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of the order was to enable the party complaining of a non-compliance with the order to make an *ex-parte* application to the court for a writ of sequestration, and to give the person upon whom the order was served notice that he would be liable to have his estate sequestered forthwith upon his disobedience of or non-compliance with the order. In the case before us there does not appear to have been any such indorsement upon the copy of the order, but the present is not an *ex-parte* application. It is an application made upon notice given by the plaintiffs five days before this motion, namely, on the 22nd, and repeated on the 24th, of the present month. We think that the parties have thus had notice that this writ would issue if they did not obey the order, and that an application of this sort was not what Rule 389 referred to. We hold, therefore, that the writ of sequestration in this case must go. The plaintiff is entitled to his costs of this motion, to be paid by the defendants in contempt who opposed it.

Order accordingly.

Oct. 6.

LA'LCHAND RAMDAYA'L .....*Plaintiff.*
GUMTIBA'I, widow.....*Defendant.*

GHELLA' PEMA' and others .....*Plaintiffs.*
GUMTIBA'I, widow.....*Defendant.*

Administrator of the Estate of a deceased Hindú—Letters of Administration granted to Administrator General—Relation back—Suits brought before Grant of Letters of Administration against Representatives of a deceased Hindú—Administrator General's Act (XXIV. of 1867).

The legal *status* of the administrator of the estate of a deceased Hindú, as compared with the legal *status* of the administrator of the estate of a deceased person who in his lifetime was governed by English law, pointed out.

When ordinary letters of administration to the estate of a deceased Hindú are granted to the Administrator General under Act XXIV. of 1867 (but not under Sec. 17 of that Act), his title does not relate back to the death of the deceased, nor to the date of the Judge's order directing such letters to be issued, but accrues only as from the date of the grant of such letters.

Quære—whether, if letters are issued to the Administrator General under Sec. 17 of that Act, the case would be otherwise, or his powers greater.

Where a Hindú died leaving a widow and no male issue, and two of the creditors of the deceased brought suits against such widow as the legal

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representative of the deceased, and attached before judgment certain property of the deceased and afterwards obtained judgments against the widow, an application on behalf of the Administrator General, who at the widow's request, but after the judgments were obtained, took out letters of administration to the estate of the deceased, to have such attachments removed, was refused, though the Judge's order, directing that the letters should be issued to the Administrator General, was prior in time to the passing of the judgments; and the judgment-creditors were held entitled to be paid out of the property attached, so far as the same proved sufficient for that purpose.

THE question involved in these cases, and the facts and arguments, sufficiently appear from the judgment of the court.

Dunbar for the Administrator General.

Marriott for the plaintiffs.

Cur. adv. vult.

WESTROPP, C. J.:—This was an application on behalf of the Administrator General (originally by summons, but afterwards, on account of the nicety of the legal points involved in it, adjourned into and argued in court) to remove attachments before judgment laid upon moveable property, part of the estate of the late Govind Girdhar, on the 19th of December, who had died intestate and without leaving issue.

Five days after the laying on of the attachments, Gumṭibái, the defendant in both suits, being the widow and sole personal representative of Govind Girdhar, and sued as such in these actions, caused her solicitor to write a letter to the Administrator General stating that her husband had died without issue and in insolvent circumstances, leaving certain moveable property and effects and outstandings in Bombay; that she was not desirous to administer his estate; that she requested the Administrator General to take charge of the assets, and to obtain letters of administration thereof, and to divide the assets amongst the creditors at large of her deceased husband. The letter also mentioned that his Márvádi creditors had obtained attachments; that she had not sufficient interest to oppose them, but was willing to assist the Administrator General in doing so.

Accordingly, on the 6th of January, the Administrator General petitioned this court for letters of administration of

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the estate of Govind Girdhar. On the 9th of January the sitting Judge made his order on that petition, directing that such letters should issue to the Administrator General.

On the 11th of January the plaintiff in the first suit obtained in court a decree for Rs. 2,929-9-2, and on the same day the plaintiffs in the second suit obtained a decree for Rs. 1,768-14-0.

On the 27th of January letters of administration were issued to the Administrator General, pursuant to the Judge's order of the 9th of January.

