Present: Bertram C.J. and De Sampayo J.

1918.

In re the Estate of P. H. NICHOLAS.

HOLSINGER *v.* NICHOLAS.

71—D. C. (Inty.) Negombo, 1,601.

Judicial settlement—Right of Court to inquire into charges of waste and negligence against an executor—Is separate action necessary?—Is executor entitled to charge more for proctor's fees than what the Civil Procedure Code provides?—Notary's fees—Executor's remuneration—Costs.

Where a complaint is made against an executor of negligence or waste, it is competent to the Court to inquire into the matter in a judicial settlement. The object of a judicial settlement is that all matters that may arise in the course of the administration of the estate between the accounting party and the beneficiary should be dealt with promptly and in an expeditious manner, so that the whole question might be finally wound up in those proceedings. If the Judge thinks that the matter is of such complication and importance that it can only be inquired into by a regular action, he might suspend the settlement until that matter is determined by a regular action, or conclude the settlement subject to the determination of that matter.

Where an executor paid to the proctor, whom he employed for the purpose of the legal business of administration, a sum of Rs. 5,000, which was agreed upon in advance,—

Held, that it was open to the Court to require the amount to be submitted to taxation before passing the item in the judicial settlement.

Under Ordinance No. 1 of 1907 a notary is not entitled to charge a higher fee than that prescribed in the Ordinance, and an executor cannot debit the estate with a higher fee for notarial charges.

The remuneration of an executor should not be a lump sum, but by a rate.

THE facts are set out in the order of the District Judge, M. S. Sreshta, Esq.:—

This inquiry has been held upon an application made by the heirs for a judicial settlement of the accounts of the executor. I have already decided that this account can be judicially settled upon the petition presented by the heirs. The other two issues which, of consent, were framed are:—

Can any of the items referred to in the petition of the heirs be judicially settled?

If they can be, are any of such items, or any part of them, not chargeable against the estate?

Most of the items in the account which are questioned relate to money paid to creditors and legatees for alleged necessary expenses and for the services of the executor. Two of the items refer to amounts alleged to be irrecoverable, and, therefore, not recovered, namely,

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debts due on promissory notes by Mrs. Leembruggen and M. B. Perera. These are items 1 and 2 contained in schedule A 2 annexed to the account. . . . . .

It is clear from section 739 of the Civil Procedure Code that the District Court is empowered to enter a decree under chapter LV. of the Civil Procedure Code, adjudicating upon the facts referred to in the section. It follows, therefore, that in an inquiry held under this chapter the Court has power to hold the necessary inquiry for the purpose of making such adjudication. . . . . .

The executor expressed his willingness to assign the note in questior to the heirs, as he has a hold on the interest payable to the first and second petitioners to secure himself against any personal loss by reason of making such assignment. I therefore make an order that the executor do assign to the three petitioners the notes in question, on their giving security to the Court that any money recovered on the notes would be deposited by them in Court to the credit of the estate. Although I am making this order, it is desirable that I should record my opinion that the executor has not exercised due diligence in regard to these two notes. One of them was granted by Mrs. L., whose husband is alive. The executor made no effort to recover the money due on this note. This lady's husband is a well-known doctor, and yet in practice at Negombo. In fact, he was one of the doctors who attended on the testatrix during her illness, and who was paid the large sum of Rs. 852.50 (*vide* Rs. 24 attached to the final account).

The executor admits that he had no reason to suppose that the money would not be paid. It is incomprehensible why he did not speak to Dr. L. and ask him for the payment of this debt. There is nothing to show that Mrs. L. obtained money on this note without his consent, and he might have regarded the debt as one of honour. Before payment was made to Dr. L. on account of medical attendance, an effort might have been made to deduct the money due on the note.

As regards the promissory note granted by M. B. P., proper inquiry should have been made as to who he was. The heirs should have been questioned. There is nothing to show that he has no property, and that it would be waste of money to sue him. No letter of demand was sent either to Mrs. Leembruggen or to Mr. Perera.

