made in the Code, as Secs. 232 to 239 inclusive, with regard to the mode or manner of attachment of the various kinds of property, and not in any respect to the district in which it may be made.

We have had the great advantage of fully consulting our brothers Gibbs and Melvill, who decided the case *In re Abraham*, and are authorised by them to say that on reconsideration of the points involved in it, they have arrived at the same opinion which we have, namely, that the ruling there made cannot be sustained. They, however, are not to be understood as pledged in all particulars to the course of reasoning by which we have come to that conclusion.

Mr. Latham's motion for the attachment before judgment sought for in the present case must be refused, on the ground that, under the Civil Procedure Code, a civil court cannot attach before judgment property situated beyond the local limits of its jurisdiction.

Motion refused.

Attorneys for the applicant: *Acland, Prentis, and Bishop.*

March 27.

In re PESTANJI SHA'PURJI KA'KA' and EDALJI SHA'PURJI KA'KA'.

Insolvency—Final Discharge—Opposing Creditor—Grounds of Opposition—Personal Discharge previously granted without opposition—Stat. 11 *&* 12 *Vict., c.* 21, *ss.* 47 *and* 60.

An opposing creditor who has not filed grounds of opposition to, or opposed, the personal discharge (under Sec. 47 of the Indian Insolvent Debtors' Act) of an insolvent trader, can nevertheless come in and oppose the insolvent trader's application for his final discharge under Sec. 60 of the Act.

The grounds of such opposition may include matters which might have been put forward as grounds for opposing the insolvent trader's personal discharge under Sec. 47 of the Act, and need not necessarily be confined to matters either not known at, or that have occurred since, the time of the personal discharge being granted.

The Court, in considering whether it will grant or refuse to an insolvent trader his final discharge, will take into consideration the whole course of the mercantile dealings of the insolvent trader, and will not confine itself to his conduct with reference to the opposing creditor merely.

THE insolvents in this case filed their petition and schedule on the 1st of August 1870. A rule *nisi* having been

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granted to them in the usual course, they obtained their discharge, under Sec. 47 of the Indian Insolvent Debtors' Act, on the 17th of October 1870. Grounds of opposition to such discharge were filed on behalf of one Nathu Lakhmidás, but his opposition was withdrawn on the day the matter came on for hearing, and the insolvents obtained their discharge.

On the 21st of November 1870 the insolvents applied for and obtained a rule *nisi* for a final discharge in the nature of a certificate under Sec. 60 of the Act.

The rule *nisi* came on for hearing on the 16th of January 1871, when Mr. Reid, of the firm of Messrs. Finlay, Scott, & Co., applied for leave to oppose the discharge of the insolvents. Leave was then granted to him to file his grounds of opposition, and the hearing of the insolvents' petition was for that purpose adjourned until the 6th of February 1871, when it came on for hearing. The matters that formed the ground of the opposition of Messrs. Finlay, Scott, & Co. were all known to Mr. Reid before the time when the insolvents' personal discharge was granted, but he stated that he did not then oppose, because he thought he should have been able to have urged his grounds of opposition, when called as a witness by Nathu Lakhmidás, by whom he had been summoned as a witness. Mr. Reid was not, however, called, as Nathu Lakhmidás withdrew his opposition to the insolvents' discharge.

The history of the insolvents' transactions is detailed in the judgment of the court.

McCulloch and *Lang* for the opposing creditors.

Farran for the insolvents.

The hearing took place before GIBBS, J., sitting as Commissioner in Insolvency, on the 6th of February and 13th of March 1871.

Cur. adv. vult.

March 27. GIBBS, J. :—These insolvents obtained their discharge under the 47th section of the Act (11 & 12 Vict., c. 12) on the 17th of October 1870, and on the 21st of November

1870 applied for a final discharge in the nature of a certificate, under the 60th section of the Act. A rule *nisi* was granted, and notices in accordance with the rule were duly published. On the day for making the rule absolute, I permitted grounds of opposition, which had been tendered by Messrs. Finlay, Scott, and Co., a day beyond the proper time, to be filed, and the hearing of the said opposition was commenced on the 6th of February, and was concluded on the 13th of March. Mr. McCulloch and Mr. Lang, being counsel for the opposing creditors, and Mr. Farran, being counsel for the insolvents, having been heard, I took time to consider my judgment.

