

**(1949) 06 CAL CK 0007**

**In the Calcutta High Court**

**Case No :** Appeal No. 41 of 1946 in Mitter No. 29 of 1932

John Amador Barretto

APPELLANT

Vs

Official Trustee of Bengal

RESPONDENT

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**Date of Decision :** 30-06-1949

**Acts Referred:**

**Citation :** (1949) 06 CAL CK 0007

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## **Judgement**

Mitter, J.—Louis Joseph Barretto and Edward Brightman (hereafter called the Settlers) were, in the year 1827, partners of the firm of Messrs. Joseph Barretto and Sons. The said firm, as also the two individual partners, became involved in debts. On March 10, 1827, they as first parties executed a deed of trust for the purpose of liquidating their debts. The second parties to the document were some of the creditors, who executed the document on behalf of themselves and the other creditors. They were made trustees. The assets of the said firm, as well as the personal properties of the settlers, were conveyed to the trustees for payment of their debts. The third parties to the document were intended to be those of the creditors, who would later on accept the terms of the trust by executing the trust instrument.

2. The document is a long one and need not, for the purpose of this appeal, be summarised in all its details. The important provisions may be summarised in a general way as follows:

(i) That the trustees were to pay out of the profits and proceeds of the partnership assets the joint debts of the settlers, due to those creditors of the firm who would be parties to the deed;

(ii) that they were to pay the personal creditors of the settlers, who similarly would become parties to the deed, out of proceeds of their separate properties;

(iii) That creditors of the firm, who were resident abroad or beyond the seas, need not have joined in the execution of the deed before the final dividend was declared, but for them the trustees were to set apart and retain in their hands an

amount of money sufficient to pay them; and

(iv) that, in consideration of the settlors conveying their properties to trustees, the creditors joining the deed did not release the settlors from their debts but only covenanted to allow them liberty "to follow and "attend to any affairs, business, matters or things "whatsoever and whenever without any arrest, "attachment or molestation whatever".

3. There are three provisions in the deed in favour of the settlors which are material to the case before us. They are:

(1) that, if there remained a residue or surplus in the hands of the trustees after paying up in full the dues together with interest calculated up to the date of payment of those of the creditors who became parties to the trust deed, that residue or surplus was to be held by the trustees in trust for the settlors or their heirs, legal representatives or assignees;

(2) that, if any money out of the moneys which the trustees were to set apart and retain in their hands for the payment of the overseas creditors of the firm remained in the hands of trustees at the time of closing the trust account, then that surplus or balance was to be considered as part of the-general residue;

(3) that if a creditor neglected or refused to execute the trust deed or otherwise legally to accede to the same within a year of the service of notice on him by the trustees requiring him to execute the document, then that creditor was to be excluded from the benefit of the trust and the settlors were to stand in his shoes and to have the benefit which such creditor would have been entitled to, if he had accepted the trust deed.

4. The original trust deed was lost before 1876. The copy, which was produced in Court in that year and was accepted then, is the one which has been printed in, the record. It shows that in all 107 creditors, some of the, firm and others of the individual settlors, had executed the document on or after March 10, 1827.

5. The trustees appointed by the deed including the last survivor entered upon the trust and carried on its administration. In 1874, the Official Trustee of Bengal was appointed the sole trustee of the said trust. Before his appointment and between the years 1831 and 1850 the former trustees had declared three dividends totaling 63? per cent, of the debts due to the creditors who were entitled to participate in the trust. But all those creditors, in whose favour dividends had been so declared, did not take payment of all those three dividends. Some took payment of all the three dividends, some of two and some of one only. About fourteen persons did not take payment of any one of the three dividends.

6. One of those creditors, who had taken payment of all those dividends, namely, Sinaes, became insolvent in 1831 and his estate vested in the Official Assignee of Calcutta. The said Official Assignee, on behalf of the said insolvent and on behalf of all the creditors of the said settlors and of their firm, who had executed the

trust deed, brought a suit in this Court in 1876 against the Official Trustee, as trustee of the said trust, for administration of the trust. That suit was numbered 232 of 1876. The preliminary decree in that suit was passed on November 30, 1876. It directed inter alia the trusts mentioned in the trust deed to be performed and carried into execution. It also directed accounts of the trust fund and of what was due to the Official Assignees or Assignee of Sinaes and to the other creditors who were entitled to the benefit of the trust and further directed the Registrar of the Court to cause advertisements to be published in the Government gazette and other public papers to the effect that creditors of the firm who had executed the trust instrument and all other persons claiming to be entitled to the benefit of the said trust deed were to come in and prove their claims within a certain time and in default thereof to be excluded from the benefit of the decree and that the Government securities and moneys held under the said trust deed be applied in payment of such claims as shall be proved in due course of administration.

7. In pursuance of the said directions, the Registrar published advertisements inviting the proofs. Two of such advertisements, dated March 28, 1877, were published in the issues of the "Calcutta Gazette", dated the 4th and 11th April, 1877. They are printed at pp. 303 and 316 of the gazette of that year. We will set out the material portions of this advertisement in a later part of our judgment. The Master's report is not available. It, however, appears from the final decree, which was passed on December 10, 1878, that the total assets, then in the hands of the Official Trustee in the shape of Government securities and cash money, amounted to Rs. 2, 48, 593-8-3. This would not have been sufficient to pay in full the creditors, who were entitled to the benefit of the trust, if they had come forward to receive payment. Four schedules of creditors were prepared. Schedule A contained the names of the original creditors of the firm of Joseph Barretto and Sons with the respective amounts owing to them shown against their names. Schedule B contained the names of those of the creditors who had not received payment of all the three dividends declared by the trustees between 1831 and 1850 and the amounts of those dividends, of which they did not get payment, were also shown against their respective names. Schedule C contained the names of those of the original creditors who had accepted the trust deed as also the amounts owing to them, but who had not come forward in pursuance of the Registrar's advertisement to prove their claims in the suit and Schedule D set out the names of those of the creditors who had accepted the deed and amounts owing to them who had come forward and proved their claims in the suit. Those schedules were incorporated in the final decree. The final decree declared--

(i) that the persons, whose names appeared in Schedule A, were the "original" creditors of the firm of Joseph Barretto and Sons;

(ii) that the persons, whose names appeared in Schs. B and C, were some of the original creditors of the firm; and it was further declared that the sums of money

shown against their names were the amounts then due to them; and

(iii) that the persons mentioned in Schedule D (except No. 11) were some of the original creditors of the firm or their legal representatives who had proved their claims in the suit and that hatfuls of money shown against their names were then due to them.

8. With regard to creditor No. 11 of Schedule D special directions were given.

9. Leaving out minor details, the final decree further directed the Official Trustee--

(i) to set apart, out of the assets in his hands the sums shown in Schedule B, subject to further orders of the Court;

(ii) to apportion the balance of the assets in an account to be prepared by him among the several persons mentioned in Schs. C and D ratably and in proportion to the amounts shown against their names. This meant a rateable apportionment between the C Schedule and D Schedule creditors in the first instance and a further sub-apportionment amongst the individual creditors mentioned in the said two schedules in proportion to their dues;

(iii) to retain in his hands the amounts thus apportioned and sub-apportioned in respect of the creditors intentioned in Schedule C subject to further orders of the Court; and

(iv) to pay the Plaintiff and such other creditors, whose names appeared in Schedule D, the respective sums which, in the said account, shall be apportioned to them.

10. These directions were carried out by the Official Trustee, who in May, 1881, declared a "final dividend" of 11 1/2 per cent. This dividend was paid out to the D Schedule creditors. Except the representative of a person whose name appeared in Schedule B, no other person mentioned in that schedule or his representative, or any person mentioned in Schedule C or his representative came forward up to this time (May, 1881) to claim payment of the sums of money, or any portions thereof, shown against his name on apportionment. Ameer Ali J. in a later proceeding in the suit found in his judgment, dated July 9, 1932, that the two Schs. C and D as attached to the final decree passed, in the year 1878 had not been correctly prepared, with the result that a smaller amount, less by Rs. 33,353-2-8, was allotted by the Official Trustee to the creditors of the D Schedule when he declared the "final" dividend in 1881. He consequently held that creditors mentioned in Schedule D did not receive then as much as they were justly entitled to. The judgment which was delivered on July 9, 1932 and his subsequent order dated August 27, 1932 and the further decree in the suit dated August 27, 1932, that followed the judgment and the said order have an important bearing upon some of the questions involved in the appeal before us.

