

1868.

In re  
EKNA'TH  
MA'DOBA'

The Court (FORBES and WESTROPP, JJ.) passed the following resolution:—

The Court reverses the Judge's order of the 3rd of October last, and directs that he proceed with the inquiry into the petition, which inquiry, as Reg. VI. of 1827 has been repealed by Act X. of 1861, the Judge will conduct in person, as prescribed in the Code of Civil Procedure,

### Ecclesiastical Side.

Nov. 6.

In the matter of the administration *de bonis non, cum test. annexo*, of N. C. VIEGAS.

*Administration cum testamento annexo—Pecuniary Legatee—Creditor—Administrator General—Act VIII. of 1855, Secs. 10 and 17.*

A pecuniary legatee is not entitled to letters of administration *cum test.* in preference to a creditor, and, therefore, is not entitled, under Secs. 10 and 17 of Act VIII. of 1855, to a grant of administration in preference to the Administrator General.

**T**HIS was an application by the Administrator General of Bombay for a grant of letters of administration *de bonis non*, with the Will annexed, of Nicolão Caetano Viegas, of Bombay, Portuguese inhabitant, deceased.

The testator died at Bombay, on or about the 5th of November 1856, possessed of a house and premises at Parel, and personal property of considerable amount, and leaving him surviving his wife, Louisa Macdonell, and an illegitimate daughter, Pássú Bibí, by a woman named Husen Bibí, but no legitimate children. He had previously, on or about the 2nd of April 1855, duly made and published his Will, whereof he appointed Bezanji Fakírji, and Mrs. Helen Maidment, wife of Mr. R. Maidment, executor and executrix: probate of the Will was granted to them on the Ecclesiastical Side of the late Supreme Court on the 16th of December 1856.

The testator, after directing that his just debts and funeral and testamentary expenses should be paid and discharged out of his personal estate, as soon as conveniently might be after his decease, devised as follows:—“I give, devise, and bequeath unto Bazonjee Fuckeerjee of Bombay, Parsee inhabitant, and Helen Maidment, also of Bombay, European inhabit-

rant, their heirs, executors, administrators, and assigns, all the residue of my estate, real and personal, upon trust, first, to allow Hoossein Bebee of Bombay, Mahomedan female, to reside during her lifetime in my dwelling-house situate at Parell, and to take the rents and profits thereof, together with the rents and profits of the stable thereto appurtenant; and as to the residue of my said estate in trust, as soon after my decease as may conveniently be, to sell such part thereof as does not consist in money, and invest the money arising from such sale or sales, and all other monies coming to their hands by virtue of this trust, in promissory notes of the Government of India in trust" (to pay Helen Maidment, the executrix, Rs. 4,000, testator's niece Rs. 500, and his natural daughter, Pássú Bibí, Rs. 1,000 on her marriage), "and, as to the residue of the said promissory notes, the said Bazonjee Fuckerjee and Helen Maidment, heretofore named, the trustees or trustee shall stand possessed thereof in trust, out of the interest thereof to pay to my wife, Louisa Macdonell, a monthly allowance of Rs. 10 during her lifetime \* \* \* and, further, the said trustees or trustee shall, out of the said interest accruing as aforesaid, pay to the said Hoossein Bebee a monthly allowance of Rs. 40, and continue the same until the marriage of her daughter, the said Passoo Bebee; and after such marriage to pay a monthly allowance of Rs. 10 to the said Hoossein Bebee during her lifetime, and a monthly allowance of Rs. 10 to the said Passoo Bebee for her lifetime, and a further monthly allowance of Rs. 20 to the said Passoo Bebee for the support and maintenance of her mother, the said Hoossein Bebee, and of any child or children of the said Passoo Bebee; and that the said trustees shall stand possessed of all my residuary estate in trust for any child or children of the said Passoo Bebee in equal shares, such share or shares to be paid to such child or children respectively when he, she, or they may, in case of females, marry; and in the case of males, attain the age of 21 years;— and I desire the said trustees or trustee in the mean time to accumulate my said lastmentioned residuary estate, before it shall become payable, as aforesaid, to any child or children of the said Passoo Bebee, and to invest the income thereof from time to time for the benefit of the said lastmentioned trust; and I hereby constitute and appoint the said Louisa Macdonell, and the said Hoossein Bebee, their respective heirs, executors, and administrators, my joint residuary legatees.

