In re Pestanji Cursetji Shroff, and Act XXVIII. of 1865.

[Before the Sitting Judge in Chambers.]

Books of Account—Seizure—Practice.

Books of account cannot be taken in execution.

1866. September 21. *In re* Pestanji Cursetji Shroff.

IT was brought to the notice of the Sitting Judge (Mr. Justice Westropp) that an attempt had been made by a Sheriff's officer to seize the books of account of the insolvent, which had been produced at a meeting of his creditors, held under Act XXVIII. of 1865.

His Lordship asked the Deputy Sheriff whether he could refer to any authority or rule of Court, showing that a judgment creditor had a right to seize the books of account of his debtor; and that officer stated that such had been the practice of the Sheriff's office for several years.

His Lordship said that he had a strong impression that such seizure was illegal: but that he would look into the authorities and consider the matter.

September 24.

Westropp, J. :—I have considered this matter and looked into the law on the subject, and am confirmed in the view which I expressed a few days ago. It was held in *Francis* v. *Nash*, quoted in Comyn's Digest: 4th Ed. by Kyd, Title Execution, C. 4, that at Common Law nothing that cannot be sold, as deeds, writings, bank-notes, &c., can be taken in execution. The same doctrine is also to be found in 2 Arch. Pr. by Prentice, p. 642; Ed. 1852; and in *Legg* v. *Evans* (a).

In England that rule has been relaxed by legislation. The Statute 1 & 2 Vict., c. 110, Sec. 12, empowered the Sheriff to seize any money or bank-notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for

(a) 6 M. & W. 36.

money, belonging to the person against whose effects a writ of *fi. fa.* should be sued out; but even since that statute, deeds and writings, &c., cannot be taken, unless they be securities for money within the meaning of the statute. For instance, a title-deed (even, it would seem, if pledged with the debtor) or a letter, or a guarantee for some collateral act, or any other deed or writing which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot, it is said, be taken (2 Arch. Pr. by Prentice 643).

Under the Civil Procedure Code, monies, bank-notes, cheques, bills of exchange, promissory notes, government securities, bonds or other securities for money, may be taken in execution; but I do not find in that Code anything which would warrant, in my opinion, the seizure in execution of other deeds or writings, account books, or other things of a like unsaleable nature. The words, " all other property whatsoever, moveable or immoveable, belonging to the defendant," contained in that section, must be restrained by the fact that the execution, contemplated by the Code against property, (except in the case of a decree for delivery of possession of land or of any specific moveable: Secs. 199, 200, or in the case of debts Secs. 241, 242, 243, or of rents Sec. 243,) is execution not by attachment only, but by attachment and sale: Secs. 201, 205. Hence anything, which is not in its nature saleable, and not expressly provided for, would seem not to fall within the scope of the 205th section, howsoever comprehensive its language may, at first sight, appear. It has been suggested that deeds, writings, and account books might be sold as waste paper, but such a proceeding would be more in the nature of a wilful destruction of property, than of a *bonâ fide* sale, such as was intended by the framers of the Code. In the absence of any express legislation, rendering books of account liable to seizure and sale, I think that the Common Law rule of exemption should be applied to them.

I should have been very much surprised to have found any

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legislation sanctioning the seizure of books of account; as such a proceeding must be productive of great inconvenience and injustice, and would greatly injure defendants in conducting their business. In England, no man can be distrained for rent by the utensils of his trade, as for instance the axe of a carpenter, the book of a scholar, or the materials for making cloth in a weaver's shop: Bacon's Abridgment, Title, Distress, B—a rule which, to a certain extent, has been applied by the Legislature in England to executions. The Statute 8 & 9 Vict., c. 127, Sec. 8, after reciting that it is expedient to protect the actual necessaries of, or belonging to, judgment debtors from being seized in execution, enacts that the wearing apparel and bedding of any judgment debtor, or his family, and the tools and implements of his trade, if they do not exceed in value £5, shall not be liable to seizure under any execution or order of any court against his goods and chattels.

It is easy to conjecture how the practice of seizing books of account has arisen in Bombay, which practice has not, however, to my knowledge ever received the sanction of the Supreme Court or of the High Court. The Charter of the Supreme Court allowed (as does the Civil Procedure Code) the seizure of debts due to the defendant; and execution creditors had, in all probability, put the Sheriff in motion against the books, in order that they might ascertain from them what debts were due to the defendant. But the execution creditor had no right whatever to make use of the property of the defendant. He had as little right to make use of his account-books as to ride upon his horse or in his carriage. Upon a *fi. fa.* the Sheriff cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt, but the goods are to be sold. If the Sheriff on a *fi. fa.* levy the goods and pay the plaintiff with his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods: Bacon's Abridgment—Title, Execution, C. 4; and Title, Sheriff, N. 5.

I have brought this matter to the notice of the Chief Justice, who fully concurred with me in thinking that the

account books of a defendant are not liable to seizure or sale. I have not had an opportunity of fully consulting the other Judges sitting on the Original Side of the Court on the subject; but I have mentioned it to them, and have no reason to suppose that they entertain a different opinion. It is desirable that the Sheriff should henceforth refrain from taking books of account in execution.

Original Suit, No. 372 of 1866; Appeal, No. 88.

THE GU'JARA'T TRADING COMPANY (LIMITED). *Appellants.*

TRIKAMJI' VELJI' and others trading as Trikamjí Veljí and Company .... *Respondents.*

Indian Companies' Acts of 1857 and 1866—Illegal contract—Repeal.

In a suit filed on the 28th of April 1866, and brought by a Joint Stock Company, after registration, to recover damages for breach of a contract made with the defendants before registration:—

Held (by *Couch*, C. J., and *Arnould*, J., affirming on appeal the decree of *Sargent*, J.) that the contract was illegal under Sec. 2 of Act XIX. of 1857, and that the plaintiffs could not sue upon it.

Where the law is altered while a suit is pending, the law as it existed when the action was commenced must decide the rights of the parties; unless the Legislature, by the language used, shew a clear intention to vary the mutual relations of such parties.

1866. Oct. 5, 8, 9, Nov. 27. O. S. No. 372 of 1866.

THE Original Suit (No. 372 of 1866) was brought by the Official Liquidators of the Gújarát Trading Co., lately carrying on business at Ahmedabád and also in Bombay, but now under liquidation, by an order made by the District Court at Ahmedabád and filed in the High Court (*a*); and was heard by Sir Charles SARGENT, sitting in a Division Court, on the 5th, 8th, and 9th of October 1866.

The plaintiffs sought to recover from the defendants the sum of Rs. 48,400, with interest thereon at 9 per cent. from the 1st of July 1865, in specific performance of an agreement in writing made between the plaintiffs and the defendants on the 18th of March 1865, for the purchase and sale of a share in the Bombay Reclamation Co., Limited, which the

(*a*) *Ante* p. 20.