11. In 1926, a large amount, many lakhs of rupees, remained in the hands of the

Official Trustee in cash and Government securities, chiefly as a result of the representatives of the creditors mentioned in Schs. B and C not coming in the suit and claiming on proof of title the moneys set out against their respective names in pursuance of the final decree of 1878. On June 26, 1926, John Amador Barretto and Joseph Nicholas Francis Barretto, claiming inter alia, as the next of kin of the settlor, Louis Joseph Barretto took out a Master's summons. In the application filed by them in support of the summons they prayed for orders--

(1) directing the Official Trustee--

(a) to discover fully the nature and extent of the trust fund then in his hands;

(b) to furnish the best particulars of persons entitled to the same and of the sums respectively apportioned to and unclaimed by them;

(2) directing the Registrar to cause advertisements to be published asking the unpaid creditors whose names appeared in the schedules annexed to the final decree of 1878 or their legal representatives as also persons who may claim to be the next of kin of the settlor, Louis Joseph Barretto, to come forward within a certain fixed date to show cause why the trust funds then in the hands of the Official Trustee should not be otherwise disposed and that, in default of their appearance, they may be completely and effectively debarred from claiming any right, title and interest in these funds or any portion thereof, and

(3) that, in the event of such default, they, the Applicants, be declared to be the sole surviving next of kin of the settlor. Louis Joseph Barretto and as such beneficially entitled to a moiety share--the share of the settlor Louis Joseph Barretto, in the undisposed trust fund and that the Official Trustee be directed to make over the same to them as being the next of kin of the settlor. Louis Joseph Barretto.

12. They also claimed as the legal representatives of two of the creditors, but this part of the claim is not necessary to be considered in the appeal.

13. The summons came on for hearing before C.C. Ghose J. on July 12, 1926. The Official Trustee intimated to Court that he intended to make an application in the suit (No. 232 of 1876) for directions. On his undertaking to do so, the summons was not heard, but was directed to be brutish up with the application which Official Trustee undertook to make.

14. On September 1, 1931, the Official Trustee filed the promised application. After setting out the previous history of the trust and of the proceedings of Suit No. 232 of 1876, he gave details of the persons mentioned in Schs. B and C of the final decree who had since 1881 come forward and received payments. They were seven in number--four of Schedule B and three of Schedule C, all of whom came in before 1909. He also annexed schedules giving the names and other details of those creditors mentioned in said Schs. B and C who had not till then come forward to receive payment of the amounts owing to them. He then stated that he had at that time in his hands Government Promissory Notes of the face

value of Rs. 4,52,800 and cash amounting to Rs. 1,63,089-8-5. He further stated that two conflicting claims to the funds then lying in his hands had been preferred--one by the Government to the whole of it u/s 23 of the Official Trustees Act and the other by J.A. Barretto and J.N.F. Barretto to half of it as next of kin of the settlor, Louis Joseph Barretto. We are leaving out the recital of the claim preferred by the last mentioned person as the legal representative of two creditors. He asked for directions on the following among other matters:

(i) Whether the creditors, who had been included in Schs. B and C of the decree of 1878 and who had not come forward up to then to prove their claim in the suit, were entitled to any share of the trust fund then lying in his hands;

(ii) Regarding the claim by the Government u/s 23 of the Official Trustees Act;

(iii) Regarding the claim of the two Barrettos as next of kin of the settlor, Louis Joseph Barretto.

15. He also prayed for necessary directions for the purpose of ascertaining the names and present addresses of the representatives of the creditors named in the schedules who had not come forward to prove their claims in the suit and to receive payment. This last mentioned prayer was granted by Pearson J. on September 3, 1931, who directed advertisements to be published for that purpose. The advertisement was actually published on September 10, following. It required all persons claiming to be interested in the trust-deed to send their names and addresses to the Official Trustee and also to the Registrar by January 7, 1932, together with the particulars of their claims. All such persons were required, if they so desired, to attend in person or by advocates in chambers on January 21, 1932, at the proposed hearing of the said application of the Official Trustee.

16. In pursuance of this advertisement, John Amador Barretto and Joseph Nicholas Francis Barretto put in their claim on January 4, 1932. The claim so put forward was the same which they had put forward in the Master's summons which they had taken out on June 26, 1926. They also appeared at the hearing of the application which was taken up by Ameer Ali J.

17. The learned Judge delivered his judgment on July 9, 1932 and gave further directions by his order dated August 27, 1932. At this stage it is necessary to notice in a brief manner the following matters, namely:

(1) Ameer Ali J. held that the "active creditor", those who had come and proved in the suit--that is to say, the creditors whose names were in Schedule D--briefly to be called the D creditors and a few more of the B and C creditors who came subsequently to 1881 and had proved their claims--were not entitled to claim the unclaimed sums of money that had been apportioned in the account by the Official Trustee in pursuance of the decree of 1878 to the creditors mentioned in the B and C schedules (the B and C creditors as he calls them). He designates those funds as the B and the C funds;

(2) he further held that Schs. C and D had not been correctly prepared in 1878, with the result that less money had been apportioned to the D creditors and more for the C creditors;

(3) he directed the Official Trustee to prepare the schedules correctly and to make an apportionment on the corrected schedules and to pay a further dividend to the D creditors--equal to what they would have been paid in 1881, if the apportionment of the assets and calculation of dividend had been then correctly made on the basis of correct schedules together with accretions; and

(4) he gave liberty to the Official Trustee to advertise at his

discretion "for creditors and next of kin or other "persons who may be entitled to the trust funds".

18. We will, in our judgment, adopt, for the purpose of convenience and uniformity, those nomenclatures of Ameer Ali J. His direction for the correction of Schs. C and D and for re-allocation of funds among the C and D creditors cannot and has not been challenged before us. The Court has the inherent power to rectify the errors committed by it and had also the right to place the 1) creditors in the same position as regards the apportioned funds as they would have occupied in 1878, if Schs. C and D had been correctly prepared then. His further order, conferring on them the same benefit in the distribution of the dividend, if things had been done correctly in 1881, is right. Consequently, his further order in their favour regarding accretions, which had accrued since 1881 to the fund which should have been allotted to them, cannot be and has not been challenged before us.

19. The advertisements issued in pursuance of Ameer Ali J.'s order and decree of August 27, 1932, were widely published in the years 1934 and 1935. The representatives of only a few of the B and C creditors came in the suit. Their names are indicated in the lists given in the Official Trustee's letter of April 26, 1937, to Messrs. Morgan and Co., which is printed at p. 32 and the following pages of the paper book. The representative of one creditor, namely, Casa de Seguros De Macau, claiming Rs. 75,000 odd, had to file a suit in 1936 against the Official Trustee, but that suit has been since dismissed. The representatives of two B creditors were paid. Rs. 355 and Rs. 3,730 odd in 1935 and 1930 respectively and it seems that, since April 26, 1937, out of the representatives of the C creditors who had preferred their claims mentioned above, the claim of one--and that for a comparatively small amount--has been admitted and he has been paid; a representative of another C creditor has since then filed a claim. His claim is for a comparatively small amount and his claim is still under investigation. These are all the claims so far preferred after 1932. The position, therefore, is that none of the B creditors, except the representative of one, had come forward to receive the money before 1881; the representatives of four of the B creditors and of three of the C creditors came in and received money between 1881 and 1909.

20. No representatives of the B and C creditors had come in between 1909 and 1932, that is before Ameer Ali J.'s judgment, order and decree and the representatives of a few of the C creditors came in after that order and up to now. Most of them, however, could not prove their representative title. We have taken these figures partly from the record and partly from the agreed statements made from the bar. It is highly improbable that the representatives of any more B or C creditors would come in at this very late hour, seeing that the trust was being administered by the trustees from 1831 and by the court since 1878. The large amount of undisposed of trust fund (at least a good portion thereof) now lying in the hands of the Official Trustees in the shape of Government securities and cash are not likely to be distributed by the Official Trustee amongst the creditors of the settlors who are entitled to take the benefit of the trust. It is high time that the administration of the trust should be closed and it may be that for that purpose a last and final advertisement inviting the unpaid creditors or their representatives, who are entitled to the benefit of the trust and whose names appear in the corrected B and C schedules, to come in and prove their title and claim in the suit within a fixed time on the penalty of being excluded on their default. In fact that; is the order which we propose to make.

21. In pursuance of Ameer Ali J.'s order, a further dividend has been declared in favour of the D creditors and we are told that all of them have received that dividend. They and the "active creditors" cannot any more prefer claim to the surplus now in the hands of the Official Trustee and which may lie in his hands which have been apportioned to the B and C creditors, because Ameer Ali J. dealt with that claim without any reservation and overruled it finally.

