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question whether the fact that Mr. Dadysett was accompanied by the recognized agent distinguishes the case from the one just referred to. Whether this man was or was not able to answer all material questions, we have no means of knowing. But assuming that he was able, but for some reason did not think proper to conduct the case on behalf of his principals, his mere presence in Court would not, in my opinion, be an appearance in the suit. Section 36, as pointed out by my colleague, is permissive. An appearance may be made by a pleader or recognized agent; but it is evident that the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Here Mr. Dadysett, though instructed to ask for an adjournment, was not instructed to appear at the hearing; and the recognized agent, though present in Court, was, it appears, unwilling to carry on the case. In these circumstances it seems to me that there was no appearance at the hearing of the defendants in Suit No. 13201 or by the plaintiffs in Suit No. 14928.

ORIGINAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

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November 11.

BHAIJI BHIMJI, PLAINTIFF, *v.* THE ADMINISTRATOR GENERAL OF BOMBAY, DEFENDANT.*

Administrator General—Administrator General's Act (II of 1871), Secs. 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator General prior to that of attaching creditor.

On the 16th April, 1898, the plaintiff obtained an *ex-parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz.*, on 4th March, 1898), an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II of 1871), authorizing the Administrator General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 29th April, 1898, the plaintiff under section 268 of the Civil Procedure Code (Act XIV of 1882) attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July, 1898, letters of administration were granted to the Administrator General.

* Small Cause Court Reference, No. 126 of 1898.

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Held that, as against the Administrator General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator General was entitled by virtue of the High Court's order to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount and excluded that of the defendant (the son of the deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under sections 278 and 280 of the Civil Procedure Code, the Administrator General had the right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

Lalchand v. *Gumtibai*(1) distinguished.

CASE stated for the opinion of the High Court, under section 617 of the Civil Procedure Code (Act XIV of 1882), by C. W. Chitty, Chief Judge :—

"1. This was a suit brought by the plaintiff as creditor of one Devidas Khushal, deceased, against Kika Devidas, heir and legal representative of the said Devidas Khushal, to recover a sum of Rs. 1,115-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*.

"2. On the 16th April an *ex-parte* decree was passed against the said Kika Devidas, and on 29th April an attachment was levied under section 268 of the Civil Procedure Code against a sum of money lying in the hands of Goverdhandas Govindji and due by him to the estate of the deceased Devidas Khushal.

"3. On the 4th March, 1898, an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II of 1874), authorizing and enjoining the Administrator General to collect the assets and ordering him, if necessary, to take out letters of administration to the deceased's estate. On the 2nd July, 1898, such letters were granted to the Administrator General.

"4. On the 15th August, 1898, the Administrator General was brought on the record as party defendant, and a garnishee notice in respect of the said attachment came on for disposal.

(1) (1871) 8 Bom. H. C. Rep., 140 (O. C. J.).

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As the garnishee had not paid into Court the amount admitted by him to be due to the estate of the deceased, the notice was perforce discharged, but the question arose between the plaintiff and the Administrator General whether the attachment was not bad, and whether it ought not now, in any case, to be set aside. I held that the attachment could not now be set aside at the instance of the Administrator General, notwithstanding that the order under which he took out letters of administration was made under section 17 of the Act, and that there had also been an order under section 18.

"The facts of the case and the reasons for my decision are fully set out in my judgment, a copy whereof is hereto annexed and to which I crave leave to refer.

"The questions for their Lordships' consideration will be:—

"(1) Was the attachment bad *ab initio*?

"(2) If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act?

"(3) Can the Administrator General now claim to have the attachment set aside?

"6. The Administrator General has deposited in Court Rs. 50 to meet the costs of reference."

The following is the judgment of the Chief Judge referred to above:—

The plaintiff was a creditor of Devidas Khushal, who died in the month of November, 1896. On the 4th January, 1898, the plaintiff filed this suit against Kika Devidas as heir and legal representative of his father, Devidas Khushal, to recover the sum of Rs. 1,145-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*, Kuverbai. On the 4th March, 1898, on the petition of J. Duxbury and Co, Limited, the High Court made an order under section 18 of the Administrator General's Act (II of 1874), authorizing and enjoining the Administrator General to collect and take possession of the assets of the said deceased, and by the same order directed him, if necessary, to apply for letters of administration of such assets under

