1866.
March 14.

Appellate Civil Jurisdiction.

Regular Appeal No. 1 *of* 1865.

HENRY GAMBLE, Official Assignee, and Assignee of James Hunt and Gustave Monnet, and Hunt, Monnet, and Co., and Hunt and Co.....*Appellant and Plaintiff.*

BHOLA'GI'R GURU' MA'NGI'R, Gosávi .....*Respondent and Defendant.*

Regular Appeal No. 2 *of* 1865.

SAME PLAINTIFF.....*Appellant.*

MA'NEKJI PESTANJI, Mossman.....*Respondent and Defendant.*

Regular Appeal No. 3 *of* 1865.

SAME PLAINTIFF .....*Appellant.*

AMI'RUDDIN GULA'M HUSEN, Bohrá ..... *Respondent and Defendant.*

Regular Appeal No. 4 *of* 1865.

SAME PLAINTIFF .....*Appellant.*

A'BDUL HUSEN ISUBJI, Bohrá.....*Respondent and Defendant.*

Regular Appeal No. 5 *of* 1865.

SAME PLAINTIFF .....*Appellant.*

NA'NCHAND MULCHAND, by his Manager, Vakhatchand Phulchand .....*Respondent and Defendant.*

Regular Appeal No. 6 *of* 1865.

SAME PLAINTIFF .....*Appellant.*

SHIVLA'L BHAGVA'N PATA'KAR, Manager of the firm of Khusháldás Dámodar. .....*Respondent and Defendant.*

Regular Appeal No. 7 *of* 1865.

SAME PLAINTIFF .....*Appellant.*
VIZIA' RAMGAMYA' SVA'MI' MUDELIA'R.....*Respondent and Defendant.*

Regular Appeal No. 8 *of* 1865.

SAME PLAINTIFF .....*Appellant.*
MUHAMMAD SIDDI'K .....*Respondent and Defendant.*

Regular Appeal No. 9 *of* 1865.

SAME PLAINTIFF .....*Appellant.*
DOSA'BHA'I JIVANJI .....*Respondent and Defendant.*

Attachment before Judgment—Execution Creditor—Official Assignee—Priority— Execution—Seizure—Vesting Order, Signing of—Practice— 11 & 12 *Vict., c.* 21*—Act VIII. of* 1859, *Secs.* 81, 82, 83, 84, 89, 233, 240, and 270.

Where moveable property, of defendants in certain suits in a Civil Court in the Mofussil, had been attached, before judgment, under Secs. 83 and 84 of Act VIII. of 1859; and so continued, until decrees and orders for execution had been made in those suits; and warrants for such execution had been lodged with the Názar of the court :—

Held that those warrants, at the latest, on their delivery to the Názar, bound the property, without re-seizure by him; and that, accordingly, the execution creditors were entitled to preference, as regarded the attached goods, over the Official Assignee, in whom the estate of the defendants had become vested by orders of the Insolvent Debtors' Court at Bombay, made before sale by the Názar of the attached property, but subsequently to the delivery to him of the warrants for execution.

Held, however, also, that mere attachment, before judgment, does not so bind the property attached, as to give, to the attaching creditor, priority over the Official Assignee, in whom the estates of the defendants had been vested, by orders of the Insolvent Debtors' Court, made subsequently to such attachment, but before decree and warrant for execution.

Doe d. O'Hanlon v. *Paleologus* (Mort. Rep. 323) observed upon.

Held, as to an objection taken that the vesting orders, relied upon by the Official Assignee, were signed by himself, and not by the Clerk of the Insolvent Court (as directed by Rule 5), that, in the face of an established practice of the office that the Clerk and the Official Assignee should, in the absence of either, and in the transaction of official business, sign one for the other, and no attempt having been made to set aside the vesting orders for irregularity, the District Court, as well as the High Court in appeal, was bound to regard such orders as in full force and effect. The High Court, however, considered the practice, so far as it permitted the Official Assignee to sign vesting orders, objectionable, and requiring alteration.

