Suit No. 275 *of* 1865.

THE FINANCIAL ASSOCIATION OF INDIA AND CHINA (LIMITED)

v.

PRA'NJI'VANDA'S HARJI'VANDA'S and BHAGVA'NDA'S PURSHOTAMDA'S.

[BEFORE THE SITTING JUDGE IN CHAMBERS.]

Act XXVIII. of 1865—*Stay of proceedings—Execution of decrees—Laches—Practice—Equitable mortgage.*

An order, made under Act XXVIII. of 1865 for the winding up of the estate of a trader, not only stays the further prosecution of suits, &c., against him, but also prevents the completion of an execution against his immoveable or ordinary moveable property, if such execution have not been consummated by seizure and sale before the filing in court of the resolutions passed at the meeting of creditors; unless the leave of the court be given to the execution creditor to proceed notwithstanding the winding-up order.

Such leave ought not to be given except upon special grounds.

Laches of the execution creditor will be an obstacle to his obtaining such leave.

Under the Insolvent Debtors' Acts (1 & 2 Vic. c. 110—English repealed Act; 11 & 12 Vic. c. 21, India) the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution, bound the goods as against the assignees in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignees in insolvency, subject to the right of the execution creditor to have satisfaction of his debt by sale. But in bankruptcy the law is otherwise. The execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication; otherwise the execution creditor is entitled only to a rateable part of his debt with the other creditors.

The practice of the High Court under the Civil Procedure Code on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the sheriff duly executed, to issue a writ directing a sale. The writ of *fi. fa.*, which issued from the Supreme Court, was an authority to the sheriff not only to seize, but also to sell. Sec. 250 of the Civil Procedure Code applies neither to executions against immoveable property, nor to executions against debts due to the defendant: and in order to give to third parties full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously, even against personal property, and it would not seem to be proper to do so, except under special circumstances.

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A SUMMONS had been obtained on the 8th of September 1866, by the plaintiffs, calling upon the defendants and the trustees (under Act XXVIII. of 1865) of the estate of the defendant Pránjívandás Harjívandás, and also the trustees, under the same Act, of the estate of Bhagvándás Purshotamdás to show cause why an order should not be made, under Sec. 242 of the Civil Procedure Code, for the issuing of a warrant of sale, authorizing the sheriff to sell certain immoveable property belonging to the defendant Bhagvándás Purshotamdás, in satisfaction of Rs. 56,000, being the balance due to the plaintiffs under a decree for Rs. 78,296 and upwards, obtained in this cause by the plaintiffs, against both the defendants, on the 4th of August 1865.

Mr. Peile (Messrs. Cleveland & Peile) attended this day on behalf of the trustees of the estate of Bhagvándás Purshotamdás to show cause.

Mr. Bishop (Messrs. Acland, Prentis & Bishop) for the plaintiffs supported the summons.

The Sitting Judge took time to consider his decision.

September 24.

WESTROPP, J.—The question raised on the 8th section of Act XXVIII. of 1865 is of considerable importance. The preceding section enacts that a winding-up order, made under the Act, shall relate back to, and take effect from, the filing in court of the resolutions which have been carried at the meeting of creditors. That provision, and the peculiar language of the 8th section, tend strongly to show, that the policy of the Act is, to a great extent, similar to that of the present Bankruptcy Acts in England: Stat. 12 & 13 Vic. c. 106, Secs. 133, 184 (1849); Stat. 24 & 25 Vic. c. 134, Secs. 73, 103 (1861). In *Hutton* v. *Cooper* (*a*) it was held that, under the 184th section of Stat. 12 & 13 Vic. c. 106, a creditor, who has obtained judgment in an adverse action against a bankrupt and has issued a *fi. fa.* thereon, and sold the goods, is not entitled to the proceeds, unless not only the seizure, but the sale also, takes place before the date of the fiat, or filing of the petition for adjudication in

(*a*) 6 Exch. 159.

