

Master's Office.]

MERCHANTS' BANK V. MONTEITH.

[Master's Office.]

Rae, for plaintiffs.

J. A. Paterson, for creditors.

Black, for infant.

J. Macgregor, for defendant Pritchard.

THE MASTER-IN-ORDINARY.—In this case the executors named by the testator renounced probate, and the Surrogate Court granted letters of administration with the will annexed to the defendant, Monteith, who, as appears by the evidence taken in this matter, was then, and still is, an infant under the age of twenty-one years.

The administration order directs the usual accounts of the dealing of the infant defendant with the assets of the estate; and in proceeding to account for such assets this defendant has brought in accounts showing the payment of nearly the whole assets of the estate to a solicitor for the purposes of litigation.

During the proceedings before me this solicitor claimed to act for and represent this infant defendant without the usual and necessary appointment of a guardian *ad litem*; and he contended before me that such payment of the bulk of the assets of the estate to him, as solicitor for this infant, was rightful, and he relied on *re Babcock*, 8 Gr. 409, as warranting the action of this infant defendant in so doing. The official guardian being unable to attend for this defendant, I appointed Mr. Black to act as his guardian *ad litem*.

It must be to ordinary minds difficult to perceive how an apparent authority to retain \$200 on account of costs which the report showed had been incurred to a larger amount can be cited to warrant an administrator handing over \$3,385.78, nearly the whole cash assets of the estate, to a solicitor within a few months of his appointment for the purposes of litigation, and without any bills of costs or other evidence of the necessity of such payment. But such claim is made and such argument is strenuously advanced in this case.

In view of this contention it is proper to consider whether the letters of administration granted to the infant defendant are voidable or void. Since the payment to the solicitor, and during the proceedings in this office, the grant of letters has been revoked by the Surrogate Court, and administration *durante minore etate*, has been granted to the defendant Pritchard.

The statute (Imp.) 38, Geo. 3, c. 87, s. 6, enacts: "And whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted that where an infant is sole executor, administration with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have obtained the full age of

twenty-one years, at which period, and not before, probate of the will shall be granted to him."

In a note to *ex parte Sergison*, 4 Ves. 147, it is stated that the circumstances of that case had considerable effect in producing the above Act of Parliament. The M.R. in that case would not permit an infant, though he was an executor, to receive the money of the estate, and in his judgment he intimated that the legislature should forbid the ecclesiastical court granting probate to an infant.

In *Hindmarsh v. Southgate*, 3 Russ. 324, it was argued that "an infant could not be lawfully clothed with the character of administrator;" and the court refused to direct an account against an infant who had been appointed administratrix.

In *re Cunha*, 1 Hagg 237, the court adopted the Portuguese law, and granted limited administration to a minor. But that case was not followed in similar applications to appoint minors as administrators. In *re Manuel*, 13 Jur. 664, Sir H. Jenner-Fust declined to give effect to the law of Turkey; and in *re Duchesse d'Orleans*, 7 W.R. 269 when Sir C. Cresswell declined to recognize the law of France—adding, that in this country a minor could not take upon himself the liabilities which the law casts upon an administrator.

It is further stated: "a minor cannot be administrator because he cannot execute the bond which is required by the Act of Parliament, or rather because the authority of the administrator is derived from the statute Edw. 3, which must receive a legal construction, and therefore the administrator must be of age according to the common law, which is twenty-one:" *Dodd & Brookes Prob. Pr.* 404.

And in 1 Williams, on Executors, 231, it is said: "If an infant be appointed sole executor he is altogether disqualified from exercising his office during his minority."

A similar disqualification exists in the United States.

In *Carow v. Mowatt*, 2 How. N.Y. 57, the Vice-Chancellor said: "On account of the incompetency of infants to bind themselves by bond, or to render themselves liable to account for property which may come into their hands during minority, they cannot lawfully be appointed to fill the office of administrator. If, through mistake or inadvertence, the appointment has been conferred upon an infant, it may be revoked by the Surrogate Court." And in *Collins v. Spears*, Walk. (Miss.) 310, the Court held that it was error in a Probate Court to grant administration to a minor, although such minor was the widow of the deceased; and they revoked the letters of administration.

The negative words in the English statute pro-