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

THESE were regular appeals from judgments passed by C. Walter, Judge of Puná.

No. 1 was argued on the 28th of June 1865, before COUCH and WARDEN, JJ., by *Anstey* and *Cooper* for the appellant; and by *Reid* and *Shántárám Náráyaṇ* for the respondent.

Nos. 2, 3, 4, 5, 7, 8, and 9 were argued, on the 27th of September 1865, before WESTROPP, TUCKER, and WARDEN, JJ., by *Howard, Cooper,* and *Kelly* for the Official Assignee; and by *O'Leary* and *Shántárám Náráyaṇ* for the respective respondents.

No. 6 was argued on the 23rd of November 1865, before WESTROPP, TUCKER, and WARDEN, JJ., by *Kelly* for the appellant; and by *Ganesh Hari Paṭvardhan* for the respondent.

In the course of the arguments the following authorities were cited: *Savá Rámji* v. *Jádavji Nathú* (*a*); *Doe d. O'Hanlon* v. *Palcologus* (*b*); *Rustomji Cowasji* v. *Dodsworth* (*c*); *Nemychurn Mullick* v. *Mackintosh* (*d*); *Holmes* v. *Tutton* (*e*); *Tilbury* v. *Brown* (*f*); *Giles* v. *Grover* (*g*); *Holder* v. *Fenwick* (*h*); *Horsley* v. *Cotton* (*i*); *Phillips* v. *Jones* (*j*); *Woodland* v. *Fuller* (*k*); *Hutton* v. *Cooper* (*l*); *Woodbridge* v. *Swan* (*m*); *Johnson* v. *Evans* (*n*); *Morgan* v. *Magins* (*o*); *Murray* v. *Arnold* (*p*); *Lucas* v. *Nockolds* (*q*); 4 Comyn's Dig., Execution 135; 2 Stephen's Comm., 4th ed., 167; Stat. 11 & 12 Vict., c. 21, s. 49; Bom. Insolv. Ct. Rules; Civil Proc. Code, *passim*; Stat. 9 Geo. IV., c. 73: Stat. 12 & 13 Vict., c. 106, s. 184; Reg. IX. of 1827, Sec. VIII., Cl. 1, and Sec. XI.; Case No. 3645, 2 Morris's S. D. A. Rep. 153; Case No. 3831, 4 S. D. A. Dec. 131.

The facts are stated in the judgment of the Court, delivered this day by—

WESTROPP, J.:—The first of the nine suits, which have just been called on for judgment, was brought in the Civil

(*a*) M. S.; Last Case. (*b*) Mort. Calc. Rep. 323. (*c*) *Ibid.* 322. (*d*) *Ibid.* 317. (*e*) 24 Law J., N. S., Q. B. 346; S. C. 5 E. & B. 65. (*f*) 30 Law J., N. S., Q. B. 46. (*g*) 9 Bing. 128, 240. (*h*) Sm. Rules 211. (*i*) *Ibid.* (*j*) *Ibid.* 212. (*k*) 11 Ad. & E. 859. (*l*) 6 Exch. 159. (*m*) 4 B. & Ald. 633. (*n*) 13 Law J., N. S. 117 C. P. (*o*) 9 Exch. 145. (*p*) 32 Law J., Q. B. 11. (*q*) 10 Bing. 182, per Littledale, J.

Court at Puná, against Bholágír Mángír Gosávi, by the Official Assignee of the Court for the Relief of Insolvent Debtors at Bombay, under the Stat. 11 & 12 Vict., c. 21, for a declaration of the plaintiff's title to, and a delivery over to him of, certain goods and stock in trade, then in the hands of the Názar of the Puná Civil Court, and advertised for sale under a decree of that court (dated the 28th of June 1864) for Rs. 41,800, in an action brought by the present defendant, Bholágír, against the firm of Hunt, Monnet, and Co., of Puná, which firm consisted of two partners, James Hunt and Gustave Monnet.