On the 1st of February the Administrator General obtained a summons in each of these suits from the sitting Judge, calling upon the plaintiffs in both suits to show cause why the attachments granted before judgment should not be removed. The summonses also contained interim orders for the stay of proceedings in both suits.

The decree made in the first suit, on the 11th of January, was drawn up and sealed upon the 5th of February, and that made on the 11th of January in the second suit was drawn up and sealed on the 8th of February.

It was contended for the Administrator General that he was entitled to demand the removal of the attachment: 1*st*, because the letters of administration issued to him on the 27th of January related back to the time of the death of the original debtor, Govind Girdhar, and that judgments in suits against his widow could not bind the estate as against the Administrator General, in whom it must be considered as vested from the time of the death of Govind Girdhar; 2*ndly*, that even if the letters did not so relate back, yet, the order for granting them having been made on the 9th of January, *i.e.*, two days before these judgments were obtained, the estate of Govind Girdhar must be regarded as having been divested from Gumtibái, and vested in the Administrator General, before the judgments were recovered; and that she, therefore, did not then represent the estate, and that the attachments before judgment must fall on the accruer of a *jus tertii*, such as that of the Administrator General. In

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support of this argument there were cited *Javá Rámji* v. *Jádavji Náthá* (*a*), and the ruling secondly mentioned in the head-note of *Gamble* v. *Bholágir* (*b*), and two Calcutta cases—*Rampersad* v. *Calachund Das* (*c*), and *Indra Chandra Dogar* v. *Tarachund Dogar* (*d*)—which, going beyond the abovementioned Bombay cases, ruled that though the title of the Official Assignee may not accrue until after judgment and the issuing of an attachment upon it, yet if his title accrue before sale the execution-debtor is thereby ousted. Counsel for the Official Assignee in *Gamble* v. *Bholágir* did not venture to put his case so high, but admitted that if seizure had taken place under the warrant of attachment on the five decrees which were made before the vesting order transferring the estate of the defendants to the Official Assignee, the execution-creditor should be preferred, and as to these five decrees simply contended that there had not been any sufficient seizure, a point which was decided against the Official Assignee. The four other decrees were not obtained until after the vesting order, and the attachments before judgment in these four cases were held to be unsustainable against the Official Assignee. Beyond this latter ruling this court has never gone in favour of the claim of the Official Assignee, and the two Calcutta cases already mentioned have been much questioned here. I have always thought that the difference between the rule in Insolvency from that in Bankruptcy was overlooked in those cases. *Woodland* v. *Fuller* (*e*) and *Hutton* v. *Cooper* (*f*) exemplify that difference. It has been clearly recognised by a recent Full Bench decision in Calcutta—*Anand Chandra Pal* v. *Panchilal Sarma* (*g*)—which must be regarded as completely overruling the two other cases there decided. I fully concur in that recent decision, but I think that in the present case too much stress has, in the course of the argument, been

(*a*) 1 Bom. H. C. Rep. 224; S. C. 2 Bom. H. C. Rep. 142, nom. *Savá Rámji* v. *Jádavji Náthá.*

(*b*) 2 Bom. H. C. Rep. 146 *et seq.* (*c*) 1 Ind. Jur., N. S., 325, 373.

(*d*) 2 Beng. Law Rep., A. C. J. 61.

(*e*) 11 Ad. & E. 859.

(*f*) 6 Exch. 159; and see the remarks in 3 Bom. H. C. Rep., 26 O. C. J., and the cases there mentioned.

(*g*) 5 Beng. Law Rep. 691; S. C. 14 Calc. W. Rep., F. B. R. 33.

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laid upon the supposed analogy between the office of Administrator General and that of Official Assignee. I think that the decision in this case must rest upon other grounds, and upon authorities which have not been cited.

It is difficult to maintain that the Administrator General occupies, with respect to a creditor seeking to enforce a decree against the estate of the deceased, even so favourable a position as that of the Official Assignee, when the vesting order precedes a seizure under a decree made at the suit of a creditor of the insolvent.