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bankruptcy. The case of *Woodland* v. *Fuller* (*b*) shows that this was not so under the repealed Insolvent Debtors' Act, 1 & 2 Vic. c. 110. It was there ruled that the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution, bound the goods as against the assignees in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignees in insolvency; but it did so subject to the right of the execution creditor to have satisfaction of his debt by sale. The same principle is involved in the decision recently made in the first five of the suits brought against execution creditors by Mr. Gamble, under the Indian Insolvent Debtors' Act (Stat. 11 & 12 Vic. c. 21), as assignee of Hunt and Monnett's estate (*c*). But in bankruptcy the law is otherwise. The right of the assignees to the bankrupt's property was regarded as dating *primâ facie* from the act of bankruptcy (*d*); and although that rule was considerably modified by the repealed Stat. 2 & 3 Vic. c. 29, and also by the present Statutes 12 & 13 Vic. c. 106, and 24 & 25 Vic. c. 134—which, as *Cockburn*, C.J. says in *Edwards* v. *Scarsbrook* (*e*), were passed to give some degree of protection to execution creditors against acts of bankruptcy—the execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication, otherwise the execution creditor is entitled only to a rateable part of his debt with the other creditors: *Hutton* v. *Cooper*; *O'Brien* v. *Brodie* (*f*).

The decision of the present Chief Justice, in *Motirám Dálpatrám* v. *The Gújarát Trading Company, Limited* (*g*), turned upon the 72nd section of Act XIX. of 1857, which provides that "after the date of the order or decree for winding up the Company, all suits and actions against the Company shall, if the Court so orders, be stayed." The Chief Justice held that, as that decree had been partly executed by the attachment

(*b*) 11 A. & E. 859. (*c*) 2 Bom. H. C. Rep. 150. (*d*) *Cooper* v. *Chitty*, and the Cases cited in the Notes to it, 1 Smith L. C. 220.
(*e*) 9 Jur. N. S. 537. (*f*) 12 Jur. N. S. 527. (*g*) *Ante* p. 20.

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of property of the defendants, although there had not been a sale, there was no longer a suit or action to be stayed within the meaning of that section; and he referred to a *dictum* of *Knight Bruce*, L. J., in *Ex parte Parry, in re the Great Ship Company, Limited* (*h*), upon Sec. 201 of the Companies' Act of 1862 in England.

The section (201) of the English Companies' Act of 1862, commented upon by *Knight Bruce*, L.J., and also the 85th and 197th sections of that statute, apply to the staying of actions, suits or proceedings *before* the making of an order for winding up the company. All that those sections provide is, that the court may stay actions, suits, and proceedings if it thinks fit. But the 87th section, which applies to a stay *after* the making of a winding-up order, unlike those sections, or Sec. 72 of Act XIX. of 1857, imposes a direct bar. It runs thus: "When an order has been made for winding up a Company under this Act, no suit, action or other proceeding shall be proceeded with or commenced against the Company, except with the leave of the Court, and subject to such terms as the Court may impose." The 108th section of the Indian Companies' Act of 1866 is, omitting the word "action," in precisely the same terms. The 212th section of that Act, protecting contributories of a company registered under Part VII. of the Act, follows the language of the 108th section. The 211th section more nearly resembles the 85th, 197th, and 201st sections of the English Companies' Act of 1866, and, like them, relates only to a stay before the making of the winding-up order. It is unnecessary now to give any opinion as to whether the same rule of construction should be applied to the 108th and 212th sections of the Indian Companies' Act of 1866, as *Knight Bruce*, L.J., seemed disposed to give to the 201st section of the English Companies' Act of 1862, and as *Couch*, C.J., gave to the 72nd section of Act XIX. of 1857. I have mentioned the 108th and 212th sections (which are themselves less favourable to execution creditors than Sec. 72 of Act XIX. of 1857 and Sec. 201 of the Companies' Act

(*h*) 33 Law. J., N. S., Ch. 245.