The Official Assignee rested his title on two vesting orders of the Court for the Relief of Insolvent Debtors at Bombay, of which, one was made, on the 30th of June 1864, of the estate of Gustave Monnet, and upon his petition of that date; and the other was made, on the 1st of July 1864, of the estate of James Hunt, on the petition of Mervánji Pestanji Tabák, of the same date, a creditor of James Hunt.

On the 9th of June 1864 the defendant, Bholágír, filed his plaint (on which the decree of the 28th of June was afterwards made), and, on the same 9th of June 1864, obtained an order and warrant for attachment of the goods and stock in trade of the firm of Hunt, Monnet, and Co., at Puná, under the 83rd and 84th sections of the Code of Civil Procedure (Act VIII. of 1859). The attachment was laid on the goods and stock in trade upon that day by actual seizure into the hands of the Názar. The decree was made on the 28th of June. An order for attachment of the goods and stock in trade of the firm was made on the same day, and a warrant pursuant thereto then issued, and was lodged with the Názar on the 29th of June.

There was a conflict of evidence as to the time at which the Názar re-seized, or affected to re-seize, the goods and stock in trade under that warrant, and especially as to whether the re-seizure took place before or after the making of the vesting order of Monnet's estate on the 30th of June; but it having been eventually admitted by Mr. Howard, who was counsel for the Official Assignee, that the warrant in question

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

was officially in the hands of the Názar on the evening of the 29th of June or on the morning of the 30th of June, before the making of the vesting order of the 30th of June, it became, for a reason which I shall presently mention, unnecessary for us to ascertain whether the alleged re-seizure on the 30th of June, or the vesting order of that date, was prior in point of time.

An objection was taken to the vesting orders of the 30th of June and 1st of July, that they were not signed by Mr. Orr, the Clerk of the Insolvent Court, but were signed for him by Mr. Gamble, the Official Assignee. However, the orders in question are both of them under the seal of the Insolvent Court, and no attempt has ever been made in that court to have them set aside for irregularity. They are, therefore, in full force and effect. The District Court was bound so to regard them, and so is this court upon appeal. The fact that no attempt was made to set them aside is fully accounted for by the evidence given on behalf of the plaintiff, that it is the practice, in the transaction of business in the office of the Insolvent Court, for the Official Assignee to sign on behalf of the Clerk of that court in his absence, and, *vice versâ*, for the Clerk to sign on behalf of the Official Assignee in the absence of the latter. Any attempt to set the vesting order aside, would, in the face of such an established practice of the office, have been unsuccessful. It would, however, we think, be desirable that some other officer than the Official Assignee should, in the absence of the Clerk of the Insolvent Court, be appointed to sign vesting orders. In making that suggestion we are not to be understood as casting any reflection upon Mr. Gamble, who, we have no doubt, in signing those orders, merely followed a practice which he found to prevail in the office when he first entered it.

This suit was one of nine suits brought by the Official Assignee against various execution creditors of the firm of Hunt, Monnet, and Co. In all nine the Judge at Puná made decrees in favour of the defendants. The plaintiff, the Official Assignee, has appealed against those decrees. Counsel for the defendants, the respondents, have not attempted to

support those decrees on a ground relied on by the Judge, which he thought he found in the advertisement of dissolution of partnership of the 13th of April in the *Gazette*; and which he held to show that Gustave Monnet had assigned over to James Hunt his (Monnet's) interest in the goods and stock in trade of the firm of Hunt, Monnet, and Co. It is, therefore, unnecessary for us to consider that point, and, even if it had been pressed, the opinions which we have formed on the other points would render it unnecessary for us to come to any conclusion upon it. The appeal in one of the nine suits, namely, *The Official Assignee* v. *Bholágír Gurú Mángír Gosávi*, was heard by Mr. Justice Couch and Mr. Justice Warden, and the appeals in the remaining eight were heard by Mr. Justice Tucker, Mr. Justice Warden, and myself; the arguments being conducted with much force and ability. Since the appeals were argued, the four Judges have met, and considered the points which seemed to call for decision; and the judgment now being given contains the views at which they have unanimously arrived upon those points.