I shall now deal with the objections regarding the payment of certain items. The objection to the charges of Rs. 50 and Rs. 125 in schedule A 5 were practically withdrawn. As regards the charge of Rs. 105.50, that was incurred on account of visits paid to lands mortgaged to the estate; the executor admitted that it was not his duty as executor to consider the propriety of the investment made by the testatrix, and that he visited these lands as they had to be assigned by him as executor to himself as trustee. The will made him trustee of the cash bequest to the first petitioner. This charge must, therefore, be disallowed in the present account.

As regards the charge of Rs. 72.70 appearing in schedule A 4, it is composed of Rs. 62, being the hire of motor car employed by the executor on the day of the funeral of the testatrix, and Rs. 10.70, the amount of the bill of the Negombo resthouse-keeper for resthouse charges, dinner, drinks, &c., on the same day. The only work connected with the funeral that was done by the executor on this day was the ordering of a hearse and a coffin for the deceased from the firm of Walles. The

order for them could have been given by telephone. At the most the executor could have gone in a rickshaw to the firm's place of business. It was absolutely unnecessary to engage a motor car for the purpose of going to this place, or to go to Negombo for the funeral. The executor had no need to go to the funeral in his capacity as executor. He attended the funeral, being a close relation of the deceased. He could have easily gone to Negombo by the same afternoon train which took the coffin. As regards the resthouse charges, they were incurred at Negombo, not only for the executor, but for some others. As I have said, the visit paid by the executor to Negombo was not made in his capacity as executor. The entirety of this charge of Rs. 72.70 is, therefore, disallowed.

Charges of Rs. 283 in Schedule A 6.—Mr. Martin was sued in the District Court of Colombo on a mortgage bond (see P 8). The defendant was served with summons, but made no appearance in Court. The case was fixed for *ex parte* trial on June 16. The testatrix died before that date. Subsequently the defendant deposited the amount of principal and interest. Later on the executor took steps to withdraw the money in deposit. The charge now under scrutiny is made on account of the legal expenses incurred by the executor to draw the money in deposit. The defendant not having tendered the money due by him, even on the date on which he had to appear in Court on summons, could not have pleaded that no demand of the debt had been made from him before the institution of the action. The expenses in question were necessarily incurred by the executor, and should have been recovered from the defendant. It has not been shown that it would have been waste of money to endeavour to recover this sum from the defendant. The executor's explanation, through his counsel, was that these expenses could not have been charged against the defendant. However, in view of the Supreme Court decision already referred to, I cannot make any order against the executor regarding th non-recovery of costs from Mr. Martin. I would, however, suggest that as it appears from the journal entries on P 8 that as no decree has been entered as yet against Mr. Martin, steps be taken to recover from him the amount of costs charged against the estate. Of course, the executor should satisfy himself that this money is recoverable.

Rs. 960 paid as Legacies to Misses Ella and Jessie Nicholas.—According to the will, these legacies were payable by the heirs. There is no residue in the estate; and the result of the payment of these legacies having been made by the executor is that the cash bequest made in trust for the first petitioner and her children has been diminished. The heirs of the first petitioner are, therefore, prejudiced. The executor committed an error of judgment, which neither he nor his counsel appears to have appreciated. I direct the heirs to refund in equal shares this sum of Rs. 960 to be credited to the estate. I may add that the heirs could have easily refunded this money to the executor to be added to the trust fund, if they had the interests of the fiduciary heirs at heart.

The Non-payment of Mortgage on the Negombo House bequeathed to the First Petitioner.—The first petitioner was given the Negombo House and View House at Kandy. The third petitioner was given Lawford House at Nuwara Eliya. All these houses were subject to mortgage. The executor paid off the mortgages on Lawford House and on View House. Now, the petitioners want that the mortgage on the Negombo

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House should also be discharged by the executor. So far as I can see, the executor was in error in discharging mortgages on the Nuwara Eliya and the Kandy houses. The point of law involved has not been argued; but reading the opinion of counsel obtained by the executor himself (see P 1), it appears to me that the mortgages should have been left to be discharged by the heirs themselves. The result of the payment of these mortgages has been that the pecuniary legacy to the first petitioner and her children has been diminished. Both the heirs are benefited by this error made by the executor. The third petitioner has obtained Rs. 5,000 (?) more than he should have got; and the first petitioner, who was only entitled to the interest on Rs. 5,000 (?), has obtained the capital itself. As both the heirs, through their counsel, accepted the opinion given in P 1 to be correct, I direct them to refund to the credit of the estate the amounts paid by the executor to discharge the mortgages in question.

