[APPELLATE INSOLVENT JURISDICTION.]

IN RE DHANJIBHA'I KHARSETJI RATNA'GAR and another.

1873.
August 21.

Insolvency—Assignment to trustees for benefit of creditors—Voluntary assignment—Pressure—Indian Insolvent Debtors' Act—Stat. 11 & 12 *Vict., ch. XXI., s.* 24.

Where two insolvent partners, being sued by two of their creditors, and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted, and the creditors at such meeting resolved that the affairs of the insolvents should be wound up, under a deed of assignment in trust for the benefit of their creditors, and, in pursuance of this resolution, (which was not shown to have been proposed by or to have originated with the insolvents,) a deed of composition was drawn up and executed by the insolvents, whereby they assigned their entire property to trustees for the benefit of all their creditors who, before a certain specified time, should sign the deed ;

It was held that, under these circumstances, the composition deed could not be considered a voluntary assignment within the meaning of Sec. 24 of the Indian Insolvent Debtors' Act, and the deed was accordingly upheld. The onus of proving an assignment to be voluntary within the meaning of the above section lies upon the person impugning it.

Whether one of the creditors of an insolvent, without the consent, or without using the name, of the Official Assignee, can take steps in the Insolvent Court with a view to have an assignment by an insolvent to trustees set aside as voluntary—*Quære.*

THIS was an appeal from an order made by PINHEY, J., as Commissioner in the Insolvent Court, discharging with costs an order made by BAYLEY, J., *ex parte* on the application of Jamsetji Ratnágar, an opposing creditor of the insolvents, whereby it was ordered, under Sec. 26 of the Statute 11 and 12 Vict., c. 21, that Fardunji Frámji and two others (Trustees of a deed of composition, dated the 16th of December 1872, executed by the insolvents and their partner in favour of all their creditors who, within three calendar months, should execute the same,) should hold and retain all property belonging to the insolvents in their power or control, and all the proceeds thereof until the Insolvency Court should make further order concerning the same. The following is a brief resumé of the facts of the

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case: their effect is fully stated in the judgment of the Court.

The insolvents were merchants carrying on business in partnership, both in Bombay and in China. They became involved in difficulties towards the end of 1872, and on the 26th of November of that year a meeting of their creditors was convened, but no definite steps were then taken. After the meeting several of their creditors pressed the insolvents much for payment of their claims, and two of such creditors (one of them being the opposing creditor and the applicant in the present proceedings) filed suits in the High Court against the insolvents. The latter were, therefore, compelled again to call a meeting of their creditors which they did. This creditors' meeting took place on the 14th of December 1872, and at it a resolution was passed to wind up the affairs of the insolvents by a private trust deed, and three persons were appointed trustees for the purpose, namely, Fardunji Frámji Colah, Keshavji Devji, and Mohanji Mánikchand. In pursuance of the above resolution a trust deed was prepared, and the same was executed by the insolvents on the 16th of December. The trust deed conveyed the whole property of the insolvents to the trustees who had been appointed at the creditors' meeting in trust for the benefit of all the creditors of the insolvents who should come in and sign the deed within three months from the date of its execution. All the creditors of the insolvents, including the opposing creditor and the other creditor who had filed suits against the insolvents, had due notice of, but the latter two creditors did not attend, the meeting. A large proportion of the other creditors attended it.

On the 23rd of December the solicitors of the trustees wrote to the creditors who had filed suits against the insolvents, asking them to withdraw the suits and come in and sign the composition deed, informing them that the time for doing so would expire upon the 17th of March 1873; but, notwithstanding such notice, the creditors proceeded

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with their suits, and the insolvents, in consequence, on the 13th of January 1873, filed their petition and schedule in the Insolvent Court. On the next day the opposing creditor obtained a decree against the insolvents, but, in consequence of their having filed their petition and schedule in the Insolvent Court, the execution of the decree was stayed. Subsequently, the opposing creditor obtained in the Insolvent Court the injunction against the trustees from the order discharging which the present appeal was presented.

