FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 8/78.

No. 1,809 of 10th MAY, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

Re NICHOLAS ROSENBAUM, deceased

Supreme Court (in chambers)
Spry, C. J.

20 November 1978

Probate—whether court has discretion to pass over executor—Administration of Estates Ordinance, s. 12—Court of Probate Act, 1857, s. 73—Administration of Estates Act, 1925, s. 10—Supreme Court of Judicature (Consolidation) Act, 1925, s.162—Administration of Justice Act, 1928, s.9.

A caveator entered a caveat against the grant of probate to the executor named in the will of the deceased, on the ground that his conduct showed him to be unfit for office. On the hearing of a summons for directions, a preliminary point of law was taken, that the executor was entitled to a grant as of right.

HELD: The executor, not being under any legal disability and being willing to act, was entitled to a grant of probate, the court having no discretion to pass him over.

Cases referred to in the order
Smethurst v. Tomlin (1861) 164 E.R. 947
In re White [1928] P.75
In the Goods of Samson (1873) L.R. 3 P. & D. 48
Re S. decd. [1968] P. 302
In the Estate of Biggs, decd. [1966] P. 118
In the Estate of Leguia [1934] P. 80

Summons for Directions

This was a summons for directions under the Non-Contentious Probate Rules, 1954, brought by a caveator who applied to the court to pass over the executor named in the will of the deceased and appoint an administrator.

K. H. T. Schiemann and A. V. Stagnetto for the executor
G. Lightman and A. J. Vasquez for the widow and for the substitute executor
P. J. Isola for the caveator.

28th November 1978: The following order was read in open court—

The late Nicholas Rosenbaum died on 1 April 1976 having by will appointed Nicholas Doman to be his executor. The will has been proved by the executor in the State of New York, where the deceased was domiciled, and in England. A daughter of the deceased, Ildiko Rosenbaum Rosenfeld, a beneficiary under the will, entered a caveat against the sealing of a grant of probate in Gibraltar. She alleges that the executor has by his conduct shown himself to be unfit for office. A warning to the caveat was issued and served, and the caveator entered an appearance and took out a summons for directions. After various proceedings before the Registrar, the matter has come before me.

On 20 November 1978, I heard argument on a preliminary point of jurisdiction. I now give my ruling.

Mr Schiemann, who appeared for the executor, submitted that the executor is entitled to probate as of right and that this court has no jurisdiction to pass over him. There has been no suggestion that the will is not a valid and effectual instrument or that there is any defect in the appointment of the executor. The conditions contained in para. (a) of the proviso to r.29 of the Non-Contentious Probate Rules, 1954, are satisfied. Mr Schiemann claimed, relying on *Smethurst* v. *Tomlin* (1), that at common law even conviction of felony did not disentitle an executor, and in the present case there is no such suggestion. So far as statute law is concerned, the rights of the executor have not ceased under s.7 of the Administration of Estates Ordinance (Cap. 1) and s.12, which relates to the grant of letters of administration, does not apply.

Mr. Lightman, who appeared for the widow of the deceased and for a person named in the will as substitute executor, supported Mr. Schiemann and cited *In re White* (2) as a decision that the proviso to s.10 of the English Administration of Estates Act, 1925, from which s.12 of Cap. 1 was taken, is limited to cases where a person died wholly intestate. I should have thought that so clear as not to need authority.

(1) (1861) 164 E.R. 947.
(2) [1928] P.75.

Mr. Peter Isola, for the caveator, submitted that s.12 of Cap. 1 gives the court jurisdiction to pass over an executor and appoint an administrator. He argued that *White's* case supported his argument. He further argued that s.6 of Cap. 1, which preserves the power of the court to "do such other things concerning the will as have heretofore been customary", was relevant. Thirdly, he invoked s.62 (1) of Cap. 1, which preserves all powers of the court which exist independently of the Ordinance. Fourthly, he invoked s.22 of the Supreme Court Ordinance (Cap. 148) which confers on the court "all the jurisdiction, powers and authorities" of the High Court in England. Finally, and in the alternative, he submitted that it was within the inherent jurisdiction of the court to pass over an executor.