The defendants in the eight suits besides that of Bholágír, had, before either of the vesting orders of the 30th of June and 1st of July was made, obtained in their respective suits against Hunt, Monnet, and Co., attachments under the 83rd and 84th sections of the Civil Procedure Code, similar to the attachment before judgment already mentioned as obtained by Bholágír. The defendants in four of those eight suits, namely: *The Official Assignee* v. *Amíruddin Gulám Husen, Bohrá; The Official Assignee* v. *A'bdul Husen Isubji, Bohrá; The Official Assignee* v. *Nánchand Mulchand;* and *The Official Assignee* v. *Dosábhái Jivanji,* had obtained decrees and orders and warrants for execution in their respective suits against Hunt, Monnet, and Co., which decrees and orders were made, and the warrants for execution, it is admitted, were lodged with the Názar, before the making of either of the vesting orders; and the so-styled re-seizure under those four warrants of execution, it was admitted at the bar, took place simultaneously with the so-styled re-seizure under

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

the warrant for execution in Bholágír's suit against Hunt, Monnet, and Co., and before the making of the vesting order of the 30th of June; but no sale had taken place under any of the five warrants for execution previously to the making of that order, or the order of the 1st of July.

The defendant in the remaining four suits brought by the Official Assignee, viz.: *The Official Assignee* v. *Mánekji Pestanji, Messman*; *The Official Assignee* v. *Shivlál Bhagvándás*; *The Official Assignee* v. *Viziá Rangamyá Swámi Mudeliár*; and *The Official Assignee* v. *Muhammad Siddik*, had not, in their respective suits against Hunt, Monnet, and Co., obtained any decrees or warrants of execution until after the making of both of the vesting orders of the 30th of June and 1st of July 1864. Those defendants, accordingly, rely on the attachments before judgment which they obtained, under the 83rd and 84th sections of the Civil Procedure Code, previously to the making of either of the vesting orders. In the four suits against them it, accordingly, became necessary to consider, whether their attachments before judgment conferred upon them priority over the Official Assignee.

Before stating our opinion upon that point, we think it more convenient to revert to the Official Assignee's five other suits, including that brought against Bholágír.

It appears to us that, although the 233rd section of the Civil Procedure Code declares that the attachment by way of execution of moveable property in the possession of the defendant shall be made by "actual seizure," and the 240th section does not prohibit alienation of such moveable property until after the attachment has been made by "actual seizure; yet that, inasmuch as the goods and stock in trade of Hunt, Monnet, and Co. were, under the attachment of the 9th of June, still in the custody of the Názar, no further seizure was necessary in order to give effect to the warrants of execution placed in his hands on the 29th of June; and that those warrants, at the latest, on their delivery to him, instantly bound the goods and stock in trade, which having already seized, and they being still in his custody,

he could not seize over again. This view is supported by *Jones* v. *Atherton* (*a*), where it was held that, if a second *fi. fa.* be delivered to the Sheriff, after he has the defendant's goods in possession under the prior *fi. fa.* of another person, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the Sheriff; and *that* without warrant on the second writ, or further seizure. The same principle is acknowledged in the argument and judgment in *Johnson* v. *Evans* (*b*); although, owing to special circumstances which existed in that case and do not exist in this case, a re-seizure was there held to be necessary. The books contain other authorities to the same effect. (*c*) The principle on which *Frost's Case* (*d*) was decided, in the 41st year of Queen Elizabeth's reign, is the same. It was there resolved by the Court of Common Pleas: "That when a man is in the custody of the Sheriff by process of law, and afterwards another writ is delivered to him" to arrest the body of the same person, "presently he is in his (the Sheriff's) custody by force of the second writ by judgment of law, although he do not actually arrest him; for to what purpose should he arrest him who is, and was before, in his custody? *Et lex non præcipit inutilia, quia inutilis labor stultus:* And the words of the *capias ad satisfaciendum,* are not only *quod capiat,* &c., but *quod salvo custodiat,* &c., *ita quod habeat, corpus,* &c. So that, although he cannot take him (whom he has) in his custody, yet he may safely keep him; and therewith agrees 7 Hen. 4, 30 *b.*"