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As far as the records of this court show, this is the first occasion on which an application for final discharge has been opposed; and the following questions have been raised for the consideration of the Court:—1*st*, whether Messrs. Finlay, Scott, and Co., not having filed grounds of opposition to the discharge of the insolvents under Sec. 47, can be allowed to oppose a final discharge under Sec. 60; 2*nd*, whether the grounds of opposition against an order under Sec. 60 should be allowed to include matters which might have been put forward as grounds for opposing the personal discharge under Sec. 47, or whether they should be confined to matters either not known at that time or which have occurred since; 3*rd*, should the above two questions be decided in favour of the opposing creditors, then, whether the facts given in evidence would justify the Court in refusing the final discharge of the insolvents.

In considering the first and second questions, I would premise that the procedure laid down by the Indian Insolvency Act differs from that which was in operation in England at the time when it was passed. There were then two distinct tribunals—one the Insolvent Debtors' Court, as constituted by the 5th & 6th Vict., c. 116, amended by 7 & 8 Vict., c. 96, and 10 & 11 Vict., c. 102; and the other the Bankruptcy Court, as constituted under the 5th & 6 Vict., c. 132; and it was not till the year 1861, under the provisions of 24 & 25 Vict., c. 134, that the business of the two courts was consolidated into one: whereas we have had in India,

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at all events since 1847, one law for both bankrupts and insolvents, and under this a trader who has obtained an order for a personal discharge under Sec. 47, which has only the effect of "protecting his person from arrest in respect of all demands inserted in his schedule or established in the court, can, under Sec. 60, obtain a final discharge, in the nature of a certificate, which order shall extend to and discharge the insolvent personally, and also his after-acquired property, from all demands which would be discharged by a certificate under the bankrupt laws." In considering, therefore, the course that I should adopt with regard to the first and second questions, I think I must be guided by the procedure followed by the Insolvency and Bankruptcy Courts at home previous to the late changes which have been introduced within the last few years. And in so doing I shall consider the order of discharge under Sec. 47 of the Act for India equivalent to the order given after the first examination under the English Act (7 & 8 Vict., c. 96, s. 24), and the final order of discharge under Sec. 60 of the Act for India equivalent to the final order under the English Act, and also to the order for discharge granted by the Court of Bankruptcy.

In the case *re Lane*, quoted in Macrae's Practice, page 411, an objection was taken that the creditor who appeared to oppose did so for the first time on the day for the final order, and so could not be heard ,as his opposition should have been made on the day of first hearing; but Mr. Commissioner Stephen held that the grounds of opposition ought to be heard, and this seems to have been the established practice of the Insolvent Court. It is true that the wording of the English Act gave very great discretionary powers to the Commissioners, and it may be said that under the Act for India nothing is said as to the course to be pursued under Sec. 60, as to what opposition, if any, should be allowed; but doubtless, considering the provisions made for serving notice of the rule *nisi* having been granted to every creditor, it would be absurd to hold that such notice did not contemplate an opposition by the creditors if they

were so inclined, especially as the courses the court may adopt are similar to those under Sec. 47. Again, considering the great difference between the effect of an order under Sec. 47 and an order under Sec. 60—the one merely relieving the debtor from the dread of personal arrest for any of the debts mentioned in his schedule or established in the court, but leaving his future property liable to be taken for the benefit of his creditors; and the other releasing him and his property from all liability, and enabling him to commence business again, absolved from all the responsibilities of his previous debts (see *ex parte Parbury* [*a*])—I say that it would appear but reasonable to allow a creditor, who might not care to oppose in the first instance, to come forward and show grounds why the insolvents should not be permitted to recommence business with a clean bill of health: so that, following what I believe to have been the practice at home in the Insolvent Debtors' Court and Bankruptcy Court, I think, on the general question, that a creditor may be allowed to come and oppose for the first time when application is made for a final discharge.