Charge of Rs. 750 for Lawyer's Fees in Schedule A 3.—Although this charge was objected to by the petitioners in their petition as excessive, and on the ground that no details were given of the charge, no details have yet been given, and no evidence has been adduced to show the various items of work which were done. According to the executor, the lawyers simply appear to have conducted some correspondence. He says: "These charges are only for correspondence. The other items were for correspondence with Messrs. F. J. & G. de Saram in connection with. . . . . " The charge made appears, *primâ facie*, to be excessive. The executor's excuse is that he was dealing with an established firm, whose charges he had no reason to dispute or question. As the executor actually paid this amount, and as it may be that the charges would not have been questioned by the testatrix if she were alive, I shall pass this item, but I shall take it into account when fixing the commission payable to the executor.

The charges made for executing the various deeds (see E 2) appear to be most exorbitant. The charges are greatly in excess of those allowed by the Notaries Ordinance. Although on the first day the learned counsel for the petitioners made a statement to that effect, and although the executor undertook to file a statement showing the amounts paid for stamps and for fees and particulars as to how they were arrived at, the executor's lawyer, who was also the notary employed by him, has studiously avoided showing the charges made for the various items of work done. It was obvious that the statement was wanted in order to enable the Court to see whether there was any over-charge obnoxious to the Notaries Ordinance. The notary apparently wants to take cover under certain items which do not appear to have been provided for in the Notaries Ordinance; but what those items are it is not quite clear, and had such items and the charges made for them been stated clearly, I have no doubt that it would have been obvious that a breach of the Notaries Ordinance had been committed. Section 34 of the Notaries Ordinance makes a demand or insistence upon receiving a higher fee than authorized punishable with a fine. The testatrix was a wealthy lady, and the estate belonged originally to her husband, who acquired it by dint of industry and hard work (see executor's evidence). The title to all the properties appears to have been quite good. The same firm of lawyers employed by the executor had been employed by the testatrix, and they must have known a good deal

about the estate. Moreover, the executor has not got to warrant and defend title. I cannot understand why such exorbitant charges should have been made for executing the transfers in question. These transfers were entirely of a formal character, and it has been held by the Supreme Court that they are not necessary. It was, however, said that the Loan Board does not lend money in the absence of conveyances executed by executors. Even if so, there was no need to waste money in executing deeds not required by law, unless the heirs insisted upon the execution of such deeds for the purpose of borrowing money from the Loan Board. The Loan Board apparently follows the practice prevailing before the Supreme Court decision referred to, and I think it would be satisfied with a copy of the decree of Court on a judicial settlement of the estate, showing the distribution of the estate among the heirs. I do not, however, disallow the charges altogether, as the petitioners' counsel did not ask for such an order.

To test the reasonableness of the charges, I have looked into deed P 9, which is one of the deeds for which the charges in question have been made. A rough calculation shows that this deed contains about 8 to 9 folios of 120 words. The charge for drawing, engrossing, and attesting this deed would, therefore, be Rs. 22.50. As I have already said, examination of title was not necessary. There is nothing to show that the executor requested the notary to examine the title. A charge is payable only for examining title at the request of any party. But even if a charge for examining title can be allowed, only Re. 1 can be charged for the first deed examined, and 50 cents for each additional deed examined. The charge for registering any deed is only Rs. 5. The charge for sending a duplicate to the Registrar of Lands is half the charge for drawing the deed, namely, Rs. 11.25. There are some other small items of work mentioned in the statement E 2; Rs. 50 for this deed would appear to be quite ample for the work done in connection with this deed. The chances are that even this amount is more than what is payable. If in reality this amount is less than what can be charged, the fault is entirely the executor's and the notary's for they fail to frankly and clearly state the details of their charges; they are clearly afraid that the charges, if given in detail, cannot bear scrutiny. In some of the other deeds a little more work may have been done and in some less. On the average a sum of Rs. 50 may be allowed for each of the eight deeds first mentioned. The deed for the assignment of Silva's bond was a comparatively unimportant one, involving only a sum of Rs. 750. I would allow the charges as below for stamps and work done:—