We, accordingly, think that the decrees in favour of the defendants in those five suits, including the suit against Bholágír, must be affirmed with costs.

It remains for us to dispose of the question on which the other suits turn, namely, whether the attachments before judgment, made under the 83rd and 84th sections of the

(*a*) 7 Taunt. 56. (*b*) 7 M. & Gr. 240.

(*c*) See the *dictum* of *Taunton,* J., in *Giles* v. *Grover,* 9 Bing. 190; and *Blockhurst* v. *Clinkard,* 1 Shower 173.

(*d*) 5 Rep. 89.

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

Civil Procedure Code, so bind the goods and stock in trade thereby attached, as to give to the attaching creditors priority over the Official Assignee.

The same point was, in a suit at the Original Side of this Court, No. 782 of 1864, *Savá Rámji* v. *Júdavji Nathú*, raised before, and recently decided by, *Sausse*, C. J., and *Arnould*, J., in the negative.

But it was said that the point was of so much importance it ought to be reconsidered, and specially because the attention of the Judges who decided *Savá Rámji* v. *Júdavji Nathú* had not been directed to *Doe on the demise* of *O'Hanlon* v. *Nicholas Paleologus* (*e*), *Rustomji Cowasji* v. *Dodsworth* (*f*), and *Nemychurn Mullick* v. *Mackintosh* (*g*), which were decisions on the effect of the writ of sequestration before judgment, given by the Charter of the late Supreme Court at Calcutta, a process which, on behalf of the respondents in all of the nine appeals now before us, it was argued, was similar to that created by the 81st, 82nd, 83rd, 84th, and following sections of the Civil Procedure Code.

We have carefully considered those Calcutta cases, but do not think it necessary that we should now give any positive opinion as to whether or not they were rightly decided, or as to the practice which seems to have been at one time uniform in Calcutta, of not permitting the sequestration to be set aside unless the defendant not only appeared, but also perfected bail. The reasons, for which the Supreme Court at Calcutta held the right of sequestration before judgment to bind the goods, are to be found most fully stated in *Doe d. O'Hanlon* v. *Paleologus*. It was likened in its effect to a *fi. fa.* *Ryan*, C.J., is reported as having said: "Now it certainly seems to me that the right of the sequestrator is not more inchoate than the right of a judgment creditor upon execution executed, *i.e.*, upon seizure under a *fi. fa.*" To show when execution is executed, he quoted the

(*e*) Morton's Calc. Rep. 323.
(*f*) *Ibid.* 322; but more fully reported in 2 Morley's Digest, 38.
(*g*) Morton's Calc Rep. 317.