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of 1862) for the purpose of comparison with Sec. 8 of Act XXVIII. of 1865, and of showing that it goes far beyond them, and accordingly that my decision will conflict neither with the *dictum* of *Knight Bruce*, L.J., as to Sec. 201 of the Companies' Act of 1862, nor with the decision of the Chief Justice on Sec. 72 of Act XIX. of 1857.

Before quoting Sec. 8 of Act XXVIII. of 1865 I shall refer to the Indian Insolvent Debtors' Act, 11 & 12 Vic. c. 21. Its 49th section enacts that if, after the filing of any insolvent's schedule and before he obtain his discharge, "any suit or action shall be pending against the insolvent, his heirs, &c. &c., or any execution or process shall be issued out or issued from any of the said courts, or be enforced against such insolvent, his heirs, &c., for or in respect of any debt, &c., admitted in the schedule of the insolvent, or disputed as to amount only, the said Court in which such action or suit shall be pending, or from which such execution or process as aforesaid shall issue, on proof to its satisfaction that such action or suit, execution or process is in respect of the debt or demand aforesaid, *may* stay the proceedings in such suit or action, so far as the same respects the said debt or demand, until further order of the said Court, and may set aside or suspend such execution or process, so far as the same respects the said debt or demand, until further order of the said Court," &c. In one point that enactment falls short of Secs. 108 and 212 of the Indian Companies' Act of 1866, and Sec. 87 of the English Companies' Act of 1862. It does not declare, as they did, that suits and proceedings shall be stayed, but like Secs. 85, 197, and 201 of the English Companies' Act of 1862 and Sec. 211 of the Indian Companies' Act of 1866, provides that the court, if applied to for that purpose, may stay them. In another point, however, it goes beyond all of those enactments; it not only contemplates, as they did, the stay of actions or suits, but also of "execution or other process."

Sec. 8 of Act. XXVIII. of 1865 is as follows:—"After the date of such order (the winding-up order) all suits or legal proceedings of whatever kind, in respect of such trader's

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civil liabilities, *shall be stayed*, and *no execution, attachment, or other process* against such trader's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of the jurisdiction of the Court, shall be *available* to any creditor or claimant without leave of the Court." That section, in providing that the winding-up order shall of itself operate as a stay of suits, &c., and impose a bar upon them, comprises the strong point of Secs. 108 and 212 of the Indian Companies' Act of 1866 and of Sec. 87 of the English Companies' Act of 1862; and by specifying execution, attachment or other process, comprises also the strong point of Sec. 49 of the Indian Insolvent Debtors' Act [11 & 12 Vic. c. 21], and thus takes the present case out of the reasoning which guided *Knight Bruce*, L.J., and *Couch*, C.J., in the cases before them already mentioned. The very strong and peculiar language of Sec. 8, combined with Sec. 7, which, on the making of the winding-up order, vested "all the moveable and immoveable estate and effects" of the trader "and debts due to him," &c., in the trustees, and declared that "such order, when so made, shall, by virtue of this Act, relate back to, and take effect from, the filing of the said Resolutions (for winding up the estate, &c.) in Court as aforesaid, and shall instantly and without any conveyance or assignment vest all the moveable and immoveable estate and effects as aforesaid of such trader in the said trustees," clearly indicate that the policy of Act XXVIII. of 1865 is analogous to that of the Bankruptcy Acts, so far as they regard personal estate; and that, as regards immoveable (real) property, Act XXVIII. of 1865 goes beyond those Acts, because it makes no distinction between executions against immoveable property and executions against moveable property, as Sec. 133 of the Stat. 12 & 13 Vic. c. 106 has done in England. That statute treats execution against the lands and tenements of a bankrupt as perfected by seizure only, whereas it required seizure and sale to perfect execution as against his goods and chattels. The reason, however, for

