Present : Mr. Justice Middleton and Mr. Justice Wood Renton.

1909.
November 12.

SOYSA *v.* ABEYDERA.

D. C., Galle, 2,948.

Civil Procedure Code, s. 551—Compensation to executors and administrators for trouble—Reimbursement of out-of-pocket expenses.

An executor (or administrator) is entitled to his out-of-pocket expenses in addition to the compensation provided for by section 551 of the Civil Procedure Code.

Section 551 deals only with compensation in the sense of remuneration for trouble; the first part of the section prescribes the maximum rates allowable; the second part limits the gross amount recoverable by the executor; but neither that amount nor any additional compensation allowed by the Court may increase the rates prescribed by the earlier part of the section.

APPEAL from a judgment of the District Judge of Galle.

Walter Pereira, K.C. (with him *Samarawickrama*), for the appellant (4th heir).

A. St. V. Jayewardene, for the respondent.

Cur. adv. vult.

November 12, 1909. MIDDLETON J.—

This was an appeal by Regina, the so-called 4th heir of her deceased father, together with her husband, against an order made in testamentary proceedings in favour of the executor-respondent, on August 23, 1909, allowing the respondent to withdraw the sum of Rs. 2,931, and the interest accrued thereon from March 24, 1904, said to be lying in deposit to the credit of the 4th heir in the present action, she being permitted by the same order to draw the balance.

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On April 27, 1901, a claim was made by the executor that he should be allowed by the Court to charge Rs. 7,200 for travelling expenses and Rs. 14,578 for compensation as executor. This claim was considered by the Court and allowed in the presence of Mr. Goonewardene, a proctor, who apparently then held the proxy of Francis Perera, who at that time was the duly appointed curator of the infant heirs, including Regina.

It would seem, however, from the evidence of Arthur de Soyza (p. 1,380/12), uncontradicted, that he was married to Regina on February 1, 1899, and there is no evidence pointed out to us in the record to show that Regina or her husband received notice of that particular application.

On August 6, 1901, Francis Perera appealed against this order, apparently as heir and not as curator, and on October 6, 1901, this appeal was allowed to be withdrawn by the Supreme Court.

On October 13, 1902 (record, p. 138), the executor, by consent of the three remaining heirs, excluding Regina, obtained leave to withdraw three-quarters of an amount then said to be in deposit. Regina received no notice of this application, except through the curator, and on August 17, 1903 (record, p. 138), a proxy from herself and her husband in favour of Mr. W. E. Weerasuria was filed in Court.

The question is (1) whether Regina, being a married woman at the time, is affected with notice of the order of April 27, 1901, through her curator appointed by the Court. By the form given, No. 94, of a certificate of curatorship, it remains in force until the minor attains the age of twenty-one years.

The executor (p. 138 M/11) admits that when the order of April 27, 1901, was made Regina was still a minor though married, and he did not give her notice of the application for that order because he thought she was still represented by her curator. By section 502 of the Civil Procedure Code a minor shall, for the purposes of chapter XXXIV., be deemed to have attained majority or full age on marriage. It seems to me therefore that Regina and her husband ought to have had notice of the application for the order of April 27, 1901, and they are not bound thereby, not only by parity of reasoning derived from a comparison of the position of a guardian *ad litem* with a curator, but also because on marriage a woman, though she does not under the Roman-Dutch Law (*Voet 4, 4, 9*) attain majority, yet, if she brings to her husband movable property, he as her guardian by marriage and by virtue of section 19 of Ordinance No. 15 of 1876 must have a right to notice before the Court can deal therewith. I would hold, therefore, that the order of April 27, 1901, cannot be deemed to affect Regina and her husband.

The other heirs apparently have consented to the order, and are, I assume, bound by it. This point was taken by the learned Solicitor-General subsequently to the main point insisted on by him, *i.e.*, that section 551 of the Civil Procedure Code would not permit

the Court to order as compensation to an executor any sum above Rs. 5,000 which would exceed the aggregate of 3 per cent. on property sold and not sold, together with 1½ per cent. on cash found in the estate and property especially bequeathed.

