the Indian Code (see pages 1,008 and 1,009, O’Kinealy). I need not quote these forms in their entirety, but it will be seen that they refer to suits by a creditor, by a legatee, and by next of kin against a defendant who may be personally ordered to pay what the Court decrees.

“ I hold therefore that the order of the District Court of Kandy of the 27th November, 1905, is a nullity, and that Cargills, Ltd., and the other creditors who have appeared are entitled to the fund

(1) (1878) 1 S. C. C. 51.

(2) (1888) 8 S. C. C. 141.

in Court rateably. The money will not be paid out of Court till the appealable time has elapsed. The application of the defendant is disallowed. The defendant will pay all costs of these proceedings."

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" Since delivering my judgment I have been informed by the proctors for the parties that the only motion on which the Court's order was desired and which was discussed by counsel—though the other motions were incidentally mentioned—was the administrator's motion to draw the fund in Court. That being so, the only order I make is that the defendant's motion to draw the money be disallowed. In fact I find that that is the only order I made, though I expressed an opinion that Cargills and the other creditors were entitled to draw the money. However, so that the matter should admit of no doubt, I record that the application made by the other parties to draw money do stand over for discussion till the appealable time is past, or if there is an appeal, till the case comes back from the Supreme Court."

The administrator appealed.

Elliott, for him.—The Court has power under section 199 to order a rateable distribution among all the creditors. That has been the practice in the District Court of Colombo. The fact that the property was sold in execution makes no difference. Section 199 is not confined to administration suits only, but applies to all testamentary proceedings.

Sampayo, K.C., for Cargills, Ltd.—Sections 198 and 199 corresponding to section 213 of the Indian Code relate to decrees in administration suits and not to testamentary actions. These sections are taken from 38 and 39 Vict., c. 77, s. 10, which was enacted to assimilate the practice in Chancery in administration suits to that in bankruptcy. Administration suits are a well known form of action in Ceylon [*Uduma Lebbe v. Kassim* (1), *Fernando v. Fernando* (2), *Alwis v. Daniel* (3)]. Section 199 merely provides for the distribution of assets under a decree for administration by the Court of an estate, and not for the distribution of assets by an administrator. There is no such suit and no such decree in this case. The order of the District Judge of Kandy in the testamentary action is meaningless, and was apparently made under a misapprehension of the significance of the term "administration" and the scope of these sections. The administrator might indeed have sold the property himself and paid debts, but he cannot draw proceeds after execution sale. To allow him to do so would be to contravene section 350 of

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the Code and to defeat the rights of execution-creditors to concurrence under section 352.

F. S. Dornhorst, for H. van Cuylenberg.

Elliott, in reply.

28th June, 1906. LASCELLES A.C.J.—

I have no doubt that the order appealed from is right, and that the order of the District Court of Kandy was passed under misapprehension of the proper scope of sections 198 and 199 of the Civil Procedure Code. The derivation of these sections from section 10 of the Judicature Act of 1875 makes it plain that the "administration" referred to in sections 198 and 199 is not the ordinary testamentary procedure provided for by our Code. The sections refer to actions such as those brought by a legatee against an executor or by a *cestui qui* trust against a trustee claiming on account of the trust estate and administration of the property by the Court.

The order of the District Judge ought, in my opinion, to be affirmed. I think the costs of the parties should come out of the estate.

MIDDLETON J. agreed.