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that distinction in England is manifest. Execution against the freehold or copyhold lands and tenements of a debtor did not exist at Common Law, and can only be had by seizure under a writ of *elegit*, by virtue, so far as regards freeholds, of the Statute of Westminster the 2nd (13 Edw. 1) c. 18, Stat. 29 Car. 2, c. 3, Sec. 10 and Stat. 1 & 2 Vic. c. 110, Sec. 11; and, so far as regards copyholds, of the last mentioned statute; and cannot be had by sale. Accordingly, the Bankruptcy Consolidation Act (12 & 13 Vic. c. 106) was moulded to meet that state of the law as to the execution of judgments against real estate in England. But in the three Presidency towns of India the charters of the Supreme Courts sanctioned the sale, under a writ of *fi. fa.*, of the real as well as of the personal property of the debtor, and so does the Civil Procedure Code under its process in all parts of India to which it has been extended. Hence Act XXVIII. of 1865 has made no distinction whatever between executions against immoveable and executions against moveable property; and if executions in either case be not completed as well by sale as by seizure, they are stayed by Sec. 8.

It should, moreover, be especially noted, that the language of that section is not simply that execution, attachment, or other process shall not be issuable, but that it shall not be "available" to the execution creditor against the property of the trader. The practice of this court under the Civil Procedure Code on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the sheriff duly executed, to issue a writ directing a sale. It, therefore, becomes necessary for the execution creditor to come again to the court, after the attachment, and to apply for the aid of its process to compel a sale. This was not so in the Supreme Court. The writ of *fi. fa.*, which issued from that court, was an authority to the sheriff not only to seize, but also to sell. The 250th section of the Civil Procedure Code enacts that "the usual process for attachment and sale, when the property to be attached consists of goods, chattels, or other personal estate,

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other than debts, may be issued either successively or simultaneously, as the Court directing the sale may, in each instance, think proper." That section applies neither to executions against immoveable property, nor to executions against debts due to the defendant. And in order to give third parties, whose property may have been wrongfully taken in execution, as that of the defendant, full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously, even against personal property, and it would not seem to be proper to do so, except under special circumstances. As to execution against debts, it will be useful to refer to some of the English cases, in which a conflict has arisen between orders made under what are styled the garnishee clauses in the Common Law Procedure Act of 1854 (Secs. 60 to 65) and the Bankruptcy Acts. *Holmes* v. *Tutton* (*i*) decided that from the time of the service of the order, attaching the debts due to the defendant, it binds those debts in the hands of the garnishee (the debtor to the defendant), but subject to the operation of the Bankrupt Law Consolidation Act, 1849, which, so far as it is unrepealed, must be treated as incorporated with the Act of 1861; and, therefore, if the defendant become bankrupt before the debt is paid under the order, the debt passes to the assignees, and the attachment fails. *Tilbury* v. *Brown* (*j*) decides that the bankruptcy of the defendant, after an order for payment, under Sec. 63 of the Common Law Procedure Act of 1854, has been served on the garnishee, but before actual payment, in effect discharges the order. In the recent case of *Wood* v. *Dunn* (*k*), decided in November 1865, it was held that it is no answer to an action, by trustees of a deed under Secs. 192 and 197 of the Stat. 24 & 25 Vic. c. 134 (Bankruptcy Act 1861), for a debt due to the insolvent trader, that the debtor, to avoid execution under a garnishee order, has paid the debt to the judgment creditor, in obedience to the order, *after* registration of the deed, and with notice of it. The court,

(*i*) 5 E. & B. 65; 24 Law J., N. S., Q. B. 346.
(*j*) 30 Law J., N. S., Q. B. 46. (*k*) Law Rep. 1, Q. B. 77.

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moreover, seemed to think that the payment would have afforded no defence even if made without notice. Mr. Justice *Mellor* said, "We must give effect to the provisions of the Bankruptcy Act, and they operate on the order absolute just as in the case of an order *nisi*." Mr. Justice *Lush* said that it "must be taken as settled law that if the bankruptcy intervenes at any time before the garnishee has paid over the money, the attachment must lapse, and the judgment creditor must come in with the other creditors and take his share of the assets. By the 197th section of the Bankruptcy Act, 1861, the registration of a deed for the benefit of creditors is equivalent to a bankruptcy, and the trustees have all the rights of creditors' assignees in bankruptcy. The plea to be a good plea, in my judgment, ought to show that the payment was made under the garnishee order prior to the registration of the deed,—that is, before that which is equivalent to a bankruptcy. It has been contended that payment after the registration of the deed, but without notice of it, would be good. As at present advised I cannot assent to that proposition." Although the present case is an attachment of immoveable property, and not of a debt due to either of the defendants, yet garnishee cases being of daily occurrence here before the Sitting Judge, and as the English garnishee cases very clearly illustrate the policy of the Bankruptcy Acts, so strongly resembling that of Act XXVIII. of 1865, it seemed desirable to refer to those cases with some particularity.