Starling (with him the Honourable *A. R. Scoble*, Advocate General,) for the opposing creditor and appellant, contended that the composition deed in this case not having been made for the benefit of all the creditors, but for the benefit of those only who should come in and sign it to the exclusion of the rest, was void: *Irving* v. *Gray* (*a*). Though that case was decided upon the English Statute of 1849, it only embodied the general principle that such deeds are only valid against not assenting creditors when they are for the benefit of all the creditors. The cases of *Fisher* v. *Bell* (*b*), *Tetley* v. *Taylor* (*c*), and *Ex-parte Morgan* (*d*), show the manner in which the Courts apply this principle. See also *Bloomer* v. *Darke* (*e*), and *Larpent* v. *Bibby* (*f*). There is no clause in the present composition deed in express terms excluding any of the creditors; but the trust being for those who sign before a particular day, some of the creditors are partially excluded from its benefit. See 1 Story Eq. Jur. S. 370 and S. 1036. As to the effect of the creditors not coming to sign or expressing their assent to the deed before the insolvency, see *Ilderton* v. *Castrique* (*g*), *Ilderton* v. *Jewell* (*h*), *Ex-parte Morgan* (*i*), *Ex-parte Rawlings* (*j*), *Biron* v. *Mount* (*k*), *Benham* v. *Broadhurst* (*l*). Independently of this objection, the facts before the Court

(*a*) 3 H. & N. 34. (*b*) 12 C. B. 363. S. C. 21 L. J., C. P. 228
(*c*) 1 El. & Bl. 521. (*d*) 32 L. J. Bkptcy 15.
(*e*) 2 C. B. N. S. 165. (*f*) 5 H. L. Ca. 481.
(*g*) 13 L. T., N. S. 506—B. C. (*h*) 33 L. J., N. S., C. P. 148, 151.
(*i*) 1 De G. Jo. & Smi. 288. (*j*) 1 De G. Jo. & Smi. 225.
(*k*) 24 Beav. 642. (*l*) 3 Hurl. & Colt. 472.

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show that this was a voluntary conveyance by the insolvent to the trustees, and that being so, it is void under Sec. 24 of the Indian Insolvent Act.

Macpherson (with him *Marriott*) for the respondents argued that the cases cited were decided upon the English Bankruptcy Acts, which give to the deeds executed under their provisions a greater effect than deeds have here or had in England before those Acts were passed. Before their passing, such deeds did not prevent the non-executing creditors from suing the insolvent personally, though they did protect the assets in the hands of trustees: *Johnson* v. *Fesemeyer* (*m*), *Raworth* v. *Parker* (*n*) (in which case the deed was executed in 1853), *Whitmore* v. *Turguand* (*o*), where the deed was executed in 1861. For the law in Bombay, see *Bamanji Mánikji* v. *Naoroji Pálanji* (*p*), and *Bápuji Auditrám* v. *Umedbhái* (*q*). Besides in England the mere fact of executing a composition deed is an act of bankruptcy. The affidavit of the insolvent, Dhanjibhái Kharsetji Ratnágar, shows that this conveyance was not voluntary, but that it was the result of *pressure*: *Mogg* v. *Baker* (*r*), *Edwards* v. *Glyn* (*s*), *Johnson* v. *Fesemeyer* (*t*), *Strachan* v. *Barton* (*u*), approving of *Mogg* v. *Baker*; Story's Equity Jurisprudence 1030 a; *Norman* v. *Thompson* (*v*), *Pickstock* v. *Lyster* (*w*), shows that apart from the English Act such a deed of composition is good.

WESTROPP, C.J.:—This is an appeal against an order of the 2nd July last by Mr. Justice Pinhey in the Insolvent Court, discharging with costs a previous order of the 7th May last made under Sec. 26 of the Statute 11 and 12 Vict., c. 21, in that Court by Mr. Justice Bayley on an *ex-parte* application of the opposing creditor, Jamsetji Ratnágar, whereby it was ordered that Fardunji Frámji Colah and two other

(*m*) 3 De G. & Jo. 13.
(*n*) 2 Kay & J. 163.
(*o*) 3 De G. F. & J. 107.
(*p*) 1 Bom. H. C. Rep. 233.
(*q*) 8 Bom. H C. Rep. A. C. J. 245.
(*r*) 4 M. & W. 348.
(*s*) 28 L. J. Q. B. 350.
(*t*) 3 De Gex. & Jo. 13, 24.
(*u*) 11 Exch. 647.
(*v*) 4 Exch. 755.
(*w*) 3 M. & S. 371.

gentlemen (trustees of a deed of composition, dated 16th December 1872, executed by certain traders, viz., the present insolvents and their partner, in favour of all of their creditors who, within three calendar months, should execute the same) should hold and retain all property belonging to the insolvents in their power or control, and all the proceeds thereof, until the Insolvency Court should make further order concerning the same.