I will begin by examining Cap. 1. Section 7 sets out three circumstances in which the right of an executor to representation ceases. Clearly none has any application to the present case. Section 12 reads as follows—

> "12. In granting letters of administration the court shall have regard to the rights of all persons interested in the real and personal estate of the deceased person, or the proceeds of sale thereof, and in particular administration, with the will annexed, may be granted to a devisee or legatee; and in regard to land settled previously to the death of the deceased, and not by his will, administration may be granted to the trustees of the settlement, and any such administration may be limited in anyway the court thinks fit:
>
> Provided that, where the deceased died wholly intestate as to his real and personal estate administration shall—
>
> (*a*) unless by reason of the insolvency of the estate or other special circumstances the court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested under this Ordinance in the residuary estate of the deceased, if an application is made for the purpose; and
> (*b*) in regard to land settled previously to the death of the deceased, be granted to the trustees (if any) of the settlement if willing to act."

Looking at that section generally, and giving the words their ordinary meaning, it seems to me clear that it is a section regulating the grant of letters of administration; indeed the parent section was described in s.9 of the English Administration of

Justice Act, 1928, as a section "which makes provision with respect to the exercise of the discretion of the court in granting administration.". It is not a section conferring power to grant letters of administration and it does not purport to do so. The wording of the proviso is mandatory, but as a proviso it is only a restriction on the general discretion conferred by the section. It is a curious fact that Cap. 1 contains no general power to grant letters of administration. On the other hand, the statute it replaced, the English Court of Probate Act, 1857, which applied to Gibraltar, provided, in s.73, that where a person died intestate or where there was no executor willing and able to act or where the executor was out of the jurisdiction and there were special circumstances—

> "it shall be lawful for the Court, in its Discretion, to appoint such Person as the Court shall think fit to be such Administrator....."

I do not think the reported cases where grants were made under s.73 are of any assistance, because there can be no doubt that the section expressly gave the court power to pass over an executor in certain circumstances. I would only refer to *In the Goods of Samson* (1), in which the court was asked to pass over an executor, who was not resident in England and against whom there were allegations, which were strongly denied, that he was not a fit and proper person to be entrusted with the estate of the deceased. Sir J. Hannen held that while he had power under s.73 of the Court of Probate Act, 1857, to make the order sought, it would not be right to do so. He said—

> "The 73rd section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this Court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate of the deceased or other special circumstances...The executor's appointment is derived from the will. It is the intention of the deceased that that particular person shall have control over his property after death; and although in certain cases the section empowers me to give another person such control, unless the legislature thinks proper to arm me with a general power I ought not to assume it."

(1) (1873) L.R. 3 P. & D. 48.

In later cases, the courts seem to have been less scrupulous or more liberal in their interpretation of the section, but I have cited *Samson's* case as authority for saying that a court may not assume a wider power than the statute confers. None of the later cases even suggests such a power.

The Administration of Estates Act, 1925, repealed s.73 and substituted a new provision as s.10, from which s.12 of Cap. 1 was taken verbatim. There appears to be no reported case on the interpretation of s.10. That section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, which substituted a new section, s.162, which was substantially a re-enactment of s.10, including the proviso. This new section was amended by s.9 of the Administration of Justice Act, 1928, which substituted a new proviso not limited to intestate estates. The only reported case I have been referred to that deals with s.162 in its original form is *In re White* (supra) but it is of no present assistance, as it was concerned only with reconciling s.162 with section 160 of the same Act. Since the new proviso was introduced, there have been two reported cases of grants based on it: *In the Estate of Biggs, decd.* (1) and *Re S., decd.* (2). In those cases, both of which were uncontested, s.162, as amended, was treated as replacing s.73 and conferring the same wide powers. With the greatest respect, I do not share that view and I can find no power in the proviso to pass over an executor — even assuming that a proviso could have such effect. It appears only to enable the court to pass over "the person who, but for this provision, would by law have been entitled to the grant of administration". An executor is not entitled to a grant of administration, as defined in the Supreme Court of Judicature (Consolidation) Act, 1925, or as regards Gibraltar in Cap. 1. However, it is unnecessary to decide the point, since Cap. 1 does not contain the current English proviso and nothing in either case assists in the interpretation of the section itself, apart from the proviso to it.