In the present case, the order for the attachment against certain immoveable property of the defendant Bhagvándás Purshotamdás, situated in Marine Street and Apollo Street in the Fort of Bombay, was dated on the 15th of May last; and the attachment under it (by way of prohibitory order, under Sec. 235 of the Civil Procedure Code) was dated and issued on the 18th of May, and executed on the 2nd of July last. On the 28th of the same month an order was made under Act XXVIII. of 1865 to wind up the estates of the defendant Bhagvándás Purshotamdás and of his partner in trade, one Pránjívandás Tulsídás, pursuant to resolutions

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agreed to at a meeting of their creditors held on the 24th of the same month. No sale has yet been made under the attachment of the immoveable estate of the defendant Bhagvándás Purshotamdás. The Judge's summons now under consideration, dated on the 8th of September 1866, is in the nature of an order *nisi*, calling on the defendants, and the trustees of the estate of the defendant Bhagvándás Purshotamdás under Act XXVIII. of 1865, and the trustees of the estate of the other defendant Pránjívandás Hurjívandás under the same Act, (to wind up whose estate an order has been made on the 11th of August 1866) to show cause why the immoveable property of Bhagvándás, which has been attached, should not be sold, and the proceeds of sale paid over to the plaintiffs. According to the construction which I place upon Secs. 7 and 8 of Act XXVIII. of 1865, the execution being imperfect, and no sale having been made, the suit and all further execution, attachment, or other process to enforce the decree, made in it, against the property of the defendant Bhagvándás Purshotamdás are absolutely stayed by the order of the 28th of July 1866, which order relates back to the 25th of July 1866, when the resolutions passed at the meeting of his creditors were filed in court. So, too, is all process against his person, except a writ of *ne exeat jurisdictione*, on a sufficient case being shown for the issue of such a writ. The concluding part of the 8th section empowers the court to remove the bar and to permit a plaintiff to proceed against the property or person of the trader. But to give such leave in ordinary cases would frustrate the just and equitable policy of the Act, which is the distribution of the assets of the trader amongst all of his creditors rateably without preference of any one or more over the others. There should, therefore, be some special equity or ground shown in order to induce the court to allow a creditor to proceed against the property or person of the trader.

I have had an opportunity of consulting the Chief Justice and Sir Joseph Arnould as to the effect of a winding-up order under Act XXVIII. of 1865, and understand them fully to concur in the opinion, that such an order prevents the completion

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of an execution against immoveable property or ordinary moveable property, if it has not been consummated by seizure and sale before the filing in court of the resolutions, unless the leave of the court be given to the execution creditor to proceed; and that such leave ought not to be given except under special circumstances.

The remaining point is, whether any such special circumstances exist in this case as ought to induce the court to deviate from what should be its ordinary rule.