The contention of the creditor, Jamsetji Ratnágar, on which he obtained the *ex-parte* order of the 7th May, was that the deed of composition is fraudulent and void under the 24th section of the Indian Insolvent Debtors' Act, 11 and 12 Vict., c. 21. (His Lordship here read the section.) The burden of proof that the deed is fraudulent and void, rests upon the attacking party, the opposing creditor, who obtained the *ex-parte* order. In order to establish that proposition, it was necessary that he should convince the Court that the deed was voluntary, the words of the 24th section being "shall voluntarily convey," &c. That section declares that such voluntary conveyances, as are contemplated by it, shall be fraudulent and void "as against the assignees" of the insolvent. The only assignee *in Insolvency* of the present insolvents is the Official Assignee. Such an occurrence as an appointment of trade assignees under the Insolvent Debtors' Act rarely or ever happens in Bombay. The application to Mr. Justice Bayley was neither made by the Official Assignee, nor in his name, nor with his consent. That alone would seem to be a very formidable objection to it. The cases of *Harland* v. *Binks* (*x*), *Janes* v. *Whitbread* (*y*), and *Bamanji Mánikji* v. *Naoroji* (*z*), may have some bearing on that point. It may be said that the Official Assignee might refuse to make or authorize such an application, and that then the creditor would be helpless. But this is not so. The Court would, in a proper case, and on the Official Assignee's being indemnified against costs, compel him to make the application, or to

(*x*) 15 Q. B. 713. (*y*) 11 C. B. 406.

(*z*) 1 Bom. H. C. Rep. 233.

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lend his name for the purpose, in the same manner as it has ordered him, on a former occasion, to take steps to set aside a sale which there seemed reason to believe to be improper. We are very far, however, from desiring to intimate an opinion that the Official Assignee was wrong in standing aloof in the present case. Facts, which will be presently mentioned, would, most probably, have deterred the Court from placing any constraint upon him. It is, however, unnecessary for us now to decide whether the application ought to have been made by, or in the name of, the Official Assignee, inasmuch as we are of opinion that, even supposing that such an application might be made on behalf of a creditor, not being an assignee, the application, in this instance, ought not to have been successful, because the deed of composition was not as we think, voluntary. That deed was, it is true, executed within two months previously to the filing of the insolvents' petition in Insolvency, and when they were in insolvent circumstances, but, in order to come within the 24th section, it must also have been voluntarily executed; and that, as we think, it was not, when we look at the meaning of the word "voluntarily" as illustrated by the cases cited by Mr. Macpherson. If there were pressure for such a deed by creditors, if, in fact, the demand for such a conveyance originated with the creditors, then those cases show that the conveyance will not be regarded as voluntary. Two creditors, the present opposing creditor and Pránjivandás Girdharlál, had, shortly before the execution of the deed, commenced suits against the insolvents; and other creditors had, as appears in the affidavit of the insolvent Dhanjibhái, demanded immediate payment of their debts, and the insolvents were unable to comply with those demands, and, under those circumstances, were constrained to convene a meeting of their creditors for the purpose of consulting them as to the best course to be pursued. There is not any evidence to show that, at that meeting, the proposition, that a deed of composition should be executed, originated with the insolvents. It lay upon the opposing creditor, Jamsetji Ratnágar, to establish that proposition. The deed of composition itself