Document	Stamps Rs.	Work done. Rs.	Total. Rs.
View House	26	50	76
Negombo House	28	50	78
Welihena	31	50	81
Lawford House	26	50	76
Mortgage bond of J. L. Rodrigo ..	26	50	76
Mortgage bond of B. V. Rodrigo ..	26	50	76
Bond of Fernando	26	50	76
Bond of Samaraweera ..	25	50	75
Bond of Simon Silva (inclusive charge for stamps and work) ..	—	30	30
Total ..	214	430	644

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. . . . .It is clear from sub-section (3) of section 4 of Ordinance No. 1 of 1907, to which I have already referred, that a notary cannot enter into any agreement for recovering higher charges than are prescribed in the Notaries Ordinance . . . . . The notary cannot, therefore under any circumstances, make any higher charge than is prescribed in the Notaries Ordinance; as I have said before, the notary, perhaps, takes refuge under certain items which are not provided for in the Notaries Ordinance; if so, he has not stated what those items are, and what charges are made for those items. I am not satisfied that there are any such items; if there be any, the charges for them must be most unreasonable to increase the charges from the amount that I have allowed, namely, Rs. 430, to Rs. 1,825 . . . . . .

Now I come to the costs of administration, which include a sum of Rs. 5,000 on account of proctor's fees for the work done in this case. This sum was strongly objected to on the ground that it was excessive. It was admitted by the executor's counsel that this charge is in excess of what the costs would amount to if taxed. The executor's explanation for paying this heavy charge is that he entered into an agreement with his proctor that he would pay this amount as the fee for the work to be done in this case. I shall, first of all, deal with the question whether the executor was justified in entering into a special agreement with his proctor to pay a sum which might be in excess of the taxed costs. I understood from the petitioners' counsel that in the Colombo District Court the costs are always taxed when there is a dispute between the executor and the heirs. It has been held in *Johnson v. Telford*[1] that an executor is not entitled to be allowed without question the amount of bills of costs which he has paid to his solicitor, although such payment was made *bona fide*. No doubt an agreement entered into with his proctor will bind the executor. But it cannot bind the heirs. I understood that the learned counsel for the executor to accept this proposition, but to contend that the charge of Rs. 5,000 was a reasonable one in this case. But I am not quite sure whether that was his position. It is however, clear from the decision of the case just quoted that the heirs can question the charge for costs and claim that it be taxed. There is no provision in our law for, as was done in that case, moderating a bill of costs—a summary method of taxing bills, which apparently can be adopted in English Courts in lieu of regular taxation at the discretion of the Court.

The next question is whether the charge of Rs. 5,000 made is reasonable. If the executor agreed to pay such a large sum of money as costs, he acted recklessly. He says he agreed to pay this amount whether the work was much or little. He was in a position of trust. It was his duty to safeguard the interests of the heirs as carefully as if they were his own interests. Did he so safeguard them by agreeing to give away on account of costs such a large sum of money, equal to his own salary for a whole year, without trying to ascertain what the taxed costs would be, or what the usual costs would be? Would it not have struck any layman that Rs. 5,000 for proctor's costs was something enormous? It is surprising that the proctor, knowing that the costs would have to be taxed if disputed by the heirs, did not ask the executor to get the consent of the heirs also. It is also surprising that a writing was not obtained from the executor that he consented to pay Rs. 5,000 on account of the costs

[1] *(1827) 3 Russ. 477.*

without taxation. Some better evidence than the executor's bare statement should have been adduced to prove the alleged agreement. I am not satisfied that there was an agreement to pay Rs. 5,000 as alleged.