In my opinion this is the proper reading of the section, subject, however, to a construction of the word " compensation," which, I think, goes beyond that contended for by the Solicitor-General. The latter paragraph of the section seems to imply that the compensation is to be by way of remuneration and to be a recompense or reward for a loss of time and service, not including out-of-pocket expenses. Under English Law an executor is entitled to be allowed all reasonable expenses incurred by him as such, but not for personal trouble and loss of time (*Williams on Executors, vol. II., p. 1852, 7th edition*).

The question is whether under the Civil Procedure Code it was the intention of the Legislature, having regard to the English Law, to give a lump sum for compensation, which should include out-of-pocket expenses. It seems to me that the amount of out-of-pocket expenses for travelling incurred by a conscientious executor managing a small estate for some years might greatly exceed the percentage allowed by the section, and I think that the Legislature intended that the executor should be induced to perform his duties conscientiously by the payment of remuneration for services rendered, possibly as a justification for the stringency with which he may be treated for default and the difficulty of getting proper persons to fulfil the duties of the office, and should not be out of pocket for expenses properly incurred in the administration of the estate. On this construction of the section, which I think is the right one, the learned District Judge, in 1901, would have been right in allowing a sum for travelling expenses, and his order might very well be again decreed if no sufficient cause is shown for alteration on further consideration by the present District Judge, provided that the sum of Rs. 14,578 does not exceed the percentage allowed in the first part of section 551.

Under English Law an executor is entitled to his release from the beneficiaries under the will upon a filing of proper accounts and vouchers showing a due discharge of his obligation under the will, and, so far as I can gather from a perusal of chapters XXXVIII. and LIV. of the Civil Procedure Code, an executor may get his discharge in Ceylon on the same grounds and for the same reasons, although under sections 725 and 729 the Court may either order a judicial settlement of accounts, or the executor may petition for one to be ordered if he desires to do so.

In my opinion *3 N. L. R. 350* does not decide that an executor or administrator can only be deemed *functus officio* on a judicial settlement, nor do I think that section 540 of the Civil Procedure Code means this. The executor filed his accounts in 1899, and though

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the Court left them open to objection by the heirs, no objection has been taken to them up to the present. It may be the heirs' desire to drive the executor to obtain an order under 729 if he desires to get his release, but I agree with the learned District Judge that he is not to be debarred from drawing his compensation if the Court orders it upon the accounts as filed.

In the present case I have but little doubt that the appellant must have been well aware that the order of April 27, 1901, had been made, although they must be deemed to have had no legal notice of it. It was further contended by the Solicitor-General that the amount allowed to be withdrawn is an excess of one-quarter, as compared to that drawn against the other three heirs for three-quarters. This appears to be the case, and would be a further ground for varying the order appealed against. Under the circumstances, the order appealed against must be set aside, but I think each party should pay his own costs of the appeal.

As the order of April 27, 1901, has no effect as against the appellants, it will be necessary for the executor to renew his application to the Court for compensation and travelling expenses against the present appellant.

WOOD RENTON J.—

I agree. I have had some doubt as to whether an executor is entitled to his out-of-pocket expenses otherwise than as part of the compensation provided for by section 551 of the Civil Procedure Code. But, on full consideration, I think that that section deals only with compensation in the sense of remuneration for trouble; and that it was not intended by the Legislature to deprive an executor of his right, under the law of England—to the fundamental principles of which on this subject the law of Ceylon as to executors and administrators conforms (*Staples v. De Saram* [1])—to reimbursement for actual outlay. I agree with my brother Middleton as to the construction of section 551. In my opinion the first part of the section prescribes the maximum rates allowable; the second limits the gross amount recoverable by the executor; but neither that amount nor any additional compensation allowed by the Court may increase the rates prescribed by the earlier part of the section.

Case remitted.

[1] *Ram. 1863–68, 265*