In the present case there are peculiar circumstances which induced me to overlook the irregularity, and permit the grounds of opposition tendered after date to be filed, which would also, I think, have been sufficient, had the practice been otherwise, to induce me to allow Messrs. Finlay, Scott, and Co. to oppose the present application. These circumstances are that the application for discharge under Sec. 47 was opposed by Nathu Lakhmidás, one of the creditors, who called in support of his opposition the resident partner of Messrs. Finlay, Scott, and Co., Mr. Reid. This gentleman attended the court on several days when the case was likely to be called on, and, as he has explained in his evidence, thought that he should as a witness be enabled to bring his own grounds of opposition to the notice of the court. On the morning of the day on which the case would have come on for hearing, the opposition was suddenly withdrawn, without Mr. Reid knowing anything about it,

(*a*) 30 L. J. Ch. 513.

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and the insolvents obtained their discharge as non-opposed debtors from my brother Green, who sat as Commissioner on that occasion; and although Mr. Reid was mistaken in supposing that as a witness he could put forward his own grounds of opposition, still, knowing as I do, from my experience in this court, that oppositions, as a rule, are only withdrawn when the insolvent has satisfied the opposing creditor to a greater or less extent, the price of which depends on the nature of the opposition, I should be loth, unless under very exceptional circumstances, to prevent, through a technicality, any alleged fraudulent conduct of the insolvents being passed over without inquiry. The words of Lord Justice Knight-Bruce in *ex parte Selby* (*b*) point out the duty of the court. When considering the grant of the final order, he says: "A certificate under a bankruptcy is not a matter of right, but a matter of discretion—a discretion to be exercised on judicial principles; but the case of a certificate is one in which those judicial principles involve the duty of attending to the public interest and claims of society at least as much as in any other class of cases coming under the consideration of this court." Similar sentiments have been expressed in *ex parte Dobson* (*c*) and in other cases; and I, therefore, think, in considering whether the insolvents should, or should not, have a final discharge, all the circumstances of their mercantile career may be taken into consideration; and I am, therefore, of opinion that both the first and second questions should be decided in favour of the opposing creditors.

This brings me to the consideration of the third question, namely, whether or not the insolvents are entitled to their final discharge. The 60th section provides that upon the further hearing of the petition it shall "be lawful for the court to make the rule *nisi* absolute, or to dismiss such petition, or to adjourn the further hearing thereof, or to make such order therein as shall be just." Now, as I consider the entire conduct of the petitioners, as far as it is established by evidence, is open to the consideration of the Court, and that

(*b*) 6 De G. M. & G. 783, 789. (*c*) *Ibid.* 781.

in arriving at a conclusion it should be guided not only by the principles of law, but also by those of public policy, and with a due regard to the claims and interests of the mercantile community, I am bound not only most carefully to consider the facts proved in evidence, but also whether the conduct of the petitioners has been such as would entitle them to be permitted to commence business again in this city. Mr. Reid has given his evidence in the fairest manner; he has made no attempt to palliate the line of conduct pursued by his firm with regard to the insolvents; he has stated clearly and with much detail every transaction: and I may, therefore, I think, fairly consider that from his evidence, both in chief and cross examination, the court has before it a very trustworthy statement of the insolvents' method of carrying on business. I am, however, unable to say the same of the evidence given by the insolvents, who not only fenced with the questions put to them, but prevaricated considerably in their statements of what actually occurred.

Now I think the following facts are clearly established. The insolvents were the brothers of the late Máṇikji Shápurji Káká, who, in partnership with Karsandás Mádhavdás, was the guarantee-broker of Messrs. Finlay, Scott, & Co. They had for some years been carrying on business as cotton merchants, shipping cotton to England and taking advances from different houses on the shipments made. This business resulted, in 1867, in the insolvents being largely indebted to their creditors generally, and to Messrs. Finlay, Scott, & Co. in particular. The debt to this firm was between 75,000 and 1,00,000 rupees, partly to secure which they mortgaged immoveable property to the firm which was then said to be valued at 50,000 rupees, but which would not now fetch more than 20,000 rupees. It appears that in January 1869 Mr. Reid had a conversation with the insolvents with regard to clearing off this debt, and it was arranged that they should recommence business, which they had stopped since 1867, and ship cotton, and take up advances from Messrs. Finlay, Scott, & Co. to be covered by shipping-notes.