Although, no doubt, this estate was a very large one, the work that had to be done by the executor's proctor was not difficult. The estate was in an excellent condition; there were practically no cases to be brought. In the two cases of promissory notes in which an action might have been brought no action was brought. There were no debts to pay up. No intricate accounts had to be looked into. The immovable property was looked after by the heirs themselves. There was, no doubt, an important question of law involved as regards the redemption of the mortgages; but that was a pure question of law, involving no labour for the proctor; counsel's opinion was necessary, and was obtained. In fact, this was one of the easiest estates to administer that I have come across. I should have added that, in the case against Mr. Martin, where the costs could have been recovered from him, they were not recovered.

In these circumstances, there is no reason whatever why the executor should be allowed, on account of proctor's fees, anything in excess of taxed costs. I therefore direct that the executor be allowed, not Rs. 5,000 on account of proctor's costs, but only such costs as are taxed by the Secretary of this Court on a bill of costs being filed by the executor within two weeks from today. As regards commission, the amount charged is Rs. 4,000; it appears that the first and second petitioners at first consented to pay this amount. They, however, do not wish to pay this amount now. It is clear that it is for the Court to fix the rate of commission, though, no doubt, it would take into account the fact that the persons interested have agreed to a certain rate of commission. What I stated already as regards this estate being an easy one to administer, and as to the lack of diligence exercised, apply with greater force to the executor. He practically left everything in the hands of his lawyers; for visits paid to see the mortgaged lands, he is not entitled to charge anything as executor; he has been paid all his out-of-pocket expenses, including travelling expenses. His alleged scrutiny of bills dwindled under cross-examination to practically nothing. His office is in the Fort; he just stepped into Cargills, &c. and asked them to give a detailed account; he went home, and the accounts were sent to him. Without question, he paid a large sum for legal services rendered to the testatrix. He, similarly, paid up a large bill for deeds executed in favour of the heirs, &c. Taking all these facts into consideration, I think a sum of Rs. 1,000 is sufficient and reasonable on account of commission. It is to be noted that the executor should have applied to the Court to fix the rate of commission before filing the final account.

Except as modified or reduced as stated above, and subject to the remarks made above, the items in the final account are passed. As the petitioners have in the main succeeded, the costs of this inquiry should be paid by the executor personally, that is to say, these costs should not be paid from the estate. The executor's own costs of this inquiry should also be borne personally, and not from the estate.

Bawa, K.C. (with him *Samarawickreme* and *Canakaratne*), for the appellant.

Drieberg (with him *Bartholomeusz*) for the respondents.

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October 2, 1918. Bertram C.J.—

This is a case which raises important questions of principle with regard to judicial settlement of estates, and with regard to charges of proctors and notaries in connection with the administration of estates. A considerable number of items have been challenged in this particular judicial settlement. The learned District Judge has given his decision in regard to them, and with respect to some of his decisions there is an appeal to this Court.

Some of the items are comparatively of small importance. Others involve matters of principle. Speaking generally with regard to the scope of judicial settlements. Mr. Bawa, appearing here for the executor, strove to limit that scope by a reference to a decision of this Court *In re the Estate of Nukkuttiar*,[1] and, in particular, by a reference to an *obiter dictum of Middleton J.* All that was necessary to decide in that case was whether an administrator had a discretion to abandon a debt due to the estate, which, in the exercise of his common sense and judgment, he considered to be irrecoverable and not worth the powder and shot. There were similar questions with regard to the recovery of costs. The Court held that he had such a discretion, and had further held that it was not right in a judicial settlement to charge an administrator with costs which had not in fact reached his hands, even though the Court might be of opinion that those costs might be recoverable. Those were the points which the Court actually decided, and it may be considered as an authority on those points. But towards the close of his judgment Middleton J., speaking with regard to section 736 of the Civil Procedure Code, which relates to contests between the accounting party, namely, the executor or administrator, and the parties interested in the estate, and which says that such contests must be referred to the process of an ordinary trial, expressed the opinion that where negligence or fraud or some act as founding a claim in *devastavit* against an administrator is alleged, that should also be made the subject of separate proceedings. I do not think that that dictum should be pressed too far. It may very well be that in the course of a judicial settlement a matter may come up as to which the Judge may think that it is a matter of such complication and importance that it can only be inquired into by a regular action. In such a case the Judge might reasonably either suspend the settlement until that matter had been determined by a regular action, or conclude the settlement subject to the determination of that matter. But it would be a most serious limitation of a most salutary procedure to declare that, where a complaint is made against an executor of negligence or waste, the Court cannot inquire into the matter in a judicial settlement. The object of a judicial settlement is that all matters that may arise in the course of the administration of the estate between the accounting party and the

[1] *(1909) 1 Cur L. R. 53.*

beneficiary should be dealt with promptly and in an expeditious manner, so that the whole estate might be finally wound up in those proceedings. I do not think, therefore, that the objection of Mr. Bawa to the learned Judge considering at all certain of those items can be considered a sound one.