says, "it was proposed," but does not say by whom. We are inclined to think that, if the proposition emanated from the insolvents, Jamsetji Ratnágar would have been prompt to say so in his affidavit. He says, indeed, that they called the meeting, and that certainly was so; and he adds that he believes, and is informed, that it was not "well attended," and that "most of the creditors present represented the friends and relatives of the said insolvents." He, however, although he had due notice that the meeting was to be held, was not present at it. The insolvent Dhanjibhái in his affidavit shows that the meeting was very well attended, *i.e.*, by twenty-one out of the thirty-three creditors then known, who, as well as five other creditors not present at the meeting on the same day (14th December 1872), signified their wishes* that a deed of composition should be executed; and that those twenty-six creditors represented Rs. 1,03,573 of the then known liability, Rs. 1,27,525. The opposing creditor, Jamsetji Ratnágar, after describing the summoning of the meeting, as already mentioned, proceeded to state that "a resolution was passed to wind up the affairs of the said insolvents by a private trust deed, and three persons were appointed trustees for the purpose, viz., Fardunji Frámji Colah, Keshavji Devji, and Mohanji Mánikchand, and that, in pursuance of the said resolution, a trust deed was prepared and executed on the 16th day of December 1872." There is not one word in his affidavit to show that, although the meeting was convened by the insolvents, the trust deed was suggested by or originated with them. The word "resolution" indicates the action of the creditors; creditors, too, who, it must be recollected, had been just before pressing the insolvents with "immediate demands for payment," as stated by the insolvent Dhanjibhái in the following passage of his affidavit: "In consequence of the said Jamsetji Ratnágar and several of our creditors having made immediate demands upon us for payment of their debts, and we being unable to meet the same, we deemed it advisable, under the circumstances, to

* *Note.*—As to what is a sufficient assent see L. R. 4 Exch. 197.—ED.

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leave our affairs in the hands of our creditors; for this purpose, the meeting of the creditors, referred to in the 4th paragraph of Jamsetji Ratnágar's affidavit, was held, on the 14th day of December 1872, at the office of Messrs. Manisty and Fletcher; the creditors, assembled at the said meeting, considered that it would be more advantageous to the interests of the general body of creditors if our affairs were liquidated under a private trust than through the instrumentality of the Insolvent Court. The application, which my co-partner, Peroshá Pestanji, and myself have made to the Honourable Court for the benefit of the Insolvent Act, was rendered necessary in order to protect our persons from arrest at the instance of the said Jamsetji Ratnágar and the firm of Pránjivandás Girdharlál, who, notwithstanding notice of the execution of the said trust deed, proceeded to judgment against us in the High Court in respect of their claims against us. The said firm of Pránjivandás Girdharlál has since come in under the said deed."

The result of that passage is that the insolvents, being sued by two creditors, and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted. The creditors then assembled, probably influenced to a considerable extent by the fact that two creditors were suing the insolvents, and would, on obtaining judgments, sweep away an undue share of the assets, resolved that the affairs of the insolvents should be wound up under a deed of trust. There is not a word to the effect that the course, taken thus unanimously by the meeting, was suggested or proposed by, or on behalf of, the insolvents. It lay, as we have said, upon Jamsetji Ratnágar to prove that the deed was voluntary, *i.e.*, that it emanated from the insolvents, and, in our opinion, he has failed so to do.

This certainly is not a case in which we should be disposed to rest satisfied with conjecture, or slight indications of a probability that the deed originated with the insol-

vents, or to aid a creditor impeaching the deed under such circumstances, as Jamsetji Ratnágar comes forward for that purpose. He is uncle of the insolvent Dhanjibhái, who tells us in his affidavit that he went to that uncle shortly before the insolvent's firm stopped payment, informed him of its great difficulties, and requested him to join with some of the other creditors who had promised to support the firm in an attempt to continue their business. The affidavit then proceeds thus: "The said Jamsetji Ratnágar, thereupon told me that my firm's assets were then still under my control, and that I should pay him in full, and make entries bearing prior dates in my books. I told him plainly that I could not do such a thing, for, notwithstanding his relationship with me, I was bound to treat him on a footing of equality with my other creditors. This refusal on my part gave the said Jamsetji Ratnágar great offence, and since that time he has severed all his connexion with me, and made it his business to annoy me and my co-partners." The affidavit then proceeded to narrate how the scheme to enable the insolvents to continue their trade under inspectors, sanctioned by other creditors, was defeated by Jamsetji Ratnágar shortly before the firm stopped payment. The allegation, that Jamsetji Ratnágar attempted to obtain a fraudulent preference, was contradicted by him in his affidavit in reply. But subsequent events, and an examination of the letters written on his behalf and of their dates, lead us to believe that his conduct was vexatious, and that his nephew's story as to the attempt to obtain a fraudulent preference is true. Jamsetji Ratnágar and Pránjivandás Girdharlál, notwithstanding the deed of composition, having proceeded with their suits against the insolvents, the latter were compelled to file their petition for the benefit of the Insolvent Debtors' Act on the 13th of January 1873. Decrees, with stay of execution, were given in the two suits. On the 22nd January, Jamsetji Ratnágar, being perfectly aware of the deed of composition of the 16th December 1872, and that the three months, within which