22. On May 15, 1944, John Amador Barretto, Marie Theresa Rodrigues and Annie Catherine Bocarro took out a Master's summons. In the application filed in support of the summons, they claimed to be the next of kin of the settlor, Louis Joseph Barretto. The two ladies laid their claims in their own independent rights as some of the next of kin of the settlor, Louis Joseph Barretto and also in their derivative right as the legal representatives of Joseph Nicholas Francis Barretto, now dead, the person who had in 1926 claimed as one of the next of kin of the said settlor and who along with John Amador Barretto had appeared in the proceedings before Ameer Ali J. They claimed half of the undisposed trust funds lying in the hands of the Official Trustee, which had not so far been claimed by the representative of the creditors of the settlors who were entitled to the benefit of the trust and for a direction for payment of the same to them. They proceeded on the footing that the trust properties belonged to the two settlors, Louis Joseph Barretto and Edward Brightman, in equal shares. They put forward their claims as in 1926 in alternative forms, namely--

- (1) that they were so entitled under the very terms of the trust deed itself, and
- (2) that, if they were not so entitled, they were entitled de hors the trust deed, as, in law, a trust had resulted, in their favor in respect of the said fund in the circumstances of this case.

23. Their claims were opposed before the learned Judge on the original side by the Official Trustee, who, moreover re-iterated that the fund had to be handed over by him to the Government in view of Section 23 of the Official Trustee's Act.

24. The question whether the claimants are in fact all or some of the next of kin of the settlor, Louis Joseph Barretto, has not been gone into. Das J., who heard their application, has dismissed their claims on points of law. He held--

(i) that the judgment, order and decree passed by Ameer Ali J., to which we have referred, to be *res judicata* as against their said claims;

(ii) that in any event--by the apportionment and sub-apportionment of the trust funds amongst the persons named in Schs. B and C as directed by the final decree of 1878 and even more by Ameer Ali J.'s judgment and decree, the property in the moneys thus earmarked had passed to those persons to whom they had been so apportioned. According to him, a new trust, so to say, for the moneys so apportioned and sub-apportioned, was created in law in favour of those individual creditors and so the Official Trustee held the same in trust for them or their legal representatives and not in trust for the settlor's next of kin;

(iii) that under the terms of the trust-deed, there was no express trust in their favour, and even if a trust in respect of those moneys had resulted in their favour, it would have been a constructive trust and so their claims were barred by time.

25. After giving the matter our anxious consideration, we are-unable to agree with our learned brother in all respects. We, however, agree with him on one point, namely, the next of kin of the settlors cannot lay claim to the moneys and securities in the hands of the Official Trustee under the terms of the trust-deed, as none of the contingencies mentioned therein Have occurred, which would have made the trustee a trustee for the settlors or their representatives. The moneys and securities, now-left in the hands of the Official Trustee, are not the residue left after payment in full of all the creditors who had executed the trust-deed and also cannot be attributed to the creditors, who, on notice being given to them by the trustees, had neglected or refused to execute the trust instrument within the time limited in the notice.

26. The first point for consideration is, what is the precise scope-of Suit No. 232 of 1876? We agree with our learned brother that it was not strictly a creditor's action for administration of the-estate of a deceased debtor--what, in Courts of Equity in England, used to be called a "creditor's bill". It was a suit for administration of a trust, created for the payment of the debts of the settlors to such of their creditors, who had or would join in the execution of the trust instrument. The contention of the-Appellants before us, however, is that that suit had been Brought by and on behalf of the creditors who had executed the trust-deed for administration for a limited purpose, namely, only so far-as it was necessary to pay them out of the trust funds in-the hands of the trustee. They contend that, if, in the course of administration by the Court, any fund remained

after payment to those creditors, the Court in that suit could not have made an order in respect of that surplus, so that the claims of the next of kin of the settlors did not come within the scope of the suit. The implications of this contention are two-fold. Firstly, that the advertisements published in pursuance of the orders of the Court made in that suit, which invited claims, could not, in law and did not in fact, require the next of kin of the settlors to come in the suit and secondly, that the Court had no jurisdiction in that suit, at any stage, to make any adjudication on the claims of the next of kin of the settlors. This is one of the ways in which the adverse effect, if any, of the judgment of Ameer Ali J. on the rights of the next of kin of the settlor is sought to be avoided. These two contentions of the learned advocate appearing for the Appellants require a close examination, of the plaint of the suit of 1876.

27. The first paragraph of the plaint recites that Louis Joseph Barretto and Edward Brightman, the two surviving partners of Joseph Barretto and Sons, became largely indebted to various persons and that on March 10, 1827, they conveyed their real and personal estate to persons named therein upon trust (amongst others) that, out of the proceeds or produce of the said estate and property, to pay and satisfy the joint debts of the said co-partnership and firm. The said paragraph gives further details of the trust-deed and conveys the idea that the creditors of the said firm, who had executed the trust-deed, were entitled to participate in the distribution of the trust fund. The succeeding paragraphs, up to para. 13, give details about the devolution of the office of the trustee and mentions the claim of Sinaes whose estate had vested in the Official Assignee, the Plaintiff and states the amount of the trust fund then in hands of the Official Trustee. Paragraph 14 winds up by saying that the Plaintiff, as Official Assignee and as assignee of the estate and effects of Sinaes and also on behalf of all other creditors of Louis Joseph Barretto and Edward Brightman, is entitled to claim that the trusts of the said indenture should be carried out and the sums of money, then in the hands of the said Official Trustee, should be paid and distributed to the creditors, who are entitled under the said Indenture. The prayers are as follows:

[We are numbering them for convenience of reference and underlining important passages]

(1) That the trust of the said Indenture of March 10, 1827, be ascertained and declared;

(This prayer was made because the original trust-deed had been lost.)

(2) that it be determined which of the trusts mentioned in the said Indenture were subsisting and capable of being carried into effect;

(3) that an account be taken by and under the direction of the Court of all moneys and Government securities which had come into the hands of the trustee;

(4) that the said moneys and Government securities be administered in due

course of administration;

(5) that all the creditors of Louis Joseph Barretto and Edward Brightman, who had executed the trust-deed, as far as the funds in the hands of the trustee may permit, be paid their respective demand; and

(6) for further relief.

28. The Plaintiff, namely, the Official Assignee, was interested in getting money out of the trust fund as the assignee of one of the creditors who had executed the deed. As the assets of the debtors, Louis Joseph Barretto and Edward Brightman; from which only he could expect payment, were held in trust by the Defendant, the Official Trustee, under a trust for the benefit of a certain class of creditors, namely, those who had executed the deed, and as Sinaes, having executed the said deed, was bound by its terms, the Official Assignee was rightly advised to institute the suit on behalf of all those creditors and to pray for administration of the trust by the direction of the Court, because he could obtain payment only through that course. The primary object of the suit was, accordingly, to have payments made out of the trust fund to the creditors who had joined in the execution of the deed. That is what is contained in prayer No. 5. But in our opinion the scope of the suit was wider. Under the plaint, the Court was in a position to direct a full and complete administration of the trust, so that, if any surplus remained after payment of the creditors in terms of the trust deed, it could deal with that surplus, by ordering the trustee to make it over to such person or persons" whom it may have adjudged to be entitled to the same. Paragraph 1 of the plaint expressly states that one of the terms of the trust amongst others was payment of the creditors of the co-partners who had executed the trust deed. That by necessary implication brings out what was the fact, that there were other terms for the benefit of others, who were not creditors who had joined in the execution of the instrument. The last paragraph of the plaint, namely, No. 14, further states that the trusts of the Indenture of March 10, 1927, should be carried out. That means that all the trust contained in the instrument is to be carried out, so that, if there remained a surplus after payment in full of all the creditors, that surplus was to be made over to the next of kin of the settlors, for that was one of the express trusts created by that Indenture. The use of the plural number is significant and prayer No. 4 is wide enough to include full and complete administration of the trust.

29. In fact, the preliminary decree passed in 1876 stated that the trusts (which would include all the trusts) mentioned in the Indenture of March 10, 1827, ought to be "performed and "carried into execution and the same is ordered and decreed "accordingly." The suit was, therefore, not a suit for limited administration. So, if, in the course of administration, the Court found a sum of money left in the hands of the trustee, which the next of kin of the settlors were entitled to have, not under the express terms of the trust-deed, but by reason of law, we do not see why the Court could not have passed an order in the suit directing the trustee to pay it over to them.

30. The preliminary decree further ordered the Registrar of the Court to publish advertisements to the effect that creditors of the firm of Joseph Barretto and Sons, who had executed the trust-deed and all other persons claiming to be entitled to the benefit of the said trust-deed to come and prove their claims within a specified time and in case of default of being excluded from the benefit of the administration by the Court. The material portion of the advertisement, as published in the issue of the "Calcutta Gazette" of March 28, 1877, runs thus:

Pursuant to a decree of the High Court...made in Suit No. 232 of 1876 ... and dated November 30, 1876, the creditors of the late firm of Joseph Barretto and Sons, merchants and agents, who have executed certain trust-deed for the benefit of creditors dated March 10, 1827...and all other persons claiming to be interested in the said trust-deed are, before Saturday, July 28, 1877, to send to the office of the Registrar of this Court, in the Original Side, their names, addresses and descriptions and full particulars of their claims, a statement of their accounts and the nature of the securities (if any) held by them or in default they will be peremptorily excluded from the benefit of the said decree.