As regards Mr. Isola's subsidiary points, I am not persuaded that s.6 of Cap. 1 is of any assistance. The saving of practices that "have heretofore been customary" cannot, in my opinion, extend to a statutory provision, s.73, which was expressly repealed in its application to Gibraltar by s.58 and the Second Schedule of Cap. 1, as originally enacted.

Secondly, I do not think the general saving in s.62(1) of Cap. 1 of "the powers of the court which exist independently"

(1) [1966] P. 118. (2) [1968] P. 302.

of the Ordinance is relevant, because I am not aware of any power outside the Ordinance to grant administration, passing over an executor.

Thirdly, I think the jurisdiction, powers and authorities conferred by s.22 of the Supreme Court Ordinance must relate to common law jurisdiction, inherent powers and matters of practice and procedure. Certainly it cannot confer English statutory powers in relation to a subject governed by local statute.

Finally I turn to Mr. Isola's alternative submission, that the court could properly pass over the executor in exercise of inherent jurisdiction. In support of this proposition, Mr. Isola cited *In the Estate of Leguia* (1) and *In the Estate of Biggs, decd.* (Supra).

Leguia's case concerned the estate of a man who had died insolvent, domiciled in Peru. His executor had gone to England but it was not known if he was still there. He had taken no steps to obtain probate and had withdrawn a retainer he had given to solicitors. The difficulty was that he had not been cited to take out probate. The President (Lord Merriman) was invited by counsel to rely on proviso (b) to s.162(1) but, as I understand his judgment, he declined to do so. He said—

> "None of the prescribed statutory conditions to divest him of his rights exist nor has he been cited to appear and show cause why he should not be held either unwilling or incompetent to take probate. Nevertheless I am satisfied that apart from statute there is a power inherent in the Court to grant administration notwithstanding the non-citation of the executor....."

I do not think the learned President was saying that there was an inherent power to pass over an executor, but merely that in an appropriate case the court may waive the procedural requirement of citation. I think that he was addressing himself to s.5 of the Administration of Estates Act, 1925, not to s.162 of the Supreme Court of Judicature (Consolidation) Act, 1925. (With respect, I think that the learned editor of Tristram & Coote was wrong to include the case among those decided under s. 162.)

Biggs case was mainly concerned with a question not now relevant, but Rees, J., did have occasion to cite and to follow the decision in *Leguia's* case.

(1) [1934] P. 80.

Smethurst v. *Tomlin* (supra), cited by Mr Schiemann, was the case of an executor who had been convicted of a felony after the death of the testator and who sought to prove the will, and Sir C. Cresswell said that the authorities established, inter alia —

> "that where a will has been made and an executor appointed, the Ordinary cannot exercise any discretion as to the granting or refusing probate. If he refused probate, it must be on the ground of some legal disability, recognized and allowed by the common law, and not by the Canon law only."

So far as I am aware, that is still good law .

I have already referred to *Samson's* case, which appears to me, by implication, to support *Smethurst* v. *Tomlin.*

In the absence of any authority to the contrary, I have no hesitation in holding that the court has no inherent power to pass over an executor who is able and willing to serve, even where there are reasons for doubting his suitability for office. There is no suggestion that Mr. Doman is under any legal disability. As I have already found that Cap. 1 confers no power to pass over an executor, it follows that the attempt by the caveator to prevent the grant of probate to the executor must fail. The caveat is discharged.