section 17 of the Act. It does not appear that the plaintiff was aware of this order. On the 18th April, 1898, this Court passed a decree in the suit *ex parte* against Kika Devidas as heir and legal representative of his father, the said Devidas Khushal. On the 29th April, an attachment was levied under section 268 of the Civil Procedure Code against a sum of money, said to be Rs. 1,000, in the hands of Govardhandas Govindji and due by him to the deceased. On the 30th April, 1898, the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased. The notice must have been seen by the plaintiff, as on the 5th May his pleader wrote to the Administrator General to register his name as a creditor. On the 13th June, the Administrator General wrote to the plaintiff enquiring if his decree was *ex parte*. To this the plaintiff's pleader replied on the 1st July. On the 2nd July, 1898, letters of administration were issued to the Administrator General by the High Court. On the 22nd July, the usual garnishee notice was issued against the defendant then on the record, Kika Devidas, and the garnishee. On the 5th August, the garnishee appeared before me and wanted time to look into the accounts to ascertain the exact amount due to the deceased. The then defendant was not served, and as the plaintiff's pleader brought it to my notice that letters of administration had been granted to the Administrator General, and that he now represented the estate, I directed a notice to be issued to him to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and why execution should not issue thereon. On the 15th August, Mr. Motilal, for the Administrator General, appeared and consented to his name being brought upon the record as party defendant, and the matter was adjourned for a fresh garnishee notice to be served on the Administrator General in respect of the attachment already levied. That garnishee notice came on for disposal on the 22nd August, when Mr. Desai, for the garnishee, admitted Rs. 900 due to the estate of the deceased, but required time to pay. He was ordered to pay the amount into Court by Wednesday, the 24th August, and the matter was further adjourned to that day for argument. On the 24th August, the garnishee was absent, and had also made default in payment of

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the money. The usual order in that case would be to discharge the notice, and allow the prohibitory order to stand for some time to enable the plaintiff to take such steps as he might be advised. By consent, however, of the parties, I heard their arguments on the points raised by the Administrator General, *viz.*, whether the prohibitory order ought not in any case to be discharged as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration. The point is one of some difficulty, and the decision is not likely to be of much practical value in the present instance, as it may be impossible to recover anything from the garnishee. At the same time, it is a point of some importance, and one on which there ought to be a definite ruling. Mr. Carnac appeared to argue the matter, and he stated that had he been present on the 15th August, he would not have consented to his name being brought on the record, except on the condition that the suit should be treated as having been originally filed against him. Without conceding that he would have had the power to impose any such condition on the Court, I may say that Mr. Motilal, who then appeared for him, never suggested it, and his name was naturally inserted as party defendant as the person now representing the estate of the deceased. It was contended, in the first place, that the order of the High Court, of the 4th March, authorizing and enjoining the Administrator General to collect the assets, was equivalent to the order of the Insolvent Court vesting an insolvent's property in the Official Assignee, and that after such order no attachment could issue. This contention cannot, I think, prevail. The distinction between the offices of Official Assignee and Administrator General is well drawn by Westropp, C. J. (*Gumtibai's case*[1]). The wording of the two orders is entirely different. In my opinion, the Administrator General empowered under section 18 to collect assets is much more in the position of a receiver appointed under section 503 of the Civil Procedure Code, and the wording of those two sections seems to be in favour of this view. Then it was said that the grant of letters related back to the death of the deceased, and that no attachment could, therefore, be levied against such assets. In my opinion, this contention also fails. It is true that

(1) (1871) 8 Bom. H. C. Rep., 140.

since the decision at 8 Bom. H. C. Rep., 140, the Probate and Administration Act (V of 1881) has been passed and section 14 of that Act enacts that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death, but there is no saving here as to the liabilities of the deceased's estate. It is not suggested that a creditor properly and *bonâ fide* paid in full before the grant of letters of administration to the Administrator General could be compelled to refund any part of the money so paid. If carried to its logical conclusion, this conclusion would have that effect. It would involve, too, the setting aside of the decree which Mr. Carnac admits that he cannot do. Kika Devidas at the date of suit and down to the issue of letters to the Administrator General represented the estate of the deceased according to Hindu law. He was properly sued in that capacity and the attachment when levied was properly levied against him, and it cannot now, I think, be set aside unless there is some provision in the Administrator General's Act to that effect. Section 35 was relied upon by Mr. Carnac. That section is explicit, but it appears to me to be inapplicable to this case, as it was to that decided by Sir M. Westropp. This suit was not brought against the Administrator General, nor did he represent the deceased or his estate at the date of filing the suit, or at the date of the attachment. Besides that section, I find nothing in the Administrator General's Act which would justify me in setting aside this attachment. It is true that a judgment-creditor has no priority over other creditors merely by virtue of his decree; but if a judgment or other creditor has legally and properly secured an advantage to himself, I am not aware that there is any authority for saying that he can be deprived of it by the grant of letters of administration to the Administrator General. Under these circumstances my decision must be in favour of the plaintiff. I have not come to this conclusion without some doubt, and I am glad that the matter should go before a higher tribunal. The general policy of the Act seems to be in favour of a rateable distribution among all creditors, but I find nothing in the Act to meet the state of the facts which has arisen here. My present order will be that the

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garnishee notice be discharged and the attachment continued until the further order of this Court, to enable the plaintiff to take such steps as he may be advised. This order will be contingent on the opinion of the High Court on a case to be stated at the request of the Administrator General."