Every creditor holding any security may produce the same to the Registrar, etc.

31. Creditors, who had executed the trust-deed, were entitled to the benefit of the trust-deed and it is on their behalf the suit had been brought. The advertisement expressly invited claims of such creditors. But there was another class of creditors, who were also entitled to the benefit of the trust-deed, but who had not executed the deed, namely, overseas creditors. The general words "all other persons claiming to be interested in the trust-"deed" would include the last mentioned class of creditors. Those general words, which occur both in the preliminary decree and the advertisement would not, accordingly, be regarded as surplus age, if the settlors or their next of kin be excluded from their orbit. Those words would have ordinarily included the settlors or their representatives, but the subsequent reference in the advertisement to the necessity of furnishing "statement of "account," etc., would be inappropriate in respect of the settlors or their next of kin. In the preliminary decree, those general words are not so qualified as in the advertisement. It is also pertinent to observe that, at that stage of the suit, that is, before the accounts of the trust fund directed by the decree had been rendered and before the creditors appeared and proved their claims in the suit, in pursuance of the advertisement, it could not have been anticipated whether there would be a residue of the trust fund after payment to the creditors as to entitle the settlors or their representatives to the same under the terms of the trust instrument, for, under items terms the settlors or their next of kin would be entitled only if there was a surplus left after full payment of the dues of every creditor who had executed the deed. It may be that under these circumstances it was thought Unnecessary and premature at that stage of the suit to invite the settlors or their legal representatives or next of kin to come into the suit. In any event even if the advertisement was intended to be an invitation to them also, they could not have preferred any claim before the

Registrar under the trust deed at that stage of the suit. We cannot accordingly subscribe to the view of our learned brother Das, J., when he said--

(1) that they ought to have come in and put forward their claim in pursuance of that advertisement;

(2) that, by their not coming within the time limited in that advertisement, they have lost their right to participate in the administration of the trust funds; and that

(3) in respect of their claim *de hors* the trust-deed, as beneficiaries under a constructive trust, their claim was barred by time, at any rate at the time of Ameer Ali J.'s judgment, if not earlier.

32. The first conclusion does not appeal to us for the following reason:

The claim, as now preferred and pressed, which is *de hors* the trust-deed, is not a claim arising under the trust-deed. The advertisement, giving it the most liberal construction, did not require persons claiming benefit *de hors* the trust-deed to come in. The phrase is that those claiming to be interested in the trust-deed.

33. The second conclusion is also very weak, for the Court in an administration suit can always excuse a default of that nature and in this very suit such default on the part of creditors had been excused by the terms of the final decree of 1878 and also by making payments to the legal representatives of the original creditors, who came into the suit and proved many years after the final decree.

34. No question of time, running at a date prior to Ameer Ali J.'s judgment or from the date of that judgment, in our opinion, can arise, on the ground that no trust in favour of the next of kin of the settlors *de hors* the trust-deed and arising under law on the ground put forward by them, had arisen at either those periods of time. The final decree of 1878 showed that, as a result of accounting directed by the preliminary decree, the trust funds then in the hands of trustee amounted to Rs. 2,48,593 odd, taking the value of the Government securities at par. The amount shown in Schs. B, C and D annexed to the said decree amounted respectively to Rs. 1, 37, 850 odd, Rs. 8, 34, 587 (sicca) and Rs. 3,14,488 odd (sicca). By the terms of the final decree, the sum of Rs. 1,37,850 had to be set apart for the creditors of Schedule B. That would have left the sum of about Rs. 1,10,700 odd available for distribution among the creditors of Schs. C and D, whose total claims were "found" to be over Rs. 11,40,000. Besides the claims proved in the suit itself, namely, by the D creditors according to the decree was more than Rs. 3,00,000. That itself would have exhausted all the trust fund then in the hands of the Official Trustee, if those creditors were paid in full.

35. In view of the terms of the final decree of 1878, the Court reserved the power to pass orders in future for payments to the creditors, whose names appeared in Schedule B, in full and those whose names appeared in Schedule C *pro rata*, if and when they came forward and no time limit was fixed within which

they were to come in the suit and prove. In fact, some of them came in and received payments many many years after the final decree and some have come forward even after Ameer Ali J.'s judgment. The claim of next of kin of the settlors is Louis Joseph Barretto, that the Official Trustee is holding the money now in his hands or the greater portion of it as trustee for them, because the trust in respect of these moneys, as contained in the trust-deed, cannot be performed as the beneficiaries under the trust instrument, namely, most of the creditors who had executed the trust-deed and whose names are in Schs. B and C must now be taken to have abandoned their rights, as a very few of them came in after the publication of that advertisement permitted by Ameer Ali J. in his order dated August 27, 1932. The cause of action, on which the Appellants base their claim, could not have arisen, at any rate, before that advertisement was published. It cannot, in our judgment, have arisen till the Court was able to say that no other creditor would come forward and there was no knowing how many creditors would come in on seeing that advertisement and whether the claims of such of them who appeared and proved would exhaust or not the whole of the trust funds, or what portion would remain. Their cause of action would, therefore, arise at the earliest on the expiry of the time, if mentioned, in that advertisement, within which the creditors were required to come in, but to be more accurate when the last claim by the legal representative of the creditors of the Schs. B and C was preferred in pursuance of that advertisement and admitted or proved and this event could occur after-the judgment of Ameer Ali J" and would be, accordingly, within six years of their application, which we are dealing with. We,, therefore, hold that time has not extinguished the claim.

36. We have already stated that, on June 21, 1926, the two-Barrettos, John Amador and Joseph Nicholas Francis, took out a Master's summons. In the application in support of that summons they stated inter alia that the funds; in the hands of the Official Trustee should no longer be allowed to be tied up indefinitely and that, with a view to make sure that no other-creditor of the said firm of Joseph Barretto and Sons has any claim on the trust funds, necessary advertisements may be issued, requiring the creditors to come forward within a specified time to establish their claim to the trust fund and in default, to be excluded from participation. They claimed" half of the funds; that may be left as the next of kin of one of the settlors, Josepk Barretto, on alternative grounds: (1) either because it was "surplus or residue" within the meaning of the trust-deed, or (2) apart from the trust-deed, as a "resulting or ultimate trust" in their favour. This petition was not heard then, but was ordered to be brought up to a hearing along with the application for directions, which the Official Trustee undertook to make. No advertisement of the nature prayed for by them has been published.

37. The Official Trustee made his promised application on September 1, 1931. We have already stated the nature of the application. As a preliminary step, Pearson J., by his order dated September 10, 1931, directed advertisements to be issued as prayed for by the Official Trustee in his application. The said two

Barrettos preferred their claims as next of kin of the said settlors on the self-same grounds they had put forward in their own application of the year 1920. That application was put along with the application of the official Trustee, but No. separate order was passed on it. This fact has no importance, for Ameer Ali J., in dealing with the application of the Official Trustee for directions, dealt with their said claim in a way. Whether he made a final adjudication in respect of that claim of theirs is the point for consideration in connection with the question of res judicata.

38. In pursuance of the advertisement issued on the strength of Pearson J.'s order some of the D creditors and one C creditor. Casa de Sagoros de Macao, who had come forward but whose claim had not till then been proved, appeared before Ameer Ali J. Some of the D creditors, were represented by Mr. Issacs and some by Dr. Gupta, who also represented the Barrettos in their alleged capacity of next of kin of one of the settlors. Casa de Sagoros de Macao was represented by Mr. Surita. Dr. Gupta was placed in an embarrassing position, having regard to the way in which the claims of the D creditors was put forward and dealt with by Ameer Ali J. in his judgment. We need not deal with what Ameer Ali J. designates as the, DC fund as the Appellants have abandoned before us their claim to that fund. Unless otherwise indicated, we would be speaking of the C fund and D fund to represent the sums of money which ought to have been apportioned and allocated on a correct basis to the C and D creditors respectively, if the two Schs. C and D had originally been framed correctly. The "active creditors" before Ameer Ali J. were the D creditors and only a few of the C creditors, who, after 1881, came in and proved their claim in the suit. For practical purpose and for convenience, we will call the "active "creditors" as the D creditors.