remark of *Littledale*, J., in *Giles* v. *Grover* (*h*), that, "as between subject and subject, the execution is executed by the mere act of seizure, and the sale cannot be stopped by any subsequent proceedings." *Littledale*, J., was in the minority of the Judges who advised the House of Lords in that case. His dictum was, however, prefaced by the words "generally speaking," which are omitted in the report of the judgment of *Ryan*, C.J. The doctrine contained in that dictum with respect to the binding efficacy of seizure under a *fi. fa.* was by many of the other Judges considerably modified. Amongst them was *Alderson*, J., who, after referring to *Hutchinson* v. *Johnston* (*i*), *Higgins* v. *McAdam* (*j*), and *Rybot* v. *Peckham* (*k*), said: "These authorities seem to me to show clearly, first, that no property passes by the seizure from the original debtor to the creditor; and, secondly, that even in the case of conflicting rights, as between subject and subject, the point of time which the Courts uniformly look at, the period when the execution is consummate, is not the seizure, but the sale under the writ." (*l*) *Patteson*, J., after referring to *Hutchinson* v. *Johnston*, *Smallcombe* v. *Cross* (*m*), and *Payne* v. *Drew* (*n*), said: "It seems to me clear from these cases that the seizure of goods by the Sheriff will not make any difference as to the right of creditors under conflicting writs, any more than the teste of the writ does." (*o*)

And in *Higgins* v. *McAdam*, *Garrow*, B., said: "The rule is that when execution is executed the property is changed; and execution is said to be executed when a sale has taken place."

More, perhaps, than enough of authority has been quoted to show that, according to the report in Morton, *Ryan*, C.J., would appear to have stated, in a manner somewhat too unqualified, the binding effect of a seizure even under a *fi. fa.*

(*h*) 9 Bing. p. 240. See, also p. 245, where *Littledale* J., says: "It appears quite clear that in all cases between subject and subject the execution is considered as executed by the mere seizure of the goods under a *fi. fa.*"

(*i*) 1 T. R. 729. (*j*) 3 Y. & J. 1. (*k*) 1 T. R. *in notis* 731.
(*l*) 9 Bing. 160. (*m*) 1 Ld. Raymond 251, 1 Salk. 320.
(*n*) 4 East 522. (*o*) 9 Bing. 137.

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

Howsoever that may be, we should probably hesitate to follow him in his opinion that the right of the sequestrator under the Charter is not more inchoate than the right of a judgment creditor upon seizure under a *fi fa.*, or in adopting the view of *Grant*, J., that the writ of sequestration is "an incipient execution." It is difficult to regard the writ of sequestration in a suit as the inception of an execution, before there is, in that suit, any judgment in existence to be executed: and in which suit there never may be any judgment for the plaintiff. What if the plaintiff fail in his suit? Sequestration in that case would have amounted to no more than process to compel the defendant to appear, or to the means of enabling the plaintiff to proceed to trial *ex parte* in his absence. Great injustice might have resulted from attributing to a sequestration under the Charter of the Supreme Court the binding force of a *fi fa.* Take the case of a *bonâ fide* creditor, who, while the defendant was in Calcutta, instituted a suit against him. The defendant being at that time in Calcutta, there could not be any return of *non est inventus* by the Sheriff, and, therefore, the creditor could not sue out a writ of sequestration. However, while his suit is in progress, and just when it is ripe for trial, the defendant leaves Calcutta. Another suit is brought against him for a large amount: in this suit the Sheriff makes a return of *non est inventus;* and a writ of sequestration at the suit of the new plaintiff issues against all the property of the defendant in Calcutta. Next day the first plaintiff obtains judgment in his suit, but if the writ of sequestration in suit No. 2 (which is in its earliest stage, and may not reach a hearing for two years) be an incipient execution with the force of a *fi. fa.*, he, albeit that he was first in the field, and had prosecuted his suit with all due vigour, may be deprived of the fruits of his judgment by the puisne suitor. This would be a practical reversal of the rule: *vigilantibus, non dormientibus, subveniunt jura.* In the same manner a whole file of earlier suits might have been rendered of no avail by a creditor who deferred his activity until the moment of the departure of the defendant from Calcutta, then filed his plaint, obtained