It may be true that the Administrator General is a trustee of the estate of the deceased for his creditors, and, after payment of their claims, for the next of kin, in the same manner as the Official Assignee is a trustee for the creditors of an insolvent, and of the surplus, if any, for the insolvent himself. It must be borne in mind that the deceased was a Hindú, and that on his death there was not any need of letters of administration for the ascertainment of the person in whom his property should be vested (*h*). It vested immediately upon his death in his widow, Gumṭibái, as his heir, he having died both childless and separate. It seems at one time to have been doubted whether the operation of Stat. 21 Geo. III., c. 70, s. 17, reserving to Hindús and Muhammadans their laws of succession, was not to prevent the court from granting probate of wills or letters of administration with regard to the estates of Hindús and Muhammadans: 1 Morley's Dig., pl. 53, p. 245; pl. 66, p. 246. But afterwards the court held that, with the consent of all the next of kin of the deceased, such a grant might be made: *In the goods of Beebee Muttra* (*i*). *In the goods of Shaik Nathoo* (*j*), Peel, C. J., in 1844, said: "In granting administrations to Native estates the interference of the court originally proceeded upon the supposition of the consent of the parties interested. The practice thus adopted by this

(*h*) 2 Stra. Notes of Ca. 153.

(*i*) 1 Morton R. 75; 1 Morley's Dig., p. 245, pl. 60; and p. 384, pl. 195 *et seq.*, and note.

(*j*) Fulton R. 485, 486.

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court has been lately recognised by the local Legislature,* but it is discretionary with the court to grant such administration. Here one party, admitted to be equally entitled at all events, dissents immediately upon notice. There is no difference between the case of Mahomedans and Hindus." And *In the goods of Moonshee Hossein Ali* (*k*), in 1843, he said: "The power of this Court to grant probates and administrations in Native estates, where there is property within the local jurisdiction, has been lately recognised by the Legislature. The Court has got the power to select the administrator, and upon that ground we might uphold this administration. In Hindú and Mahomedan cases any party may be appointed by consent of the next of kin. The Registrar (predecessor of the Administrator General) would usually be preferred, but need not necessarily apply in his official capacity."

And *In the goods of Sumboochunder Mitter* (*l*), which was an application for the grant of letters of administration to one of two sons of the deceased (a Hindú), the other declining to join in the administration, and alleging the existence of a will, Peel, C.J., said: "The grant of administration would not conclude the question of the will. A Hindu is not bound to apply for probate." And again: "This Court has no jurisdiction over the brother on the Ecclesiastical side, except upon his own consent, and administration being granted to this applicant would not prevent the other setting up the will. We have several times been applied to for administration of Hindu and Mahomedan estates on consent of *some* of the next of kin, but have always refused it, as it would be establishing indirectly a compulsory jurisdiction over Hindus and Mahomedans. It can only be done on the consent of all, and then the jurisdiction is founded on their consent. But if done with the consent of some only, it would be *an interference with the law of inheritance, by breaking the descent and making one representative, whereas the Hindu Law says all are representatives.* Such an interference would be

* Act XX. of 1841.

(*k*) Fulton R. 339, 341. (*l*) 1 Taylor & Bell 39, 40.

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a violation of the statute (21 Geo. III., c. 70, s. 17) which says that Hindus and Mahomedans are to have their own law of inheritance and succession." Those remarks, made in 1849 by Sir L. Peel, C.J., were concurred in by Buller and Colvile, JJ.

Another important and interesting case on the same subject came in 1850 before Sir L. Peel, C.J., and Colvile, J. —*Mohar Ranee Essadah Bai Sahib Peishwa* v. *The East India Company* (*m*), at the Equity side of the Supreme Court. The plaintiff was the adoptive mother of Chimṇá A'ppá the elder, known to readers of Grant Duff's History of the Mahrattas as Chimṇáji, adopted son of Mádhav Ráv, Peshwá of Puṇá. Chimṇáji, having rightfully succeeded Mádhav Ráv Peshwá on his death, was deposed by Báji Ráv, and several years afterwards (in 1832) died at Benáres intestate, leaving a widow, Káveri Bái, and a daughter, Dwárká Bái, then both in their minority. The plaintiff, therefore, then applied for letters of administration of the estate of Chimṇáji. He had left effects of the value of more than eight lákhs of rupees at Benáres, and also property at Puṇá and Bombay, of which the defendants, the East India Company, took possession at his death. Some delay occurred in the granting of letters of administration to the plaintiff, in consequence of her proposed sureties being objected to.