39. Before Ameer Ali J. there was a cross-contest, namely, between the C creditors represented by Mr. Surita and D creditors, represented by Dr. Gupta and Mr. Issacs, the D's claiming distribution of the B fund and the unpaid C fund among them and the C's contending that the allocation to the C fund should be kept unencroached upon for payment to them should their representatives come forward later on and prove their title. Casa de Sagoros de Macao, whom Mr. Surita represented, could at that time be a C creditor, for it had not at that date proved. The claim so put forward by the D's went straightly against the claim of the next of kin. This is why we have observed that Dr. Gupta's position as counsel appearing for both the D creditors and the next of kin of the settlor was embarrassing. The next of kin's contention, however, was that the C fund be closed and half of it may be paid over to them, they being the next of kin of one of the two settlors. Ameer Ali J. framed the following issues:

- (1) Should the D C fund be released, and if so, for whom?
- (2) Should the B and C fund and/or their accretions be released and for whom?
- (3) Should the D fund (not drawn) be released and if so for whom?

40. Those issues were discussed under the third and fourth hearings of his

judgment, where he dealt with the "law" and construction of the final decree of 1878. He held that the DC fund and its accretions ought to be distributed pro rata amongst the D creditors and directed the payment of a further dividend to them out of that fund. This part of his judgment and decree has not been questioned before us by the Appellants and moreover, it cannot be.

41. His decision on the third issue was that the D fund not drawn (Rs. 560 odd plus accretion) should remain subject to proof of title. This direction cannot also be challenged. It is a final order and so *res judicata*. Moreover, the final decree of 1878 had directed payment to the D creditors and that order for payment cannot be abrogated in a later stage of the suit.

42. In dealing with issue No. 2 he discussed in great detail the competing claims of the C creditors and D creditors--"the active "creditors". He overruled the claim of the D creditors to the unpaid C fund. In this part of the judgment there is no discussion on the merits of the claim of the next of kin of the settlor. Under the fifth, heading, where the results are summarised by him, he said that "there is no resulting trust in "favour of the settlors or their representatives". We would consider the effect of this observation later on.

43. Under the heading of "Law" he reviewed a number of cases decided in England and said that in an administration suit the court may--

(i) either totally disregard the creditors who had not proved in answer to the advertisement and proceed to distribute the assets among the creditors who had proved, or

(ii) being aware of possible or likely claims may set apart, out of the assets, a sum of money for a time by way of "interlocutory protection" for those creditors who may come in and prove later on, but within a specified time. In such a case, if they did not come in or prove, within the time so specified, the sum so set apart will revert to the general fund and would be distributed among those creditors who had come and proved; or

(iii) the Court may record a finding that a person is a creditor for a certain amount from such materials as may be available to the Court, though that person had not come in and proved in the suit and set apart a sum of money for him. The abbreviated expression used is that the Court "has found the creditor". In such a case, the money so set apart will remain earmarked and would not fall into the general fund and so cannot be distributed amongst the creditors who had proved, even if that person did not come forward to receive it.

44. This last proposition he observed had been laid down in *Alderson v. Petrie and Ashley v. Ashley* (1877) 4 Ch. D. 75%. He then proceeded to observe thus:

Therefore it will be a question to be decided in each case whether there has been a finding or whether there has been merely interlocutory protection. Has the Court (in Suit No. 232 of 1876) established a right; (or) Has it merely protected the creditor : that brings me to the final question of construction.

45. We have supplied the words enclosed within brackets to make the passage clearer. He then construed the final decree of 1878 and came to the conclusion that the Court "had found" the B and C creditors. He concluded the fourth heading thus:

That being my finding on the construction the whole matter to my mind is covered by *Alderaon v. Petrie* and *Ashley v. Ashley* (supra) and I am not free to release the funds in question (B and C funds) for the benefit of the active creditors.

46. If the judgment had ended here, it could not have been contended that the claim of the next of kin had been considered or concluded. The judgment has, however, the effect, by reason of *res judicata*, of silencing the claim of the "active creditors" to those funds--the undisposed of B and C funds--for all time to come and it would have had that effect only and no more, if there was nothing more in that judgment. Then followed the summary of his conclusions under the fifth heading "Result".

47. It is not necessary for the point of *res judicata* urged against the next of kin to notice all that is stated under this head. The learned Judge directed sub-apportionment of the B and C funds amongst the different B and C creditors. The important heads are as follows:

(1) "There is no resulting trust in favour of the settlors or their representative"

(5) The accretions to the B and C funds were to go in law with the share of each individual.

"In other words the B and C funds were to be treated as "if so many individuals were beneficiaries of a particular portion of the fund from the year 1878."

(10) The Official Trustee's prayer for a direction to make over the funds to the Government u/s 23 of the Official Trustees Act was not acceded to at that stage. On the other hand, the Official Trustee was directed to pay the unclaimed amounts standing to the credit of the various creditors into Court to the credit of the Accountant-General.

(12) The matter was to be placed on the list at a future date, so that the Official Trustee may ask for further directions, if necessary.

48. Ameer Ali J. did not say that, by reason of the apportionment, the moneys allotted to the B and C funds had become the property of the B and C creditors, nor by the further sub-apportionment particular portions of those funds had become the property of the individual B and C creditors. An imputation to that effect cannot be attributed to his judgment, for that would militate against his observations contained in item No. 10. Taking the last portion of judgment under heading IV, which we have quoted above, with result No. 5, the effect of the judgment, broadly speaking, is that he found the original trust fund had been split up, firstly into two parts, one part representing the B and C funds and the

other the D fund. The B and C funds were further split up and subdivided and several and distinct trusts, so to say, were created out of the first part of the fund, in favour of the several individual creditors whose names appeared in the B and C schedules as a result of the final decree of 1878 and his own direction. It is pertinent to observe that these trusts rested on and flowed from the trust for creditors created by the trust-deed of 1827. If, under the law, a trust would have resulted in favour of the settlors and their representatives by reason of the impossibility of performance of the trust as created by the deed of 1827, it is difficult to see how a trust would not result in their favour if it was impossible for the trustee to carry out these several trusts to which the original trust had been split up as a result of the decree of 1878 and the judgment passed by Ameer Ali J. The subdivision of the original trust fund, in our judgment, would make no difference in this respect. A trust is an obligation annexed to ownership and arising out of confidence. That is the definition in the Indian Trusts Act. The trustee is the owner of the trust property which is vested in him. He is under an obligation to make it over to the beneficiary in terms of the trust instrument. Under the Indian law, the beneficiary is not the owner while the trust fund is vested with the trustee. There is here no such distinction as legal and equitable ownership. But, apart from this, if the object of a trust fails, or if the trust cannot be performed wholly or in part, the trust fund, or the residue which remains in the hands of the trustee after performance of the part that can be and had been performed, cannot be the trustee's in beneficial interest. In law, the trustee would become a trustee for the same for the author of the trust. There would be thus a resulting trust in favour of the settlor or his representative, as the case may be. This is a well-established principle and has, moreover, been codified in India. The original trust would come to an end under the "otherwise" part of Section 77 of the Indian Trusts Act and Section 83 requires the trustee to hold the fund for the benefit of the author of the trust or his legal representative. The "new "trusts" of particular sums of money created as a result of the decrees and orders passed in suit No. 232 of 1876 were trusts for payment of the creditors of the settlors" heirs, Joseph Barreto and Edward Brightman and if payments of those sums of money could not be made by the trustee to these several creditors or their Representatives by reason of their being untraced now with the reasonable certainty of being never traced at all, those sums would have to be made over by the trustee to the representative of the settlors on the ground that the trust thus far cannot be executed or performed. The decree of 1878 or the judgment and decree passed by Ameer Ali J. did not in fact wind up the administration of the trust as created in 1827. The object of this administration suit No. 232 of 1876, as of every administration suit, be it a creditor's bill or a suit to administer a trust created for the benefit of creditors, is to wind up finally. The final decree in this suit was made in 1878 with a view to wind up. The actual winding up did not take place even up to Ameer Ali J.'s judgment and decree. The fact is that Suit No. 232, which was a suit for the administration of the trust as created by the trust deed of 1827, was not finally terminated by Ameer Ali J.'s judgment and decree. On the contrary, by his order and decree dated August

27, 1932, he continued the suit by directing the Official Trustee, in his discretion, to publish advertisements inviting creditors. He thus indicated that the said trust was not considered as having been already wound up. We cannot, therefore, agree with the conclusion of our learned brother, Das J., that "the decree of 1878 and certainly the "judgment and orders of Ameer Ali J. operated to wind up the "administration of the trust created by the deed of 1827" and we have already held that creation of the "new trusts", by virtue of which "the Official Trustee" is, in contemplation of law, holding the "respective amounts in trust for the respective B and C creditors, not under the original trust, but under the trust "created by the said decree and orders", affect the claim of the next of kin preferred on the basis that a trust had resulted in law in their favour by reason of the fact that it is impossible to make over those sums of money to those creditors on the grounds stated above.