a return of *non est inventus*, and instantly proceeded to sequestration. Such a result could scarcely have been within the contemplation of the framers of the Charter. Justice might perhaps have been better secured, by regarding goods, seized under a sequestration before judgment, as so seized for the purpose of compelling the defendant to appear, and to enable the plaintiff to proceed with the suit should the defendant not appear, and as in *custodiâ legis* for such persons as might show the best grounds for having the goods dealt with for their benefit; and by not treating them as in execution, incipient or otherwise, in that suit, until the Court thought fit to direct the issue of a writ of *venditioni exponas* at the instance of the sequestering creditor. The language of the Charter does not perhaps present any insuperable difficulties to such a construction of it. In *Dadabhai Hormusji Camaji* v. *Calianji Mowji* (*p*), *Colville*, C.J., is reported as saying "There is nothing in the Charter that does more than empower the Court to make the sequestration stand for a seizure under final process in an *ex parte* cause." In the passage of the Charter empowering the court "to cause the said goods to be detained in specie or sold," the word "sold" most probably applies to an immediate sale to be ordered by the court where the goods are perishable. The sale under writ of *venditioni exponas*, subsequently mentioned, which was to be made in satisfaction of the creditor, and would certainly have required a special order of the court, is quite a distinct proceeding. Sequestration on mesne process in equity so far resembles sequestration under the Charter of the Supreme Court, that it issued upon a return of *non est inventus*, and was intended to compel the appearance (or answer) of the defendant, or to enable the plaintiff to proceed against him *ex parte* by taking the bill *pro confesso*, and the sequestrators had no power to sell the goods without the special order of the court. An order for sale of goods taken on mesne process in equity was scarcely ever made except to pay the expenses of the sequestration, or where the goods were of a perishable nature: *Shaw* v. *Wright* (*q*), *Wilcocks* v.

(*p*) Boulnois Rep. 353. (*q*) 3 Ves. 22.

1866. GAMBLE v. BHOLA'GI'R et al.

Wilcocks. (*r*) Lord *Hardwicke* (*s*) seemed to imply that the court had the power to sell on mesne process; Lord *Alvanley* doubted that he could make such an order (*t*); and Lord *Thurlow* refused to do so. (*u*) The practice seems now to be adverse to directing such a sale, except in the cases already specified: *Knight* v. *Young*. (*v*) It is said in the books that in the case of a sequestration on mesne process the court has the whole under its power, and may do therein as it pleases, "*and as shall be most agreeable to the justice and equity of the case.*" (*w*) Even where property is sequestered on final process in equity, it cannot be applied in satisfaction of the party's demand without a special order of the court for that purpose. (*x*) Sequestration in equity, as well on mesne as on final process, was process of contempt. Sequestration under the Charter of the Supreme Court seems, at all events until the issue of a writ of *venditioni exponas*, to wear a somewhat similar aspect.

Sequestration under the Charter of the Supreme Court, and attachment before judgment under the Civil Procedure Code, it was urged, must be treated as security for the alleged debt. However, in *Giles* v. *Grover* (*y*), *Taunton*, J., observed, upon a similar argument there urged on behalf of an execution creditor under a *fi. fa.* against the claim of the Crown under an extent: "But it was said that the judgment creditor, by force of the seizure, had at least a security. This has certainly been so decided with reference to the 6 Geo. IV., c. 16, s. 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do, the vendee, in common language, might be said to have

(*r*) Ambler 421. (*s*) 1 Ves. 184.
(*t*) 1 Ves. jun. 86. (*u*) 3 Bro. C. C. 72.
(*v*) 2 V. & B. 184, and 1 Daniell's Ch. Prac. 1st Edn., p. 639.
(*w*) Hindmarsh 139; 1 Dan. Ch. Prac., 1st Edn., pp. 635, 636; 3 Atk 468; Jacob 49.
(*x*) 2 Dan. Ch. Prac., 1st Edn., p. 720, 721. (*y*) 9 Bing. 182.

a security for the money which he has advanced; but if the vendor die before the trees are severed from the soil, the right of the remainderman or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case, I say no more at present, that a *jus ertii* might interpose and destroy it."