This suit, brought to recover a balance of Rs. 75,000 and interest, due upon a joint promissory note of the defendants, dated the 9th of January 1865, for Rs. 1,50,000, payable to the plaintiffs or their order on demand, was commenced upon the 31st of May 1865. The consideration for the note had been wholly received by the defendant Pránjívandás Hurjívandás, the defendant Bhagvándás Purshotamdás, although ostensibly and in point of law a principal, being in truth a surety only. Pránjívandás Hurjívandás, previously to the institution of the suit, had, on the 10th of April 1865, (a fact admitted on both sides) deposited with the plaintiffs, title-deeds to certain immoveable property belonging to him, as security for the debt. On the 8th of June 1865 he presented a petition for the benefit of the Insolvent Debtors' Act. An order vesting his property in the Official Assignee was made on that day. On the 29th of June 1865 he filed his schedule, and subsequently, on one or more occasions, amended it. His petition was dismissed on the 2nd of October 1865. Subsequently, in the same month, the Bank of Bombay, in a suit against him, attached the immoveable property of which he had deposited the title-deeds with the plaintiffs. On the 6th of July 1865, the defendant Bhagvándás Purshotamdás deposited with the plaintiffs, as security for his liability on the promissory note, title-deeds of that portion of his immoveable property as to which the present summons has been issued, upon the terms contained in a letter of that date addressed to him by the manager of the plaintiffs' Association, who thereby undertook that if the Association should obtain a decree for the balance of Rs. 75,000 due to them

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on the note, all due diligence should be used on the part of the Association to make available its lien on the property of the defendant Pránjívandás Hurjívandás by sale of the property or otherwise as might appear competent, and out of the proceeds to apply a sufficient part, or the whole, towards payment of the amount of the decree, and before it should be put in force against the defendant Bhagvándás Purshotamdás or his property. The officiating manager, in that letter, stipulated, 1st, that if the titles of the said properties should not be approved by the Association's solicitors, or if a mortgage for Rs. 75,000 were not executed by Bhagvándás to the Association, the undertaking should be of no avail; 2ndly, that if the Association were unable, within four months, legally to dispose of the property of Pránjívandás Hurjívandás, or otherwise to make it available towards liquidation of the debt of Rs. 75,000, "the said obligation" should be of no avail, but the Association should be at liberty to proceed against Bhagvándás and his properties for the recovery of that debt, in such manner as they might think advisable.

A point in dispute has been, whether the four months began to run from the date of the letter (6th July 1865), or the date of the making of the decree (August 4th, 1865), or of its being sealed (February 8th, 1866). In my view of the case it is not a very material question, but I am inclined to think that the sealing of the decree is the proper terminus from which the time should run, otherwise the defendant Bhagvándás would have been completely at the mercy of the plaintiffs. For them it has been argued that they have used all due diligence to make their lien on the property of the first defendant, which they regard as an equitable mortgage, available for payment of the debt; but that by reason of his insolvency they were prevented from doing any thing more than applying, as they did on the 18th of August 1865, by letter to the Official Assignee, to concur in a sale of that property, and that he not having given his concurrence, they were helpless. When Mr. Smith, the plaintiffs' manager, on the 6th of July 1865, on behalf of the

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plaintiffs, undertook to use all due diligence to realize the amount of the debt out of the estate of Pránjívandás Hurjívandás, he must have been fully aware that Pránjívandás had filed his petition in the Insolvent Court nearly a month before; and ought, therefore, to have been then alive to any difficulties which that insolvency might occasion in proceedings to render the equitable mortgage of that defendant's property effective. Mr. Smith must be regarded as having given his undertaking, and Bhagvándás as having accepted it, upon the assumption, that it was perfectly possible, by due vigilance and activity, to procure a sale of that property within the specified time. Otherwise, the letter of the 6th of July 1865 would have been nothing save an unworthy stratagem to induce Bhagvándás to part with his title-deeds—a conclusion to which the court would be most reluctant to come. These reasons and the reference in the letter itself to the expected decree render it more probable that the four months were intended to run from the time the decree was in a condition when it could be executed, than from the date of the letter. And it should not be overlooked that there was not any obligation on the part of Bhagvándás, a mere surety, while the suit was yet pending, and in anticipation of a decree, to deposit the title-deeds of his own property to secure the debt of the principal debtor, already secured as it was by a deposit of title-deeds by the latter. Bhagvándás was, therefore, perfectly entitled to insist upon fair terms and a sincere observance of them.