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These transactions were not guaranteed by that firm's broker, who, from being aware of the state of the insolvents' affairs, considered it too great a risk to guarantee the advances. The result of these transactions was, on the whole, unsatisfactory, and allegations have been made that the weight of the bales shipped, which should have been that of ordinary Bombay bales, was less; but that the insolvents were aware of this fact I do not consider established. They themselves throw the blame upon their *mukádam*; and Mr. Reid seems inclined, from the confidence he had in the insolvents, not to lay the blame upon them.

It appears that towards the end of 1869, in spite of all these risks which had been undertaken, the position of the insolvents with regard to the firm of Messrs. Finlay, Scott, & Co. was about the same as it had been in 1867—in other words, they still owed them a large sum of money, about a lákh of rupees. In November 1869 a conversation is stated to have taken place between the insolvents and Mr. Maxwell, who was the then resident member of the firm, and, as it occurred during Mr. Reid's absence at home, the only direct evidence of what then took place is from the statements of the insolvents; and although each prevaricated, and contradicted both himself and the other, there is no doubt but that it resulted in a special loan from Messrs. Finlay Scott, & Co. of Rs. 15,000 to the insolvents, specially guaranteed by Máṇikji Shápurji Káká himself, which was to be covered in the usual manner by shipping-notes. On various pretexts the delivery of the shipping-notes was put off from time to time, and in January, on Mr. Reid's return from England, they promised that they would procure the necessary cotton, and also agreed that they would abstain from all further business without the permission of Mr. Reid; but they failed to produce the notes, and the general break-up of credit owing to the discovery of the *Aurora* frauds rendered the fulfilment of their promise impossible, and they have been unable to this day to carry out their agreement. Had the case remained in this position, and had there been no other transaction, I think I should have been induced to

consider the matter as one solely between Finlay, Scott, & Co. and the insolvents, and should not have considered it in its effects on public policy or the interests of the mercantile community. But it is further established that about the following March or April the insolvents applied to Messrs. Finlay, Scott, & Co. for an advance on cotton, which was refused ; and their books show that on the 28th of March they took up the sum of Rs. 23,891 from Messrs. Frámji, Sands, & Co. on the security of 200 bales of cotton to be shipped per *Greyhound*, and on the same date about a similar amount, from Messrs. Bamanji, Touche, & Co., on the security of 200 bales to be shipped in the *Aurora*. On the 26th of May an application was made to Messrs. Finlay, Scott, & Co. by one Surji Punji for an advance of Rs. 20,000 on 200 bales of cotton, which, being guaranteed in the usual manner by Máṇikji Shápurji Káká, was agreed to. A bill of lading for 200 bales of cotton, purported to have been shipped on board the *Armanilla*, was given, but subsequent investigation led to the discovery that the bill of lading was fraudulent. It appears that this man Surji Punji had, previous to the month of May, taken other advances of a similar nature from Finlay, Scott, & Co., to the amount of about Rs. 47,000, irrespective of the advance in May. Owing to their not completing their engagements, Mr. Reid had a further interview with the insolvents in the end of May or beginning of June, when they produced their books, and he then found that they had the dealings above mentioned with Frámji, Sands, & Co. and Bamanji, Touche, & Co., but he was not aware, until the schedule was filed, that Surji Punji was a partner of the insolvents. I may here state that every means has been taken to procure the attendance of this man, but unsuccessfully.

Now, a consideration of these facts leads me to the conclusion that the insolvents have been in a state of insolvency since 1867 ; that with the hope of retrieving their circumstances they entered into large transactions through Finlay, Scott, & Co. in the year 1869, which led to no beneficial results, but rather, it would appear, placed them in a

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worse position than they were before as regards Messrs. Finlay, Scott, & Co., while it may be fairly presumed that their position with regard to their other creditors was also worse; that in November 1869 one final attempt was made to retrieve their losses, and the special advance specially guaranteed by their brother was taken up upon terms which, supposing the insolvents' account of them to be correct, have never been carried out; that, finding Finlay, Scott, & Co. would make no further advances, they, in combination with their brother, the broker, put forward a Hindú, Surji Punji, whom they have since admitted to have been their partner, for the purpose of getting advances; that this man obtained advances from Messrs. Finlay, Scott, & Co., the re-drafts of which were met by similar advances taken up by the insolvents from Framjee, Sands, & Co. and Bamanji, Touche, and Co., and finally, to assist to discharge these claims and pay the cotton-dealers, an advance on a fraudulent shipping-note* was taken up by Surji from Finlay, Scott, & Co., and which is now entered in the schedule as being due by the insolvents.