Without, however, undertaking to say whether or not the Calcutta cases on the sequestration clause in the Charter of the Supreme Court were rightly decided, or what effect sequestration under it had in binding the goods, as against prior suitors or the Official Assignee under an insolvency occurring before judgment and before issue of a *venditioni exponas* by way of execution, we think that attachment before judgment, under the 83rd and 84th sections of the Civil Procedure Code, cannot be regarded as the inception of an execution, or as binding the goods in such a manner as to exclude the right of the Official Assignee accruing after such attachment, but before judgment and warrant for execution. The application for attachment before judgment is allowable only, "If the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property or any part thereof, or to remove any such property from the jurisdiction of the Court where the suit is pending:" Sec. 81. If the Court be satisfied that the defendant is about to do so, it may issue its warrant to its proper officer, "commanding him to call upon the defendant," "either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property, or the value of the same, or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also, in the warrant, direct the attachment, until further order, of the whole or any portion of the property specified in the application:" Sec. 83. If the defendants fail to show such cause, or to furnish the required security within the time fixed by the Court, the Court may direct that the property specified in the application, if not already attached, or such

1866.

GAMBLE v. BHOLA'GI'R et al.

portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order :" Sec. 84. No doubt it is by way of security for the fulfilment of the possible decree establishing the alleged debt or demand that the attachment is made to this extent, that the defendant is to be prevented from disposing of his property, or removing it from the jurisdiction of the Court. But there is not any declaration that the security shall be indefeasible, or that the property, so attached, shall under all circumstances be paid over to the attaching creditor, or that the attachment shall give to the attaching creditor priority over other creditors. On the contrary, the property so attached is to abide the "further order" of the court.

What are the claims, besides that of the attaching creditor, with respect to which such further order may be made, is shown by Sec. 89: it enacts that: "Attachments before judgment shall not affect the rights of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." We find nothing in that section to limit its saving effect to rights of persons not parties to the suit which accrued before the attachment, or to decrees which had been recovered before it. The 90th section, which affords facilities to the attaching creditor to take measures for the setting aside of decrees obtained "by fraud or other improper means," favours the supposition that decrees made after, as well as decrees made previously to, the attachment before judgment, are included in the 89th section. If decrees made after the attachment be included in the 89th section, rights accruing after it would also be so; the rights of persons not parties to the suit, and the holders of decrees, being apparently placed in the same category. The main object of the attachment before judgment is to prevent the defendant from disposing of or removing his property from the jurisdiction of the Court. The 89th section proves that this prevention is not intended merely for the benefit of the attaching creditor, but may ensure to the benefit of other persons; and distinguishes the case of an attachment before judgment from the case, con-

templated by Sec. 270, of a sale under an attachment *by way of execution*. The decision of the House of Lords in *Giles* v. *Grover* shows that, notwithstanding the attachmen, and that the goods seized were thereby placed *in custodiâ legis*, the property in them would still remain, until sale, in the defendant, unless some *jus tertii* intervened. Such a *jus tertii*, we think, has intervened by reason of the vesting order of the 30th of June, which passed to the Official Assignee all of the property of Monnet, and the vesting order of the 1st of July, which passed to the Official Assignee all of the property of Hunt, subject, however, to the decrees obtained against Hunt and Monnet by the defendants in the five causes already disposed of, and on which decrees and warrants for execution had been issued before the making of those vesting orders.

1866.
GAMBLE
v.
BHOLA'GI'R
et al.

There must, therefore, be decrees in favour of the Official Assignee in the four appeals now under consideration, declaring that he is entitled to priority over the defendants (respondents) respectively in those appeals—a conclusion which we cannot regret, as 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. The decrees of the Court below in these four cases must be set aside with costs.

We think that the jurisdiction, given to Civil Courts to attach before judgment, should be exercised with great discretion, and that no Judge should grant such an attachment on light grounds, or unless he is perfectly satisfied, by trustworthy evidence, that the defendant is about to dispose of his property, or to remove it from the jurisdiction of the court.