49. We have so far discussed the effect of Ameer Ali J.'s judgment without reference to his finding as stated in item No. 1 of the fifth heading of his judgment, namely, that "there is "no "resulting trust in favour of the settlor or their representatives". If that is a final decision, it would certainly be *res judicata* as against Joseph Nicholas Francis Barretto and the two ladies in their capacity as legal representatives of Joseph Amador Barreto and as against them in their independent right as some of the next of kin of heirs Joseph Barretto, for the reasons given by our brother Das J. which we need not repeat. We do not agree with the contention of the learned Counsel for the Appellants that the claim of his clients qua next of kin of one of the settlors had not been put forward before Ameer Ali J. The statement in the judgment of Ameer Ali J. goes against that contention. Nor can we accept his further contention that their counsel, Dr. Gupta, had authority to place before the Court their claim qua representatives of some of the creditors and had no authority to represent them or place their case before the Court in their capacity as next of kin. There is no material to support this contention. On the contrary, the Official Trustee asked for directions in respect of their claim preferred as next of kin of the settlor. They, in their written statement also, put forward their claim as next of kin of the settlors and Ameer Ali J. observed in his judgment that Dr. Gupta also represented the next of kin of the settlors.

50. We have already held that the Court had, having regard to the scope of Suit No. 232 of 1876, ample jurisdiction to make an adjudication on claims put forward by the next of kin of the settlors. The question of *res judicata* cannot, therefore, be avoided by the Appellants on the aforesaid grounds. The sole question is whether there was a final decision by Ameer Ali J. against their claim as next of kin of the settlor.

51. After the delivery of the judgment on July 9, 1932, the matter was again placed before the learned Judge on August 27, 1932, when he ordered a number of directions to be added to his judgment. Paragraphs 3, 8 and 16 of this order are important. He allowed the Official Trustee to set aside and retain Rs. 20,000

on account of future costs including costs in connection with future advertisements for persons entitled to the funds or the costs of any applications that may be made by creditors in which the creditors may be unsuccessful and in which he, the Official Trustee, may be unable to recover his costs from them. Be gave the Official Trustee "the liberty to advertise at his discretion for "creditors or next of kin or other persons who may be entitled to "the funds". The words "next of kin" in this passage cannot, in our judgment, be taken to mean the next of kin of creditors. That is the construction put by our learned brother, but we respectfully dissent from him. That construction would be possible only if the word "creditors" in this passage had been used to denote the "original creditors", but that cannot be so, as the Court was fully alive to the fact that, the original creditors--persons living in 1827--must, all of them, have been dead by that time. The word "creditors", therefore, meant the representatives of the "original creditors". The words next of "kin" must, therefore, refer to persons other than "next of kin" of the "original creditors". They must, therefore, necessarily mean the next of kin of the settlors. There would be no meaning in giving liberty to the Official Trustee to advertise for the next of kin of the settlors, if Ameer Ali J. had intended to decide finally that they would have had no right to the surplus in any event. He further noticed the prayer of Dr. Gupta to add the word "at present" at the end of sub-heading (1) of heading 5 ("Result") of his judgment. The learned Judge in effect granted that request for he observed thus:

All I am prepared to say is that as a matter of course my judgment has been given upon the facts and circumstances now before me. I have not considered the future or possible future eventualities.

52. This observation cannot, in our opinion, be dismissed from consideration by saying it is a truism. We have already held that in this case a trust would result in favour of the settlors' next of kin by reason of impossibility of performance of the trust for creditors. It would result if the B and C creditors could not be traced. The intention behind the publication of another advertisement was to see if they or some of them could be traced and the Court then considered that there was no certainty at that stage that none of them would come forward in the suit. A trust would result in favour of the settlors next of kin if those creditors, or some of them, did not come in pursuance of the advertisement and get payment. Whether they would come in or not at all, in numbers, or otherwise, was a contingency that was to happen in future and the said observation of Ameer Ali J. means that he did not decide the point, keeping in view those future contingencies. In fact, even after 1881, some of those creditors had come forward. That observation, in our judgment, means that, at the time when the judgment was delivered by him, there was no resulting trust, but, whether a trust would result in favour of the representative of the settlors at a future period, when the Court would be able to say with an amount of conviction that no other creditors of the B and C lists would come forward to claim the money shown in the accounts against their names, was left over for future consideration. That stage would only arrive when there would be no response or

little response within a reasonable time to the advertisements which the Official Trustee was given the liberty to publish by the order of August 27, 1932. The cumulative effect of all the point mentioned in the order of that date, which we have noticed and which, according to the terms of that order, were to be considered as being added to the judgment of July 9, 1932, lead us to the conclusion that the decision in the judgment of July 9, 1932, that there was no resulting trust in favour of the next of kin was not intended to be and was not in fact a final decision on the claims of the next of kin of the settlors. On this ground we hold that that judgment of Ameer Ali J. is not *res judicata* as against the claim of the next of kin of the settlor as pleaded and pressed now.

53. There remains for consideration the last point involved in the appeal, namely, whether the whole of the trust fund had been effectively distributed amongst the creditors by the decree of 1878 or the subsequent judgment, decree, or order of 1932. A good part has not in fact been distributed among them, namely, the balance of the B fund and C fund shown against the names of the original creditors whose representatives have not come forward and are still untraced. The distribution would be "effective" only if, in law, the money thus earmarked in the accounts against their names became their property by reason only of the earmarking. Ordinarily, property in money passes as property in other moveable, by delivery. Strictly speaking a mere payment order by court would not be enough to pass title to the money. It is the actual payment that would have that effect. A payment order followed by setting apart the particular sum for which the payment order in favour of the particular person had been made, or setting apart or earmarking followed by a payment order, may be regarded, in law, as equivalent to delivery and so may pass title. These fundamental points must not be ignored. In the final decree of 1878, the order in respect of the D creditors was different from the order passed in favour of the B and C creditors. In the first case the Court ordered payment. In the last two cases there was no order for payment. The Official Trustee was directed to set apart and retain the moneys to be apportioned against their names subject to "further orders of the Court. This reservation would have entitled the Court to refrain from passing a payment order if they or some of them came forward later on, as for instance, if it thought that they had been paid" already or on any other ground. The Schs. B and C showed what their total dues were and the direction of the Court was that, out of the available assets, a sum equal to the total amount shown in Schedule B is to be set apart and retained and the balance apportioned pro rata to the two Schs. C and D. The sums to be allotted in that manner were further ordered to be sub-apportioned among the persons whose names appeared in Schedule C. The only addition made by Ameer Ali J. to this part of the final decree was that he ordered a sub-apportionment of the B fund also amongst the persons mentioned in the B Schedule. There was and has been no general order for payment to the original creditors, whose names appeared in the two Schs. B and C, either in the decree of 1878 or in the further judgment and decree of 1878 or in the further judgment and decree passed by Ameer Ali JJ. The effect of the judgment of

Ameer Ali J. is that the moneys so set apart were not for the interlocutory protection of the B and C creditors with the consequent effect, as expressly stated in his judgment, that the "active creditors" would not have those moneys distributed amongst them, if these moneys were not and could not be paid over to those persons of the B and C schedules on account of their not coming forward after such a length of time. The most that can be said is that the Court, in its final decree of 1878, made those special directions in respect of the B and C creditors in view of the special features of the case, some of them being that the trust had been created so far back as 1827 and the creditors were widely distributed over the globe with the intention that none of those persons or their representatives, who had not then come forward in spite of the advertisement published in 1877, may not be disappointed, if they or any of them by chance got information of the suit and that the trust fund had not been exhausted by payments and came later on. We cannot hold that there was an intention on the part of the Court to pass the to these persons or that title had passed to them by virtue of the appropriation of the money in the accounts, coupled with the fact that the court "found "them", unless we are compelled to do so by the weight of judicial decisions.

54. In view of Ameer Ali J.'s judgment we must take it that the sums of money shown in the said Schs. B and C were due to the persons named therein, that is to say, the Court in 1878 held that these persons had the right to recover the sums of money shown in the account against their respective names from the assets in the hands of the trustee. But that fact would not lead to an affirmative answer to the Respondent's contention that property in the moneys had passed to the B and C creditors, the moment the amounts were apportioned against their names.

55. A person who has a decree for recovery of money out of the assets of a particular man does not, on the strength of the decree only, become the owner of any part of those assets, even if the judgment-debtor after the decree puts a part thereof sufficient to pay up the decretal amount in a bag with a tag attached containing the name of that decreeholder. Further effective process will have to be taken by the decreeholder for the purpose of, reducing the money into" his possession.

56. The learned advocate for the Respondent, however, has relied upon the following cases in support of his contention:

In re Macdonald (1889) 59 L.J. Ch. 231; Williamson v. Naylor (1838) 3 Y. and C. Ex. 208 : 160 E.R. 676; Wilson v. Church (1911) 106 L.T. 31; Smith v. Cooke (1891) A.C. 297; Ashley v. Ashley (supra) and Alderson v. Petrie summarised in Ashley's case.