1863..  
*In re*  
 N. C. VIEGAS.

1863. " And I hereby nominate and appoint Bazonjee Fuckeer-  
*In re* jee and Helen Maidment executor and executrix of this  
 N. C. VIEGAS. my Will."

The executors named obtained probate of the Will on the 16th of December 1856, and took possession of the testator's estate and effects; Bezanji Fakirji died on the 29th of January 1860, and Mrs. Maidment on the 27th of April 1863, intestate, leaving unadministered a portion of the estate of the testator, consisting of Rs. 19,700 in Government securities.

Louisa Macdonell, testator's wife in the Will named, died in the month of September 1861. Pássú Bibí was married in or about the year 1860, and has one child, a daughter, now living; her husband died soon after marriage.

The present application was made by the Administrator General, at the suggestion of the solicitor of the late Mrs. Maidment. Husen Bibí entered a *caveat*, and sought to obtain a grant of administration to herself.

*Dunbar*, for the applicant:—In the events which have happened, the infant child of Pássú Bibí is entitled to the whole of the residuary estate of the testator, subject to the payment of the annuities to Pássú and Husen Bibí, and the life-interest of the latter in the house at Parel: the interest of the infant will be best protected by giving the administration to the Administrator General.

*Marriott*, for the caveatrix:—Husen Bibí is residuary legatee, and as such is entitled to administration. A residuary legatee is preferred to the next of kin (Wms. on Exors., p. 359, 4th ed.), and preferred to a creditor: *ibid.*, pp. 362, 366, 381; *Atkinson v. Barnard*, 2 Phill., p. 318. Sec. 17 of Act VIII. of 1855 provides that administration shall be granted to the Administrator General "if no person appear and entitle himself to the grant as next of kin." Sec. 10 provides that the words "next of kin" shall include a widower or widow of the deceased, or any other person who by law, and according to the practice of the court, would be entitled to letters of administration in preference to a creditor of the deceased. A residuary legatee is preferred to a creditor, and, therefore, entitled to be preferred to the Administrator General.

*Dunbar*, in reply:—Husen Bibí is not residuary legatee; the estate is vested in the infant. The applicant is

a mere pecuniary legatee, and no authority can be shown for preferring a pecuniary legatee to a creditor in the grant of administration *de bonis nán*: if a pecuniary legatee and a creditor stand on the same footing, the Administrator General is entitled to the grant in this case, as the caveatrix is not a person who would be preferred to a creditor.

SAUSSE, C.J.:—We think that letters of administration should go to the Administrator General. By Sec. 17 the Court is required to grant letters to him, if no person appear entitled as “next of kin.” In other words, he is given a preferential right over all persons who do not come within that class as defined by the Act, and by Sec. 10 that class is defined to include all persons who, by law and practice of the court, would be entitled to letters in preference to a creditor of the deceased.

Now Husen Bibí opposes this application, and claims administration, in right of her having been named residuary legatee in the Will, and also in right of her having a preferential title over a creditor to seek for letters of administration.

The residuary devise to her is now a dry bequest, because the residuary estate had been already disposed of, and is now vested in the infant child of Pássú Bibí. She has no interest in the residue, and she does not then come within the meaning of the decisions and practice of the court, which give a residuary legatee the next preferential right after the executor, upon the ground of interest only.

Her claim in right of being residuary legatee then fails.

No authority has been adduced to show that an ordinary pecuniary legatee is entitled to letters of administration in preference to a creditor. He would appear at the utmost to stand upon an equal footing; and in that view the right of the Administrator General, under Sec. 17, must prevail. We think, however, that this opposition and claim were induced by the act of the testator in naming the caveatrix as a residuary legatee. We, therefore, allow her costs out of the estate.

COUCH, J., concurred.

*Application granted.*