In 1834 the defendants, assuming to act as guardians of Chimṇáji's infant widow, Káveri Bái, filed a caveat to the plaintiff's application for letters of administration. The caveat was, in the same year, dismissed. It was *alleged* in the bill in Equity that other obstacles were thrown in the plaintiff's way in obtaining letters, and that she did not eventually obtain them until February 1848. Káveri Bái, the widow, had died in 1837; Dwárká Bái, the daughter, had died in 1842, but had left a son, Chimṇá A'ppá the younger, who was alive at the time of the hearing of the Equity cause, but out of the jurisdiction. The will treated the defendants as executors *de leur tort*, and prayed an account of Chimṇáji's property come to their hands. The answer treated Chimṇáji as an

(*m*) 1 Taylor & Bell, 290.

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alien prisoner of war, who was allowed to reside at Benáres as a state prisoner under the surveillance of the Agent of the Governor General, and alleged (*inter alia*) that, at the desire of the family and confidential servants of Chimṇáji, upon his death the said Agent intermeddled with his property, and admitted that the defendants did assume to act as guardians of Káveri Bái, she being an infant, though a widow. They also stated that in 1834, the Agent, by order of the Governor General in Council, made over the whole of the property belonging to Chimṇáji to Mahádev Pant, the uncle of Káveri Bái, as her guardian, and with her privity and consent. The defendants relied upon the lâches of the plaintiff, and on the statute of limitation, and denied their liability to the suit, inasmuch as the acts of the Governor General and his Agent were of a political nature, done at Benáres under the authority and with the sanction of the Governor General and Vice-President of Bengal, and submitted to the court whether they could be regarded as trustees for the representatives of Chimṇáji or executors *de leur tort*. They also said that Chimṇáji's property wholly consisted of savings of a monthly gratuitous pension of Rs. 25,000 allowed to him by the defendants: For the plaintiff it was denied that Chimṇáji could be regarded as an alien enemy, or prisoner of war, and it was argued that he was a prisoner of state only, and, as such, could acquire property. The court was of opinion that if Chimṇáji could be regarded for some time previous to his death as an alien at all (which it doubted), he was not an alien enemy, but an alien *ami*, and as such could acquire, maintain, and transmit property, and that the defendants were liable to the jurisdiction of the court in respect of it; but Sir L. Peel, C.J., added: "As accountable parties for acts antecedent to the grant of letters to her (the plaintiff), they are accountable, not to her, but to the legal representative of the estate: nor does the minority of the present heir (Chimṇá A'ppá the younger) alter the case; he is nominally a party to the suit, but not subject to the jurisdiction, and he would not be bound by any account taken in this suit (*n*); and, therefore, we

(*n*) *Carmichael* v. *Carmichael*, 2 Ph. 101.

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think that the complainant cannot call for the account she asks, which is the general one, in her character of administratrix, and that she has laid no good title to any other," and the bill was dismissed accordingly. In speaking there of the legal position of the plaintiff as administratrix, Peel, C.J., said: "The grant of letters of administration, on application of a sole heir of a Hindu, could be supported originally only as a submission voluntarily to a jurisdiction to which he could not be cited, with the consequence of having administration granted to another if he declined, as in the case where letters of administration are indispensable to perfect the representation. It is in such a case a renunciation of his own law, the voluntary adoption of another. If the application were made by one of several joint heirs with the assent of all, they would be concluded, by their concurrence in the grant, from derogating from its legal effect by asserting, against one claiming under it, their original representative character; *but it can have no effect, irrespective of the provisions of the late Act of the Indian Legislature,* which is limited to the payment of debts, and of which the protection of the debtor is the object, against Hindu representatives, dissentient or non-assentient* (and an infant can give no consent in the matter): therefore the letters in this particular case do not divest the legal estate, and do not give a title to demand from the defendants, who object to account to her, the account which a perfect title of administration under the English law would give. It does not follow from this view that such letters are inoperative wholly: for, independently of their effect in the payment of debts under the present Act, they may, when the administrator has an interest, give a limited title to that extent to one who is willing to take under the letters. I have always, in granting letters of administration, regulated myself by this doctrine, though I will not undertake to say that in some cases the objection may not have escaped me. I have required the assent of parties *in æquali jure* with the applicant, and have in several instances refused it where no such assent appeared, and the late

* Act XX. of 1841.

Mr. Justice Seton acted likewise on one occasion (which I well recollect) on the same principle."