Whatever amount of blame may attach to Messrs. Finlay, Scott, & Co. for assisting the insolvents to carry on business after they were hopelessly insolvent, and which, had the question before me been purely one between that firm and the insolvents I might have decided in favour of the latter, I am of opinion that in considering the question of the final discharge of any insolvent I am bound to consider the interests of the mercantile public generally. While, therefore, I cannot approve of the course pursued by Messrs. Finlay, Scott, & Co., I am not called on to state my opinion fully on that point. What I am required to do is to consider the conduct of the insolvents, and whether they have so far misconducted themselves as members of the mercantile community that it is expedient that I should withhold from

* NOTE.—This shipping-note was not given until some time after the money was advanced. The insolvents stated that M. S. Káká, the broker of the opposing creditors, knew that it did not represent cotton actually shipped. M. S. Káká was dead at the date of the hearing.

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them, either entirely or for a time, that certificate which alone would enable them to recommence business unembarrassed by their former liabilities. I have already quoted Lord Justice Knight-Bruce's words in the case *in re Selby*. The same learned Judge, in *ex parte Rufford* (*d*), in observing upon the argument adduced on behalf of the bankrupts that their continuing to trade might have been with the hope of retrieving themselves, says: "I must observe that, even supposing that occasionally to be done by traders who eventually set themselves right in the world again, that is no justification of such conduct" (p. 237). And in the case of *ex parte Heyn* (*e*) Lord Justice Rolt observes, when commenting on the conduct of a firm carrying on business after they had become not actually insolvent, but only "not strong, if solvent:" "What then was the bankrupts' duty under these circumstances? It must be borne in mind that, though their transactions in cotton were within the limits of legitimate commerce, yet that the article was among the most fluctuating in price, and the transactions of the most hazardous nature of any within those limits. The bankrupt was, therefore, called on to exercise the utmost caution and prudence in extending his liabilities;" and again: "Whatever was subsequently done was not done under any such necessity," *i. e.*, the keeping a large stock of cotton on hand to meet the requirements of the trade, "but solely to take the chance of profit to themselves should there be a rise in the market, with the certainty that the loss resulting from any considerable fall would not fall on themselves, but on their creditors;" and, in conjunction with Lord Cairns, who agreed with him, confirmed the decision of the Bankruptcy Court, adjourning the discharge for twelve months, six months of which was without protection.

The insolvents' method of carrying on business from 1869 to the time they filed their schedule was, in my opinion, far more blameworthy than was the conduct of Heyn Brothers in the case I have just quoted; and, considering the disclosures which have been made of late in this High Court

(*d*) 2 De G. M. & G. 234. (*e*) Law Rep. 2 Ch. Ap. 650, 653.

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in its civil, criminal, and insolvency jurisdictions—showing in many instances a painful absence of mercantile morality, and an utter recklessness with regard to the consequences which failure in speculations would ensure—I think I cannot do otherwise than mark with my severe displeasure the conduct of the insolvents in the present case, in hopes—I admit, but slight—that it may act as a warning to others, and at the same time show that to obtain a final discharge in the nature of a certificate is not a matter of course. I adjourn the grant of the certificate under Sec. 60 for a period of eighteen months.

Attorneys for the opposing creditors: *Acland, Prentis, & Bishop.*

Attorneys for the insolvents: *Hearn, Cleveland, & Peile.*

Original Suit No. 394 *of* 1870.

March 31.

JOHN G. .....*Petitioner.*
MARY ANNE G. .....*Respondent.*

Dissolution of Marriage—Adultery of the Petitioner during Marriage—Discretion—Act IV. of 1869, *Sec.* 14—*Indian Divorce Act.*

The Courts in India will adopt, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by Sec. 14 of the Indian Divorce Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act (20 & 21 Vict., c. 85, s. 31).

The discretion to be exercised under Sec. 14 of the Indian Divorce Act must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it has been more or less frequent. There must be special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner.

THIS was a petition for dissolution of marriage under the Indian Divorce Act (IV. of 1869). The petition (omitting the allegations with reference to the person who had in the first instance been joined as a co-respondent) showed—