The Chief Judge further stated a supplementary case for the opinion of the High Court, as follows:—

"1. In this suit I have already submitted a case on certain questions arising between the plaintiff and the defendant. To that case and the copy of my judgment I would crave leave for brevity's sake to refer.

"2. It will be remembered that on the 22nd August, 1898, the garnishee appeared by his pleader Mr. Desai, and admitted that he owed Rs. 900 to the estate of the deceased Devidas Khushal. This he was ordered to pay into Court by the following Wednesday, 24th August, by an order in the following form:—

"Upon reading the Judge's summons issued herein dated the 15th day of August, 1898, and on proof of service thereof and on hearing Mr. Rele, pleader on behalf of plaintiff, and attorney Mr. Motilal for defendant and pleader Mr. Desai for garnishee, I do order that the said garnishee do out of the moneys in his hands pay into Court the sum of Rs. 900 (nine hundred) in respect of the decree herein on or before Wednesday 24th instant at 11 A.M.

"3. The notice as far as the questions between the plaintiff and defendant were concerned was adjourned to Wednesday, 24th August, for argument, and from that day to the 29th August for judgment. On neither of the two latter days did the garnishee appear, and the notice being of no further use as against him was marked as discharged. The order of the 22nd August, 1898, however, still stood against the garnishee.

"4. As the garnishee did not obey the said order, the plaintiff by his pleader Mr. Rele asked me to issue execution against the garnishee under the provisions of section 649 of the Civil Procedure Code. This I agreed, though not without hesitation, to do. An attachment by seizure was accordingly ordered, and the

garnishee paid the amount of the debt into Court under protest. He then moved the Full Court to set aside the order for attachment by seizure, alleging that the Court had no power to enforce the order of the 22nd August, 1898, in that way.

"5. The Second Judge and myself were of opinion that the Court had the power under section 649 to enforce its order, but as this was a most important point of practice we delivered no formal judgment, but I readily consented to submit this point also for their Lordships' consideration.

"6. It may be stated that the form of the order of the 22nd August, 1898, has already received judicial sanction in the case of *Toolsa Goolal* v. *John Antone*(1), and Sir Charles Sargent there distinctly laid down that this Court had power to make such an order. If this be so, it must, I submit, follow that such an order is enforceable, and if enforceable, then section 649 appears to be the proper section under which to enforce it.

"7. The sole question is whether such an order as is above set out is enforceable under section 649, and relatively under Chapter XIX of the Code of Civil Procedure."

Scott, for the plaintiff.

Lowndes, for the defendant.

The following authorities were referred to—*Nilkomul* v. *Reed*(2); *Remfry* v. *De Penning*(3) *Emanuel* v. *Bridger*(4); *Fowler* v. *Roberts*(5); Administrator General's Act II of 1874, Secs. 17 and 18.

FULTON, J.:—The facts which have given rise to this reference are as follows:—

The plaintiff was a creditor of Devidas Khushal, who died in November, 1896. On 4th January, 1898, the plaintiff filed this suit against Devidas' minor son Kika as legal repesentative of his father.

On 4th March, the High Court made orders under sections 17 and 18 of Act II of 1874, directing the Administrator General, if

(1) (1887) 11 Bom., 448.
(2) (1872) 12 Beng. L. R., 237.
(3) (1884) 10 Cal., 929.
(4) (1874) L. R., 9 Q. B., 286.
(5) (1860) 2 Giff., 226.

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necessary, to apply for letters of administration of the deceased's estate, and authorizing and enjoining him to collect and take possession of the assets.

On the 18th April an *ex parte* decree was passed against Kika as legal representative of the deceased.

On the 29th April an attachment was made, under section 238 of the Civil Procedure Code (Act XIV of 1882), of a sum of Rs. 1,000 said to be due by one Govardhandas to the deceased.

On the 30th April the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased.

On the 5th May the plaintiff wrote to the Administrator General to register his name as a creditor.

On the 2nd July letters of administration were issued to the Administrator General.

Subsequently the Court issued notice to the Administrator General to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and execution should not issue thereon.

On the 15th August, Mr. Motilal appeared for the Administrator General and consented to his name being entered upon the record as a party-defendant.

Afterwards on Govardhandas admitting that he owed the amount, he was directed to pay into Court the sum of Rs. 9 Thereupon the Administrator General raised the question whether the attachment should not be set aside as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration.

Then the learned Chief Judge of the Court of Small Causes referred the following questions:—

1. Was the attachment bad *ab initio*?

2. If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act?

3. Can the Administrator General now claim to have the attachment set aside?

To the first of these questions our answer is that against the Administrator General the attachment was bad *ab initio*.