With regard to the items under consideration, as I say, some of these items are of a trifling character. The executor incurred an expenditure of Rs. 50 in hiring a motor car for making certain arrangements for the funeral at Negombo. He was acting in circumstances of considerable pressure, and I think it is an expenditure that may very well be considered to have been legitimately incurred. The estate was a large one; the deceased lady was a person of some position; it was desirable that all arrangements should be properly made, and, in the circumstances, I do not think that he is much to be criticised for incurring the expenditure. That, I think, should be passed. The same observation does not apply to the resthouse bill, and here I agree with the learned District Judge. Further, there is an item with regard to the expenditure incurred in visiting the properties which were comprised in the estate. I think, in view of the responsibility of the executor and the value of these properties, that was an expenditure he may be considered properly to have incurred.

The more important items, however, were a sum of Rs. 5,000 paid to the proctors whom he employed for the purpose of the legal business of the administration; certain notarial charges paid to the proctors in their capacity as notaries; and the sum charged for his commission in the case. The question of the remuneration of the proctors is one of very great importance. It is a matter which is not regulated in this country either by Ordinance or by judicial decisions. The facts of the case are that the executor, having to deal with a very considerable estate, not unnaturally went at once to the proctors of the deceased testatrix and suggested that they should undertake the legal business connected with the administration. The proctors appear to have stipulated for a lump sum of considerable magnitude. It may very well be that they did not think it worth their while, except for substantial remuneration, to supervise the administration of an estate in Negombo. As I say, the principles governing the matter have never been authoritatively discussed, and it is perhaps not surprising that the proctors should have stipulated for this sum. Similarly, it is not altogether surprising that the executor should in this matter have left himself in the hands of the proctors. But when the matter comes before this Court, we cannot regard it from this point of view. When a Judge is supervising a judicial settlement, he must bear in mind, not only the position of the executor and those whom he employs, but also that of the beneficiaries, and the effect of any principle that may be laid down upon other cases. It is most

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necessary that in these settlements a Judge should exercise a strict control over the practitioners employed, who, it must be remembered are officers of the Courts. That principle has always been recognized in England. It has been made the subject of not only judicial decisions, but of statutory legislation, and it is quite reasonable that, in determining what course should be adopted in a judicial settlement in our own Colony, we should examine the principles that are in force in England on the subject.

In England the matter is dealt with mainly by statute. But, apart from statute, it appears that the Courts in England always regarded special agreements between solicitors and their clients with very great jealousy. In the case of *Clare v. Joseph*, [1] the common law on the subject was very fully discussed, and was declared that agreements as to costs made before the Act of 1870 were not necessarily enforceable, but were viewed with very great jealousy. The Courts were slow to enforce such agreements where they were favourable to the solicitor, unless they were satisfied they were made in circumstances such as to preclude suspicion. The same principles are enunciated in *Grundy v. Sainsbury*[2] by Fletcher Moulton L. J. He describes these agreements as agreements of imperfect validity. In the year 1870 those agreements were by the Solicitors Act of that year submitted to statutory regulation. Solicitors were expressly empowered to make such agreements, but subject to important safeguards. It is interesting to note the view of the English statute with regard to agreements made between solicitors and clients, who are in the position of guardians or trustees. In such a case so important was it considered to protect the interests of wards and *cestui que trusts* that by section 10 of that statute it is declared that in such cases the agreement shall, before payment, be laid before the taxing officer of the Court having jurisdiction to enforce the agreement, and that such officer shall examine the same, and may disallow any part thereof, or may require the direction of the Court or a Judge to be taken thereon by motion or petition; and if in any such case the client pay the whole or any part of the amount payable under the agreement without the previous allowance of such officer or Court or Judge, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid. That section indicates the very serious care which the Legislature exercised with regard to agreements of this character.