There was not, in my opinion, any *bonâ fide* effort on the part of the plaintiffs to carry out their undertaking to use due diligence against the property of the principal debtor. The letter of the 18th of August was an attempt so faint as to be scarcely appreciable. If they be right in asserting that the four months began to run from the date of the letter, the more earnest diligence did it behove them to use. They might, immediately on giving the undertaking of the 6th of July, have applied for leave to amend their plaint, and might then have recast it by setting forth the alleged equitable mortgage to them by the

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defendant Pránjívandás which had been made on the 10th of April 1865, and have prayed a sale, or might have asked leave to file a supplemental written statement, making that case and asking similar relief; and, if the Official Assignee resisted them, ought to have made him a party defendant. In fact, the power of the court, under the 49th section of the Insolvent Debtors' Act, was not invoked by the Official Assignee, and the suit was not stayed. Notwithstanding the insolvency of the defendant Pránjívandás, the plaintiffs were allowed to proceed without interruption to judgment against both defendants, and accordingly obtained a decree against them on the 4th of August 1865, two months before the dismissal of his petition. They tarried for another month,—that is to say, until the 5th of September,—before they lodged their bill of costs for taxation. No delay occurred in the taxing office. The allocatur was signed for the costs on the 8th of September by the Taxing Master. The plaintiffs had then, by most unnecessarily slow degrees, reached the stage at which they might have had their decree formally drawn up, and sealed, and carried into execution. However, what they did was to fold their hands and slumber for nearly five months. On the 30th of January 1866 they appear to have awoke, and bespoke the decree in the Prothonotary's office. They received it thence, duly drawn up and sealed, on the 8th of February 1866. From that day to the present they have never attempted, by execution or otherwise, to enforce their claim against the immoveable property of the defendant Pránjívandás Hurjívandás. And this is what they describe as a performance of their engagement to use due diligence. While the plaintiffs were thus wasting time, the petition of the defendant Pránjívandás was dismissed by the Insolvent Court on the 2nd of October 1865; and instead of being then ready with a decree, founded on their equitable mortgage, for the sale of his immoveable property, or, (even if they had not, as they might have, reconstituted their suit for that purpose) instead of being ready with a common execution upon their money decree, as they easily might have been, they allowed the Bank of Bombay to take the lead of them, and in October to

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attach the same property of Pránjívandás Hurjívandás, upon which the plaintiffs claim to have an equitable mortgage. The pretence that his insolvency delayed them is perfectly idle. The court could not, and would not, have prevented any *bonâ fide* equitable mortgagee from taking the necessary steps to enforce his security against the Official Assignee.

The plaintiffs contend that as Bhagvándás has not executed in their favour a formal legal mortgage for Rs. 75,000, as stipulated in the letter of the 6th of July 1865, he is not entitled to the benefit of their promise to proceed in the first instance against the property of the defendant Pránjívandás. The defendant Bhagvándás, however, has sworn that he was always ready to execute such a mortgage, and that a draft of it was actually approved, on his behalf, by his solicitors. The plaintiffs, however, subsequently agreed that he should substitute for it a mortgage which was to secure, not only the Rs. 75,000, but also a fresh advance which they were to make to him—an arrangement which seems to me to amount to a waiver, by the plaintiffs, of the condition, in the letter of the 6th of July 1865, as to the execution of the mortgage for Rs. 75,000. But, even assuming that there was not any such waiver, the plaintiff must have been perfectly aware that the investigation of the title of the additional property, which was to be associated in the new mortgage together with the property of which Bhagvándás had already deposited with them the title-deeds, was a matter which must occupy time. Even supposing that it did occupy a longer time than it ought to have done, that delay—which occurred at an advanced stage of the relation of the plaintiffs with Bhagvándás—could not excuse the previous failure of the plaintiffs to use any diligence whatever in enforcing payment of the debt against the property of the defendant Pránjívandás. The execution of the mortgage was not a condition precedent to the exhibition of diligence by the plaintiffs in carrying out their part of the arrangement of the 6th of July 1865. They have been the first to infringe the treaty into which they entered with the

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defendant Bhagvándás, and cannot be allowed to complain that he has subsequently failed to perform the condition which lay upon him. Their laches—whether the four months are to be considered as running from the date of the letter (6th July 1865) or from the sealing of the decree—has been so great and so inexcusable that they have no grounds whatever for claiming the aid of the court in removing the bar which, under Sec. 8 of Act XXVIII. of 1865, the winding-up order has imposed upon the completion of their execution.