57. Macdonald's case (supra) does not carry the matter far. That was a creditor's action for administration of the estate of deceased testator. The assets, ₹1,218 in consuls, brought into court exceeded the debts which were

ascertained to be ?607. The amount due to the creditors who proved amounted to ?325 and to those who did not to ?282. Chitty J. held that the administration should not be held up till further enquiries Abbott the whereabouts of those creditors who had not come forward are completed. He did not, in the circumstances of the case, direct further enquiry about the whereabouts of the representatives of those creditors who had not responded to the advertisement but made a direction to set apart a sum of money sufficient to cover their dues and ordered payment in full to those creditors who had appeared and directed the balance left over after such payment to be handed over to the Defendant, who was the representative of the testator. The point under consideration before us did not therefore arise. It could have arisen only if later on the representative of the testator claimed the sum of ?282 or part thereof, which may have been lying in Court by reason of some or all of those absent creditors not coming forward to" receive payment after such a lapse of time as would have led the court to the conclusion that they would not come forward at all.

58. We will now deal with the cases of *Williamson v. Naylor* (supra) and *Smith v. Cooke* (supra). In the first of those cases the competition was between the creditors and the next of kin of the debtor and in the second between the creditors and two of the debtors themselves who had executed the trust-deed. In our judgment, the claim of the next of kin in the first case and of the settlors in the second was overruled on the construction of the governing documents, namely, the will of the debtor in the first case and the trust-deed in the second.

59. In *Williamson v. Naylor* (supra) the facts were as follows: Lockay and Gammon, who carried on a partnership business, became involved in debts. They executed a composition-deed, which was accepted by their creditors, who received 10 shillings in the pound under the composition. The composition-deed, however, contained no release by the creditors of any portion of their debts. The legal position, therefore, was that their claim to the extent of the balance was not extinguished, but, having accepted the composition, they could not, in law, sue the debtors for the balance. Thereafter, Lockay acquired considerable properties and felt the moral obligation of paying up those creditors, whose claims, moreover, by that time, had been barred by time. He paid some of them before he executed his will. By the will, he appointed trustees and directed the trustees to pay pro rata, out of a fifth part of his residuary estate, those creditors of the partnership whom he had not paid before the will and whose names he mentioned in the schedule to the will. Some of those persons so named predeceased him and a question arose whether their legal representatives were entitled to participate in that part of the residuary estate. This question was answered in favour of those legal representatives, but that point is not material to the case before us. The fifth part of the residuary estate was not sufficient to pay the creditors in full.

60. In the suit, some of those creditors did not come in and prove. There was no knowing whether the testator had himself paid them during his life-time and

after the date of the will. That may have been the fact or the reason for their not coming forward and proving in the suit. It may be that they had lost evidence or did not come forward for other reasons. The question was whether the portion of that residue, which would have had to be paid to them if they had proved, was to be made over to the next of kin of Lockay or to be applied in augmenting the proportion of those of the creditors who had proved. Alderson B negated the claim of the next of kin and directed those sums of money to be distributed to the creditors who had proved. The will is not set out at length in the report. The ratio of the decision has been put thus:

and although, to a certain extent the gift to those creditors (creditors of the partnership business of Lockay and Gammon) may be considered as a tenancy in common, the question is, of what body do the tenants in common consist.

61. And the answer given was--that body consisted of these creditors who had proved before the Master. Most probably this answer was given on the construction of the terms of the will.

62. The facts of the case *Smith v. Cooke* (supra) were as follows:

Henry Cooke, Joseph Cooke and J.W. Swinnerton, who carried on a partnership business under the name and style of Cookes and Swinnerton, became involved in debts. After J. W.. Swinnerton had died, the surviving partners, Henry and Joseph Cooke and Rachel Swinnerton, the executor of J. W. Swinnerton, executed a deed on December 29, 1876, by which they assured to Smith and Storey as trustees the business of the firm Cookes and Swinerton and all property of the firm. The said trustees were given the discretion to carry on the business or to close it and to sell the assets of the firm. The creditors of the said firm joined in executing the deed. The debts due to them were set out against their respective names in the schedule to the deed. The trust imposed upon the trustees was "to pay and divide the clear residue of the profits of the business and moneys (arising out of "sale, etc.) among all and singular the creditors of the firm in "rateable proportions according to the amount of their several "and respective debts." The trustees continued the business for some time. They ultimately sold the properties of the firm. In 1889, Henry Cooke and Rachel Swinnerton commenced the action against the trustees, alleging misapplication of assets, asking for accounts against them and seeking to challenge a sale made by them to a company in 1885, which company was also made a party Defendant. Joseph Cooke was also made a party Defendant, apparently because he was unwilling to join as Plaintiff. A preliminary question was raised, namely, whether on the true construction of the deed the Plaintiffs had any title to maintain the action. The Plaintiffs contended they had, because, if there remained a surplus in the hands of the trustees after payment in full to the creditors, they, as authors of the trust, would be entitled to get it from the trustee on the basis of a resulting trust. Kekewich J., who tried the case, held against the Plaintiffs and dismissed the action on the said preliminary question. He pointed out that "the words in the deed were "to pay and divide" "the residue of the said profits and moneys" and

"not towards "the satisfaction of the creditors named in the schedule according "to the amounts set opposite to their names" and so forth, which is a very common form, but to pay and divide them "unto and "among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and "respective debts". Thus, according to the construction of this part of the deed, he held there was no scope of any surplus being left. If the assets were less than the total amount of the debts, the pro rata payments would give the creditors less than what were owing to them: if more, the pro rata distribution would give them more. He put the matter as clearly as we have stated in an earlier passage of the judgment thus:

The operative part comes simply to this--that the creditors say: You, the debtors, cannot now, as you admit, pay us in full; you have certain property which is worth something and we take that and give you a release. Whether we could or could not get more by forcing you to the Bankruptcy Court, we do not stop to enquire. You give us all this property--give it to trustees for us--and then we will give an absolute release and take our chance.

63. The judgment of Kekewitch J. was reversed by the Court of appeal and the matter was taken up to the House of Lords. The House of Lords adopted the construction put by Kekewitch J. and so there was no scope of there being a surplus in any event, as the whole of the proceeds of the trust fund had, by the terms of the trust-deed conveyed out and out to the creditors through-the machinery of a trust in consideration of the creditors granting a release to the debtors in respect of their debts. It was, so to say, a case of accord and satisfaction. That case, therefore, turned entirely upon the construction of the trust instrument. There are, however, two passages in the judgment of Lord Herschell which are of some importance in the case before us. The first passage is at p. 300 and the second at p. 302 of the report. They are as follows:

If the trust providing for the disposal of the proceeds realised did not provide for the disposal of the whole of those proceeds but left a part undisposed of in the hands of the trustees, no doubt upon well known principles it would be impossible to avoid the conclusion that there was a resulting trust of that surplus in favour of the persons who had made the assignment and that the trustees were not intended to hold it for their benefit, (page 300.)

65. At p. 302 he pointed out that the trust-deed under consideration was substantially different for a creditor's deed--a deed creating a trust for payment of debts with a ultimate trust for the surplus for the assignor. That ultimate trust need not be created by express words used in the deed. If the terms of the trust-deed was "not to pay and divide "the proceeds" amongst the creditors, as was the case before them, but a trust to discharge the debts or to pay and divide rateably in payment of or towards the payment of the debts the; ultimate trust in favour of the assignor would arise of the part of the trust funds which remained with the trustee alter distribution to the creditors, on the ground that no intention would be imputed to the assignor that that sum was to be retained by

the trustee for his own benefit.

66. The trust-deed, which we have before us, is of the last mentioned type. The trust is for payment of the debts due to the creditors in full or pro rata as the assets would permit. The assignors, Louis Joseph Barretto and Edward Brightman, do not convey their properties to the creditors, who executed the deed, indirectly through the trustees, in consideration of those creditors granting a release, "taking the chance" as Kekewitch J. puts it. In fact, in the trust-deed before us the creditors, who joined it, did not grant release to the debtors. All they covenanted was that they" would allow the assignors" heirs, Joseph Barretto and Edward Brightman, to follow and attend to any affairs, business matters whatsoever and whosoever without any arrest, attachment, execution, impediment or molestation whatsoever against their persons in consideration of the said assignors conveying the properties to the trustees for payment to them, the said creditors.