Sir J. Colvile, J., said: "The plaintiff claims to be representative of the deceased by virtue of letters of administration obtained in this court so late as 1848. She is not the representative according to the rules of Hindu succession, and beyond a claim for maintenance has no interest in his estate. His heiress-at-law was his widow, and on her decease the succession passed to his daughter, and his present heir is the son of that daughter. An administrator of a Hindu estate cannot, I think, be assumed to have powers and rights co-extensive with those of an administrator of an European's estate. The latter (when these entitled to him in preference, being duly cited, omit to take out administration) obtains letters of administration, by virtue of which he becomes to all intents and purposes, and exclusively, the legal personal representative of the intestate; and inasmuch as up to the date of the grant there has been no such legal representative, his interest does not vest merely at and from the time of the grant, but is for most purposes carried back by relation to the time of the intestate's death. Letters of administration were not, until the passing of Act XX. of 1841, essential to the title of the representative of a Hindu intestate, for any purpose. That Act seems to me rather to be designed in aid and for the security of debtors, than to make any alterations in the nature of succession and representation among Hindus. It says that, except in cases where the opposition is obviously frivolous, no debtor to the estate shall be compelled to pay to a person not clothed with letters of administration or a certificate obtained under that Act, and that a debtor shall in all cases be safe in paying to a person acting under letters of administration or a certificate duly obtained; but it does not cast upon the next of kin of a Hindu intestate the obligation of perfecting his title to representation by letters of administration or a certificate, so as to enable (upon his failure to do so) any other person to acquire that exclusive character. It does not say that, until administration or a certificate is taken out, the estate of the intestate shall be treated as unrepre-

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sented, and thus afford a ground for the application of the doctrine of relation derivable from the English law of succession. These distinctions, as to their nature and effect, between letters of administration to Hindu estates, and those granted in the ordinary course to the estates of Europeans, seem to me to bear materially both upon the title of the plaintiff, and the nature of the liability with which the bill seeks to affect the defendants. They affect the plaintiff's title, because they show that she cannot be regarded as exclusively the legal personal representative of the deceased, and can still less be regarded as having been so ever since the death of the intestate. They affect the question whether the defendants can be treated as executors *de leur tort*, because the law only affects with that peculiar liability those who intermeddle with the assets of a deceased in the absence of any personal representative of right, and in this case there has been no such absence. The deceased has been, in contemplation of law, fully represented from the time of his death. His creditors, the day after his death, might have sued his widow as his legal representative."

I have made these long extracts from the judgments of Peel, C. J., and Colvile, J., in that case, because they seem to me to describe, with perspicuity which it would be difficult to equal, the legal *status* of the administrator of a Hindú.

In the goods of Budderoonissa (*o*), Peel, C. J., in 1851 (in refusing letters of administration to the creditor of a female convert to the Muhammadan faith who had died without leaving any next of kin, and to whose property the Crown, therefore, was entitled as *ultimus hæres*) said: "The foundation of the jurisdiction to administer the estates of Natives is consent; this has been the settled doctrine of this court since the decision in *Beebee Muttra's Case*. It is true that the reason for that rule applies only where there are Native representatives, whose title such administration would vary and displace. The statute (21 Geo. III., c. 70, s. 17)

(*o*) 2 Taylor & Bell, 160.

is imperative that the succession *ab intestato* to natives (Muhammadans and Hindús) must be regulated by their own law. Here, however, there is no title or estate of a Native to displace, but then the consent of the Crown is necessary by the practice of the English Courts of Probate, and that has not been obtained."

The power even of an executor under the will of a Hindú is limited: *Srimati Dossee* v. *Tarachurn Chowdry* (*p*); *Sharo Bibi* v. *Baldeo Das* (*q*); *Srimati Jaykali Debi* v. *Shibnath Chatterjee* (*r*); *Nilkant Chatterjee* v. *Peari Mohan Das* (*s*).

Of Act XX. of 1841 (the legal effect of which is stated with so much lucidity by Peel, C.J., and Colvile, J., in the passages above extracted from their judgments), Sec. 14 enacted: "That all probates and letters of administration granted by any of Her Majesty's Courts in cases in which any assets belonging to deceased persons were, at the time of their deaths, within the local jurisdiction of the court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only, and the security of debtors paying the same;* except so far as is in this Act provided."