The second, therefore, becomes superfluous.

To the third question our answer is in the affirmative.

In the case of *Lalchand* v. *Gumtibai*[1] it was held that, when a creditor had obtained a decree against the legal representative of a deceased Hindu as such, execution could be levied against the estate notwithstanding the subsequent grant to the Administrator General of letters of administration. The reason for the decision was that at the time of the decree the widow, against whom the suit was brought, fully represented the estate, and the letters of administration subsequently obtained did not, by relating back to the death of the deceased, override the decree obtained against her. The case occurred in 1871 before the enactment of section 14 of Act V of 1881, which perhaps leaves open to argument the question how far the decision is still binding. But on this point it is unnecessary for us to express any opinion, for that case is distinguishable from the present, inasmuch as in it, prior to decree, no order had been passed similar to the one here made under section 18 of the Administrator General's Act. At the time when that decree was passed, the Administrator General had no claim whatever to possession of the estate, which was wholly vested in the widow. In this case the 16th April, when the decree was passed against the deceased's son, the Administrator General was entitled by virtue of an order made under section 18 to collect and take possession of the property of the deceased within the local limits of the ordinary civil jurisdiction of the High Court, and if necessary to maintain a suit for its recovery. As soon as that order was made, his right to possession became paramount and excluded that of deceased's son, who was no longer entitled to receive payment of debts due to his father. From that time forward it was to the Administrator General, and not to the deceased's son, that the debtor was bound to make payment. Therefore, a decree subsequently obtained against the son could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than his judgment-

(1) (1871) 8 Bom. H. C. Rep., 110 (O. C. J.)

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debtor. How far the position of the parties would have been changed if the Administrator General had been made a defendant prior to decree, it is unnecessary to decide, though the case of *Hanimabalu* v. *Cook* [1] may be referred to on the point. But the entry of his name as a party-defendant after decree could not under the Code of Civil Procedure subject him to any liability, nor was it contended in argument that such would be the case.

Mr. Scott referred to the cases of *Fowler* v. *Roberts* [2] and *Burton* v. *Roberts* [3], but they merely showed that in England a judgment-creditor, who had obtained a decree and attachment of a debt in a suit against an executor before the rights of the latter were superseded under an administration decree, could enforce payment from the garnishee. In *Emanuel* v. *Bridger* [4], which was also cited, it was held that a creditor who had obtained and made absolute a garnishee order, before the bankruptcy order, had a charge to the extent of the attachment on the bankrupt's estate. But cases of this sort do not touch the point now under consideration. Here the Administrator General's rights had accrued before decree: the defendant at the time when the decree was passed merely represented the deceased's estate subject to those rights: and those rights could not be impaired by a decree to which the Administrator General was not a party.

The learned Chief Judge noted that it was not proved that plaintiff had notice of the order under section 18. But that does not seem to make any difference. There is nothing in the section to postpone the title of the Administrator General till notice has been given. If it be argued that such a construction involves hardship on the plaintiff, it may be answered that we are not at liberty to alter the wording of the section, and, moreover, that if the plaintiff's decree were to prevail, the hardship to other creditors might be still greater. If the estate were insolvent, in which case alone could the question be of any importance, the recognition of priority in the plaintiff's decree would lead to his being paid in full out of moneys in which in equity all the creditors were entitled to share rateably. Such a result would be contrary to the intention of the Administrator

(1) (1871) 6 Mad. H. C. Rep., 346.
(2) (1860) 2 Giff., 226.
(3) (1860) 29 L. J., Exch., 484.
(4) (1874) L. R., 9 Q. B., 287.

General's Act and to the principle enunciated by Westropp, J., in *Gamble* v. *Bholagir*[1] in which his Lordship said: "We think it more agreeable to the justice and equity of the case that there should be a distribution of the property of an insolvent amongst his creditors at large than that individual creditors should carry off the whole fund."

In these circumstances it appears clear that under sections 278 and 280 of the Civil Procedure Code the Administrator General has a right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

The supplementary question whether the order made to the debtor to pay the money into Court, can be enforced under section 649, and relatively under Chapter XIX of the Civil Procedure Code, does not, therefore, arise. We accordingly abstain from expressing any opinion on it. Costs of this reference to be costs in the case.

Attorney for plaintiff:—Mr. *D. Bazonji*.

Attorneys for defendant:—Messrs. *Bicknell, Merwanji and Motilal*.

(1) (1866) 2 Bom. H. C. Rep., 146 at p. 161.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS v. CHAGAN JAGANNATH.*

1898.
September 1.

*Criminal Procedure Code (Act X of 1882), Sec. 423—Appellate Court—Powers of appellate Court to enhance sentence—Sentence—Alteration of sentence.**

The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sen-

* Criminal Revision, No. 207 of 1898.