67. The cases of *Ashley v. Ashley* (supra) and *Alderson v. Petrie* require careful consideration. The last mentioned case is not reported independently, but the details of that case are given in *Ashley's* case, where a number of earlier authorities are reviewed. In both the cases, *Ashley v. Ashley* and *Alderson v. Petrie*, the Court "found" or declared the rights of the creditors, who had not come forward and proved, in the suit and whose names had been given in the Master's report with the sums of money shown as due to them put against their respective names. This feature is present in the case before us, for Ameer Ali J.'s construction of this part of the final decree of 1878 is binding on us. In both of them, the Court directed the funds to be apportioned in their favour in proportion to the sum of money reported as due to them by the Master. This feature also is present in the case before us. In both of them, the Court made orders for "payment to them of the portions of the funds in hand or which would thereafter come into hand. This feature is absent in the case before us, for, in respect of the funds apportioned to the creditors whose names appeared in Schs. B and C, the order was not for payment, but that the Official Trustee was to set apart and retain subject to further orders of the Court.

68. In *Ashley's* case, the proposition laid down is that, if a person chooses to leave his money in court, it does not thereby become the property of another, and even if both of them were the creditors of the same person, whose estate was under administration. The soundness of this proposition cannot be questioned. The question, therefore, is when does a particular creditor become the owner of a particular sum of money, the source of which was the assets of the debtor realised in the course of administration of his estate. That answer is in our opinion furnished in an earlier passage of the judgment of that case, which is as follows:

Such moneys were in fact, ordered by the Court to be paid to the parties named in the report or their representatives and to them only. It was as much their property as if there had been one unsatisfied creditor and the whole had been

directed to be paid to the satisfaction of his debt. The Court of Chancery had not and this Court has not, any jurisdiction to order the payment to any other person, unless directed or authorised to do so by an Act of Parliament.

69. This passage is the one on which that case was decided. Putting the matter in a different form, it furnishes the answer to the question--as to when and under what circumstances property in the money coming out of the assets of the debtor passes to a particular creditor. The fact that he is "found" or "discovered", or a "declaration that the debtor owed to him a particular sum "of money"--phrases used in the decided cases to convey the same import,--coupled with, the mere fact that a particular sum of money out of the realised assets of the debtor is apportioned in the accounts against his name under the direction of the court--is not enough to vest the money in him or to pass title to him in respect of the sum of money so apportioned, unless there is an order by court to pay to him the money so apportioned. To put it in another form, the order of the court for payment to him is sine qua non and that, coupled with those other facts, would be deemed to pass title to the creditor. Accordingly, the creditors of the B and C schedules did not acquire title to the sums of money so apportioned against their names, as there was no order for payment to them in the decree of 1878. In this view of the matter, the "active creditors" would have been entitled to have those sums of money and the benefit of the Government securities lying in the hands of the Official Trustee for full satisfaction of their dues, if those funds were sufficient to pay them in full or in partial satisfaction, if the funds were insufficient. Only, if a surplus remained after full satisfaction of their dues, a trust would have resulted in favour of the representatives of the settlors. This would have been our decision, if the matter had been *res integra*. But Ameer Ali J.'s adverse judgment on the claim of the "active creditors", as put before him, precludes us from reopening the matter and taking this view. The position then is that the "active creditors"--the creditors of the D schedule and the representatives of those creditors whose names are either in B or C schedules, as corrected, who came into the suit later on, cannot take any sum that has been allotted to the creditors of the B and C schedules, who have not come forward and may not come forward at all. The position of the next of kin of the settlors under these circumstances is, in our judgment, like the position of the settlor or his representative when a surplus is left in the hands of the trustees after payment in full of the creditors of the settlor for the payment or discharge of whose debts the trust was created. Thus Ameer Ali J.'s judgment gives the next of kin an advantage which they would not have had otherwise.

70. In the case of *Wilson v. Church* (*supra*), the point we have to consider in this case did not arise. That was a suit for administration--strictly a creditor's bill--and claim to the fund, lying at the disposal of the court, was by creditors, who had proved. The fund in question had been, by order of court, (passed in 13 Ch. D 1 as modified on appeal in 5 App. Cas. 176) earmarked for the creditors who had not come forward in the suit, but who, at the same time, had not been "found" by the court, that is to say whose right had not been established by a

finding of the court made in the suit. In those circumstances, the court ordered the fund in question to be distributed amongst the "active creditors". The following observation made by-Eve J. in his judgment, that

there is no order or finding under which such bond-holder has what I may perhaps call, a vested interest in the aliquot share of the fund,

has been relied upon by the learned Counsel appearing for the Respondent in support of his contention that the finding by the court that a person is a creditor without more gives a vested interest in the apportioned share of the fund and accordingly, that the creditor acquires property in the aliquot part of the money, lying in court or at the disposal of the court. In our judgment, in that passage the learned Judge only distinguished Ashley's case (*supra*), which was cited at the bar. We have already expressed our views on Ashley's case (*supra*). We will repeat it again in a brief form. Ashley's case decides that a creditor acquires property in the money if three elements concur, namely,--

(1) that the court had recorded a finding that he is a creditor for a certain amount,

(2) that the fund had been by an order of the court apportioned and a portion earmarked for him in the sense that it is shown against his name in the accounts, and

(3) the court had passed an order for payment to him.

71. As the first element was absent in Wilson's case (*supra*), no question could arise that the aliquot share in the funds had become the property of the bond-holders who had not come forward,--who either did not care to take the certificate from the trustee as ordered by the Court of appeal in 13 Ch. D 1 as modified by the House of Lords on appeal (5 App. Cas. 176), or, having taken the certificate from the trustees, had not proved their claims in court in pursuance with the advertisement published. Whether the third element was necessary or not to confer a vested interest in the aliquot share of the money to the bond-holders who had not come forward in the suit, therefore, did not arise in Wilson v. Church (*supra*). That question would have arisen only if the finding of Eve J. had been otherwise in respect of first point mentioned above.

72. We, therefore, hold that the next of kin of the settlors would be entitled to the unclaimed sum of money and securities lying with the Official Trustee which have been allotted to Schedules B and C as corrected in accordance with Ameer Ali J.'s order, subject to the order for payment of costs to the parties to this appeal and other costs which we are making.

73. We have already stated that it is high time that the administration of the trust should be ended and Suit No. 232 of 1876 finally terminated. In order to give a further and last chance to the representative of the creditors, whose names appear in Schs. B and C to the decree as corrected by Ameer Ali J.'s order, who have not yet come forward, we direct that an advertisement be

published in such manner as the Judge sitting on the Original Side may direct, calling upon the representatives of the creditors of the firm of Joseph Barretto and Sons and of the personal creditors of Louis Joseph Barretto and Edward Brightman deceased, who had executed the said trust-deed dated March 10, 1827, as also the next of kin of both those persons, Louis Joseph Barretto and Edward Brightman, to prefer their claims within a time to be fixed by the said learned Judge, on the penalty that, in default, they would be peremptorily excluded. This was one of the prayers made by the Appellants in the summonses which they took out in 1926.

74. The order for costs as made by Das J. would remain. The order for costs in this appeal would be in the same form as the order for costs as made by Das J., except for 25 gold mohurs given for the senior counsel, the figure would be 35 gold mohurs. We certify for two counsel. Junior counsel will get proportionate fees as provided for in the Rules. Costs of today will also be allowed as of hearing. Counsel's fees to be paid by the Official Trustee on counsel's endorsement. Other costs to be taxed as between attorney and client. Additional papers filed in the course of hearing before us will be treated as part of the ,paper-book. For the payment of costs as directed above the Official Trustee be at liberty to sell sufficient portion of the Government Promissory Notes lying in his hands. The costs of the advertisement will also come out of that fund. The amount thereof is to be fixed by the Judge sitting on the Original Side. The surplus money that will remain, after reserving a portion sufficient to pay the costs of further hearing before the learned Judge on the Original Side, which we are hereby directing, is to be dealt with in the following manner:

(1) first in payment of the sums of money shown against the names of those of the creditors of the Schs. B and C to their representatives who may come forward in pursuance of the advertisement and prove their title in Court. They would be entitled to the accretions also in the manner directed in the judgment and decree of Ameer Ali J;

(2) that, out of the surplus that may be left after payment as mentioned above and of further costs, the payment would be made to the persons who prove themselves to be next of kin of the settlors, Louis Joseph Barretto and/or Edward Brightman, in proportion to the share they would have to the estate of the said settlors qua next of kin. That is to say, the persons coming "forward and claiming as next of kin of the settlors will not only have to prove that they are next of kin of the settlors, but also the share they respectively have in the estate of the settlors as such.

(3) After the aforesaid payments the suit is to be terminated by a formal order.

75. We are giving the third direction, as under the proviso to Section 23 of the Official Trustees Act, the surplus that may remain in the hands of the Official Trustee, after the payments as directed above, cannot be transferred to the credit of the Government till then.

76. The order for costs passed by us will also apply to the hearing before the Hon"ble the Chief Justice and Mukherjea J. on January 22, 1948.

P.N. Mitra J.

77. I agree.