That Act was repealed by Act XXVII. of 1860, which, however, re-enacted the most important provisions of the repealed Act. Sec. 18 of Act XXVII. of 1860 is nearly *verbatim* the same as Sec. 14 of Act XX. of 1841. Neither of these Acts applied to British subjects.

Stat. 9 Geo. IV., c. 33 (Ferguson's Act), which empowered executors and administrators to sell real estate for the payment of debts of the deceased owner, did not apply to Hindús. That statute, having been rendered unnecessary by the Indian Succession Act, 1865, was repealed by the general repealing Act, XIV. of 1870.

The 33rd section of the present Act, regulating the office of Administrator General (XXIV. of 1867), has been relied

(*p*) Bourke Calc. Rep., Pt. II., 38. (*q*) 1 Beng. L. Rep., 24 O. J.
(*r*) 2 Beng. L. Rep., 1, 4, O. J. (*s*) 3 Beng. L. Rep., 7 O. J.

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on in favour of his present application. Its effect has been likened by his Counsel to Sec. 49 of the Indian Insolvent Debtors' Act (Stat. 11 & 12 Vict., c. 21). That section (33 of Act XXIV. of 1867) is as follows :—

"If any suit shall be brought by a creditor against any Administrator General in his representative character, the plaintiff shall be liable to pay the costs of the suit, and shall not be entitled to have the decree (if any) in such suit enforced, unless upon proof, by affidavit or otherwise, that, not less than one calendar month previous to the institution of the suit, he had applied in writing to the Administrator General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator General was reasonably entitled to require, and that the Administrator General had refused or neglected to register the claim according to the practice of his office. If, in any such suit, judgment is pronounced in favour of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased *pari passu* with the other creditors."

That section is, however, for the following reasons, wholly inapplicable to the present case :—

1*stly*—These actions were not brought against the Administrator General.

2*ndly*—He did not represent the deceased Govind Girdhar, or his estate, when these actions were commenced; and, therefore, the application in writing, required by that section to be made to the Administrator General one calendar month previous to the institution of any suit, could not properly have been given to him, and would have been futile if it were given.

It is unnecessary for me in this case to consider whether the 17th section of the same Act (XXIV. of 1867) confers on the Administrator General, when letters are granted to him under that section, any greater authority or estate than an ordinary administrator of the estate of a Hindú would have. That section relates to cases in which the court has been satisfied that danger is to be apprehended of misappropriation, deterioration, or waste of the assets, whereupon the court directs the Administrator General to apply for letters of administration. That is not the present case. The Judge

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did not direct the Administrator General to apply for letters. The Administrator General himself applied for them, at the desire of the widow, as expressed in her solicitor's letter addressed to the Administrator General, and appended to his petition for letters: and it appearing from that petition and the solicitor's letter that the widow abdicated her right to represent her deceased husband, in her capacity of heir and next of kin, in favour of the Administrator General, the Judge made the fiat that letters should go to the Administrator General. Under these circumstances he appears to me to have no higher authority over, or estate in, the property of Govind Girdhar, than any ordinary administrator would have over or in the property of a deceased Hindú, whatever that authority or estate may be.

Assuming, but not by any means deciding, that such an ordinary administrator would have, and that the Administrator General in this case has taken under the letters, as full an estate and authority as an administrator in England would take under general letters of administration, as in case of intestacy, I think that the Administrator General cannot succeed in his present application.

In England, if a defendant die after judgment has been given against him, and before execution, the plaintiff may proceed by writ of *scire facias* upon the judgment in order to enforce it against the administrator: 2 Wms. Exors. 1702 (4th ed.). The latter is limited to certain pleas in defence, such as that he never had in his hands any assets of the deceased, or that he has already duly and fully administered all such assets as he did receive, or a release, or payment, or levy of the amount of debt or *nul tiel record*.

But it would be no defence were he to plead that the deceased owed other debts beside the debt due to the plaintiff, and that the total amount of the debts exceeded that of the assets, and that he (the administrator) was ready and willing and offered to pay the plaintiff rateably with the other creditors, but could not pay him in full. For in England a judgment-creditor must be preferred to a simple contract-

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creditor (*t*), and, where there are several judgment-creditors, he, of them, who first sues out execution must be preferred: 2 Wms. Exors. 862 (4th ed.). Of course I am not now speaking of a case in which there is an administration suit in Equity, but merely of actions brought by individual creditors, such as those in the present instance.