Further the matter was dealt with in a previous Act, the Act of 1843, which is concerned with the taxation of costs. That Act did not take into consideration special agreements. It was dealing, in the sections to which I shall refer, purely with ordinary bills of costs, and here, too, the position of the beneficiaries and *cestui que trusts* received marked consideration. By section 39 it was specially provided that such persons may require any bill, which is presented

[1] *(1907) 2 K. B. 369.* [2] *(1910) 1 K. B. 645.*

to their executors or trustees, or which may even have been paid by them, to be submitted for taxation; and further, by section 41 it is provided that (with reference to this and other matters) the payment of any such bill shall in no case preclude the Court or Judge to whom application shall be made from referring such bill for taxation, if the "special circumstances" of the case shall, in the opinion of such Court or Judge, appear to require the same. The Legislature, therefore, has very clearly laid down that, where there are "special circumstances," even though a bill may have already been paid, that will not prevent the Court from interfering to protect persons of the description of beneficiaries under this will. Now, it is perfectly true that these words "special circumstances," which occur in several places in the Act, have received judicial interpretation. On this, however, I would draw attention to the observations of Bowen L.J. *In re Boycott*,[1] where he says that, although in practice "special circumstances" were generally understood to mean circumstances in the nature of overcharge or pressure, he saw no reason why they should be limited to those customary heads. Cotton L.J. appears to have disagreed with that expression of opinion. Fry L.J., on the whole, endorsed it. That principle is now accepted in the text books. (See in particular the article on Solicitors in Lord Halsbury's *Laws of England, paragraph 1271.*)

But we are not considering here the interpretation of a statute. We are considering general principles. The general principles laid down in England are that any special agreement as to costs is regarded with jealousy. A special agreement between a solicitor and a person in the position of a trustee, where the burden of the agreement falls, not upon the trustee, but upon the *cestui que trust*, is regarded with special jealousy. The fact that the bill has already been paid does not preclude the Court from exercising its powers of protection. The fact that the agreement is made with a person who is in the position of an executor or trustee is itself a fact of a special nature, and one which makes it incumbent on the Court to exercise special vigilance.

There were two authorities mentioned, which indicate the strictness with which the English Courts proceed in enforcing their power of protection of beneficiaries and *cestui que trusts*. One is the case of *Johnson v. Telford*,[2] where the Court said: "It cannot be contended that an executor is to be allowed, without question, whatever sum he thinks fit to pay to his solicitor," and there the Court enforced that principle, even though the sum had been already paid. The other case was the case of *In re Drake*,[3] where the remuneration had been agreed to in advance, and where a mortgage had been given as security. The Court observed.

[1] *(1885) 29 Ch. D. 571.*

[2] *(1827) 3 Russ. 476.*

[3] *(1844) 8 Beav. 123.*

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" The trustees may have to pay the over-charge, if any, out of their pocket. I express no opinion on that."

When, therefore, in the course of this judicial settlement the learned District Judge said that he could not pass the item of a fixed sum of a substantial character agreed upon in advance between the executor and the proctor, and required the amount to be submitted to taxation, he was laying down a very salutary principle. If we did not fully endorse a pronouncement of this character, we should be opening the door to very serious abuses. We should, in fact, be saying that we would not, in the exercise of our own jurisdiction, observe the principles which have been evolved with such beneficial effect in England.

The proctors, no doubt, made this charge purely as a matter of business. Had their attention been drawn to the principles which are enforced in England, I think they would have brought them to the notice of their clients. At any rate, now that the question has arisen, I do not think it is possible to decide the case in any other way than that adopted by the District Judge.

The next item is a very considerable item for notarial charges. Now, notarial charges are in this country regulated by statute. They are strictly regulated. It is even declared that if a notary demands or insists upon receiving a higher fee than he is authorized to demand under the Ordinance he is guilty of an offence (section 36 of Ordinance No. 1 of 1907). It is said that it is the practice for notaries, nevertheless, to charge higher rates, and to demand remuneration for other items than those comprised in the schedule to that Ordinance. As to that we have no precise information. If the fees are too low, that is a question for the Legislature, and I understand it is receiving the attention of the Legislature. We, at any rate, so far as the items in the schedule are concerned, cannot give judicial sanction to a practice which is irregular and unlawful.