I have dealt with this case as a question of execution only, of a common money decree. I do not undertake to say, nor am I now called upon to decide, whether the plaintiffs have lost their lien, created by the deposit of title-deeds, on the property of Bhagvándás, which they have seized under their execution, and now seek to have sold—whether, in fact, their laches has been so great as to disentitle them to relief as equitable mortgagees. The duty which lies upon those who seek equity to show that they have done equity, and the signal laches of the plaintiffs, equivalent, in my opinion, to something very like direct breach of contract—circumstances which have weighed most powerfully with me on the present occasion—will probably constitute serious difficulties in obtaining any such relief. It should be borne in mind that the contest is not now between the plaintiffs and Bhagvándás, but is between the plaintiffs and the trustees of his estate, who represent all his creditors. In *Jacobs* v. *Latour* (*l*) *Best*, C. J., said, "As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another there is not the same reason for favour." And in that spirit the Bankruptcy Acts and Act XXVIII. of 1865 have been penned. *Jacobs* v. *Latour* was a case in which a simple lien on goods, not a deposit by way of security for a loan, was held to be waived by their having been taken in execution by the party entitled to the lien. As to the difference be-

(*l*) 5 Bing. 132.

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tween an ordinary lien and a deposit by way of security for a loan, the remarks of Sir V. *Gibbs*, C.J., in *Pothonier* v. *Dawson* (*m*) may be advantageously consulted; and, as to how a lien may be lost, *Weeks* v. *Goode* (*n*).

It is sufficient, however, at present, to allow the cause shown against the summons praying a sale in execution, and to discharge the attachment laid on the property of the defendant Bhagvándás Purshotamdás mentioned in that summons.

(*m*) Holt's N. P. Ca. 383, quoted in *Legg* v. *Evans*, 6 M. & W. 36.
(*n*) 6 C. B., N. S., 367.

NOTE.—*Wood* v. *Dunn*, mentioned at page 32 in the above judgment, has been since reversed in the Exchequer Chamber. Law Rep. 2 Q. B. 73. That Court held that though the deed, in that case executed for the benefit of creditors under the Bankruptcy Act of 1861, was, when registered, equivalent to an adjudication of bankruptcy, yet that the payment by the defendant (the garnishee) to the execution creditor made after the registration of the deed must, on the true construction of the plea, be regarded as having been so made by the garnishee, either without notice of the deed, or, if with notice, under such circumstances that he was unable to get the order to pay set aside before he was compelled to pay to save execution being actually levied; and that in either case the payment was a protection to the garnishee as made under the order of a Court of competent authority. That decision of the Exchequer Chamber does not, however, in any respect conflict with the ruling of the Sitting Judge in the case in the text. The Exchequer Chamber was of opinion that the plaintiffs in *Wood* v. *Dunn* (the assignees under the bankruptcy deed) had only mistaken their remedy in suing the garnishee, and trying to compel him to pay again the debt, which he had already, under the circumstances set forth in the plea, paid to the execution creditor, and that they (the assignees) ought to have brought their suit against the execution creditor, who, when a bankruptcy has supervened after the order to the garnishee to pay, but before he has paid, is precluded by the policy of the Bankruptcy Laws from retaining the money, if subsequently paid to him (the execution creditor) by the garnishee, as against the assignees, and is only entitled to be paid rateably with the other creditors. It should also be carefully noted that the Exchequer Chamber expressly declined to give an opinion "that it would be safe for a garnishee, having been served with an order to pay, and afterwards, before payment, receiving notice of a bankruptcy or a trust deed, after that to pay under the order without an immediate threat of execution, and without taking steps himself to get the order set aside, or giving notice to the assignee informing him that he (the garnishee) should pay, unless the assignee got the order set aside."—ED.