The procedure in this country analogous to that of *scire facias* on a judgment is prescribed by Sec. 210 of the Civil Procedure Code, which enacts that "if any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be against the legal representative or the estate of the person so dying as aforesaid; and if the Court shall think proper to grant such application, the decree may be executed accordingly."

This last passage is not to be understood as giving the court an unlimited discretion to grant or refuse execution. It could only refuse in a proper case, *e.g.*, that no assets have come to the hands of the representative of the deceased against whom execution is sought, or some such case.

But the judgments here have not been recovered against the deceased, but against the widow as his heir, according to Hindú law, in respect of his debts respectively due to the plaintiffs. And it is said, 1*st*, that the letters of administration must be considered as taking effect on the day (the 9th of January) on which the Judge fiated the petition asking for them, and that the decrees, not having been made until the 11th of January, were not made against a person who then was the representative of the deceased, inasmuch as the widow's estate must be regarded as divested on the 9th of January by the order for the grant of letters to the Administrator General. Assuming, but not deciding, that the letters of administration, here granted with the assent of the heir (the widow), would have the effect of divesting her estate,

(*t*) But as to cases in India falling within the Indian Succession Act (which does not apply to Hindús, Buddhists, or Muhammadans), see that Act, Sec. 282.

and fully substituting the Administrator General for her as representative of the deceased, yet I cannot for a moment hold that the mere order that letters should issue is equivalent in force to the letters themselves. The difficulty with ordinary persons in finding sureties sometimes prevents a party, who has obtained an order for the issue of letters, from ever completing his title by taking out the letters themselves. Other circumstances also are sometimes attended with a similar result. It might sometimes happen that the Administrator General himself, after obtaining an order for letters, might find that it was desirable at that stage to hold his hand, and not to take out the letters. Infinite confusion might follow were the court to hold that an order for letters was equivalent to the letters themselves. Persons might thus become administrators who had not given security, or against their will. But, 2*ndly*, it is said that the letters, whenever issued, relate back to the death of Govind Girdhar, and override the decrees obtained against the widow. Although in England in the case of an executor the probate relates back to the testator's death, as the executor's interest is derived from the will (*u*), yet, as an administrator derives his title wholly from the court, he has none until he has sued out letters of administration: *Woolley* v. *Clark* (*v*); *Rex* v. *Smith* (*w*); and per Tremaile, J., Year Book 4 Hen. VII., p. 14; Bro. M., tit. Administrator 7; 1 Wms. Exors. 526, 527 (4th ed.). In some respects that proposition must be taken with some qualification; and for some purposes, no doubt, letters of administration have been allowed to relate back, as in the case of unlawful acts (Wms. Exors. 528) (*x*), but not to defeat lawful acts or legally vested rights: *Ibid.* 529, 530.

In the already-cited case, *Mohar Ranee Essadah Bai* v. *The East India Company* (*y*), which is directly applicable on this point, Peel, C. J., said: "The plaintiff's title cannot be carried back by relation, since the representation has always

(*u*) And see Indian Succession Act, Sec. 188.
(*v*) 5 B. & Ald. 744. (*w*) 7 C. & P. 147.
(*x*) See 8 Exch. 302; 5 M. & Gr. 760. (*y*) 1 Taylor & Bell, 290.

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been full." And Colvile, J., said: "The deceased has been in contemplation of law, fully represented from the time of his death. His creditors, the day after his death, might have sued his widow as his legal representative." So here, from the moment of the testator's death at the very least, up to the 27th of January, the date of the letters of administration, and the day on which they were issued (a period covering the institution of these suits, the laying on of the attachments before judgment, and the recovery of the judgments themselves), the representation was full. It was filled by the widow, who took as heir, and, although a Hindú widow's estate in immoveables inherited from her husband, which has been compared to that of a tenant in tail after possibility of issue extinct (*z*), she may alien only under very special circumstances, and although she may be restrained by injunction from committing waste (*a*), yet she does fully represent the inheritance even in that kind of property (*b*). Peel, C.J., once described her estate thus: "The estate, although sometimes so expressed to be, is not an estate for life: when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest which she could not do if she had not a life-estate, in quantity. There is no ground for altering the nature of the estate. It devolves as an estate by inheritance under the Hindu law, and is the estate which passed from the late owner: nothing is in abeyance. The incapacity to alienate is not in any way inconsistent with an inheritance" (*c*). And then he instances estates tail after the statute *de donis* and until the invention of recoveries, and other estates of inheritance which are not alienable; and I may add that of a Hindú, entitled to ancestral lands of inheritance, who, after he has male issue, and while they are living, is unable to alienate their inchoate shares in the lands which he holds undoubtedly as of inheritance. Peel, C. J., continues: "Nor does the fact that the next taker takes as heir to a prior