With regard to the suggestion that, whether this be so or not, the executor made an agreement for the payment of those charges and paid them, and that, therefore, they ought to be allowed, I am by no means sure that there was any special agreement at all. The notaries intimated that they could not work for the ordinary schedule rates. The executor said that in that case he would be content to pay any sum that was reasonable. But there appears to have been no discussion as to what sum was or was not reasonable. I think there is very considerable force in the criticism of the amounts charged in respect of these deeds. They were deeds only of a formal nature, not strictly necessary according to law, and made out only for purposes of convenience. I am by no means satisfied that, even if the notaries had a free hand, the fees charged were reasonable charges. The question, however, does not arise. All that we can declare in this case is that the amount claimed by the executor in respect of these payments must be reduced to such

amount as the executor shall satisfy the District Judge might have been the legal charge under the schedule to the Notaries Ordinance, No. 1 of 1907. I should have been prepared to leave the amount as fixed by the District Judge. But Mr. Bawa points out that, strictly speaking, a lump sum cannot be awarded, and he prefers that his strict legal rights under the schedule shall be determined. I think the order of the District Judge should be varied in the manner I have indicated.

Now we come to the question of commission. The executor claimed a commission of 1½ per cent. The District Judge has awarded a lump sum of Rs. 1,000. Mr. Bawa contends that the Legislature intended that executors in this position should be remunerated by a rate. That is clearly so from the words of the Ordinance. I think it is quite reasonable that the executor's remuneration should bear some relation to the magnitude of the estate. That, I think, was the intention of the Legislature, and it is quite reasonable that, where the estate is a large one, the executor should be remunerated more fully than in the case of a small estate, even though the work involved may be much the same in the two cases. Now, this estate was an estate of some magnitude, but it involved no special trouble. Everything was in a business-like condition. Though a certain responsibility devolved on the executor, the work necessarily involved no very great personal trouble, more particularly when he took the course of placing its management in the hands of an established firm of proctors. But he has been criticised with regard to certain items, and I am bound to say that there was some force in those criticisms. He appears to have left the administration of the estate rather too much to his legal advisers, and to have not concerned himself or to have taken any special care with regard to the items which have been made the subject of comment. He might have taken some trouble with regard to the sum advanced to Mr. Perera. He might have taken some trouble with regard to the promissory note due by the wife of Dr. Leembruggen. Further, I think he would have done well if he had exercised a certain diligence in the examination of the charges made by the proctors other than the sum of Rs. 5,000, even though he was dealing with a firm of standing of the proctors in this case. I make these observations to indicate that the work actually done was not of a very serious nature. Under all the circumstances of the case, I think the proper remuneration would be a fee of 1 per cent on the value of the whole estate. It is not necessary for this purpose to interpret the terms of section 551 of the Civil Procedure Code, which, in fact, appear to be somewhat obscure.

We now come to the question of costs. Certainly executors would be in a serious position if, when a judicial settlement was called for, they were made personally responsible for the costs of any issue which arose in the course of the settlement, and in which

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they were not successful. It is desirable that these matters should be investigated, and points may arise for determination which may involve argument, but if it appears that, as a result of the examination of the executor's account, he cannot justly be charged with any misfeasance or gross negligence, I do not think that the fact that he took a particular line in regard to some transactions which the Court did not approve, should be a reason for saddling him with costs. In this case the executor was dealing with a matter which had not been made the subject of judicial declaration. He acted without due consideration as to certain matters, and the Court has thought fit to correct the steps which he took. The steps were taken in good faith, and I do not think that his action can be described as gross negligence. Under the circumstances, therefore, I am of opinion that the costs of both parties in the judicial settlement in the Court below may be paid out of the estate. With regard to this appeal, in the circumstances of the case, the most equitable course would be that there should be no order as to costs.

DE SAMPAYO J.—I agree.

Varied.