(*z*) *Ibid.* 372.

(*a*) 2 Taylor & Bell, 279; 1 *Ibid.* 370. See Boulnois' Rep. 120.

(*b*) 2 Morley's Dig. 105, 111, 198, 210, 215; Fulton R. 133, 135.

(*c*) 2 Taylor & Bell, 281.

owner, and not to the immediate predecessor, furnish any reason for holding the estate a mere life-estate. It is, however, for purposes of alienation unwarranted by Hindú law, no greater an estate; and in one respect it is less beneficial than a life-estate under the English law, since the accumulations on the death of the female heir pass, not to her heir, but go with the principal. Whenever, in legal decisions or in text-writers, the estate is described as one for life, nothing more is meant than a reference to the usufruct and the power of disposition, where the exceptional power of disposition is not properly exercised. The estate is not held in trust, express or implied. It is a restrained estate: not a trust estate" (*d*). In her husband's moveable property at this side of India she takes an absolute estate, subject to payment of her husband's debts (*e*).

In *Ramchandra Tantia Das* v. *Dharmo Narayen Chucker-butty* (*f*), a Full Bench recently held at Calcutta that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under Sec. 205 of the Civil Procedure Code.

In England, if a judgment had been recovered in respect of a debt due by a deceased person against his executor, and the latter were to die before execution had, and administration *de bonis non* of the original deceased were granted to another person, it could not for a moment be contended that on due steps for the purpose being taken in England by *scire facias*, or even here by a procedure similar to that prescribed in Sec. 210, Civil Procedure Code, execution might not be had against the unadministered estate of the original deceased in the hands of the administrator *de bonis non*. It would be absurd to argue that in such a case the claims of the judgment-creditor should be defeated, and the letters of administration suffered for that purpose to relate back to the death of the testator.

(*d*) *Ibid.* 281, 282. (*e*) 1 Bom. H. C. Rep., 118, 130.
(*f*) 7 Beng. L. Rep. 341.

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The heir (the widow) at the time of the making of the decrees in these suits, at the least, as fully represented Govind Girdhar and his estate, as the executor represents that of the original deceased in the case just put.

Bombay Reg. VIII. of 1827, which, though not expressly so, was in fact mainly passed for Hindús and Muhammadans in the Mofussil of this Presidency, carefully recognises the right of the heir to represent the estate, and to administer it, without any curial sanction, should such be his desire; and the same principle guided a Full Bench of this court on its Appellate Side to its recent decision in *Purshotam Mansukh*, nephew and certified heir of *Kushandás Bhagvándás* v. *Ranchhoḍ Purshotam* (*g*).

For these reasons, I have come to the conclusion that if the plaintiffs in these suits take the proper steps to obtain execution of their decrees against the estate of Govind Girdhar, I could not properly, in respect of any circumstance which has been as yet brought to my notice on behalf of the Administrator General, refuse to grant such execution; and I, therefore, think that his application to remove the attachment before judgment, laid on certain portions of the moveable estate, is unsustainable, and that the cause shown on behalf of the plaintiffs respectively against each summons must be allowed, and the summons itself discharged. But, as the case was one of difficulty and importance in the questions involved in it, and the conduct of the Administrator General marked with complete *bona fides*, I give no costs against him personally. The plaintiffs must have their costs out of the estate of the deceased, and the Administrator General will also be entitled to reimburse himself to the extent of his costs out of any surplus of that estate, left after satisfying the decrees in these suits, which has come or may come to his hands.

Order accordingly.

(*g*) *Post*, A. C. J. 152.