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he might come in and execute it, would expire on the 17th March, applied not to the trustees of the deed, with whom he must have known the books of the insolvents were lodged, but to the Official Assignee, on the 22nd January, for inspection of those books, and that he should call upon the insolvents to deposit them; and on the 17th February by another letter requested him to call upon the trustees to deliver them up, and said that the deed of trust was void under Sec. 24 of the Insolvent Act. On the 20th February the Official Assignee informed him that, on the 19th February, a motion, on behalf of Pránjivandás Girdharlál, for a declaration to that effect, was refused by Mr. Justice Gibbs. On the 8th March, the trustees' solicitors warned Jamsetji Ratnágar for the second time (the first being the 23rd December 1872) that the period within which he might execute the deed would expire on the 17th March. Not until the 15th March did any letter on his behalf demanding inspection of the books from the trustees reach them. It was dated the 13th March. On the 17th of March a *mehtá* named Chunilál, in the employment of the firm of Pránjivandás Girdharlál, inspected several books on behalf of Jamsetji Ratnágar, who alleged that the inspection given was insufficient, and that the books yielded no information, which allegation was denied. The firm of Pránjivandás Girdharlál abandoned their opposition to the trust deed and executed it. The applications to the Official Assignee were not, as we think, made with any *bonâ-fide* desire on the part of Jamsetji Ratnágar to see the books, but merely for the purpose of putting the Official Assignee in motion against the insolvents. If Jamsetji Ratnágar really desired to inspect the books, he would, in the first instance, have applied to the trustees in whose custody he perfectly well knew that they were. He made no such application until the eleventh hour, and then endeavoured to gain further time by picking a quarrel about the nature of the inspection given. As to that dispute we do not credit the affidavits filed on his behalf. We are of opinion that he had

ample time to inspect the books, if he had made an earlier application to the trustees, but that his affected desire to inspect was merely at first a manœuvre to annoy the insolvents, and, finally, to gain time.

The proviso, that creditors should execute the deed within three months, was not, at all events as regards those resident in Bombay, unreasonable. Under equitable circumstances courts have allowed creditors to come in after the time fixed, but never where the creditor has throughout set himself in vexatious antagonism to the deed. If the present opposing creditor has lost his opportunity, he has nobody to blame but himself. He has throughout manifested implacable hostility to the deed, and, as we believe, for no other reason than to endeavour to obtain, or because he has failed to persuade the insolvents to give to him, a fraudulent preference over the other creditors.

This deed, which, as the affidavit of one of the trustees shows, has been actually executed by forty-six creditors, representing Rs. 1,50,409-3-0, out of fifty-four creditors representing Rs. 1,81,757-11-11, and is now impeached by Jamsetji Ratnágar only, is certainly for the benefit of the creditors. The cases cited by Mr. Macpherson show that a deed executed under pressure, or upon urgent demand, even in favour of an individual creditor, has been upheld. *A fortiori*, should a deed, in favour of all of the creditors, executed at their instigation, or under pressure, or upon the suggestion of some of them, be supported. There is authority to that effect. Though such a deed does not prevent a non-executing and non-assenting creditor from suing the assignor, yet it does protect the property assigned fromexecution : *Harland* v. *Binks* (*a*), *Janes* v. *Whitbread* (*b*), *Bamanji Mánikji* v. *Naoroji Pálanji* (*c*). The cases which have been cited for the opposing creditor, and which were decided on the 224th section of the English Bankruptcy

(*a*) 15 Q. B. 713. (*b*) 11 C. B. 406.

(*c*) 1 Bom. H. C. Rep. 233.

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Act of 1849 (12 & 13 Vict., c. 106), or upon the 192nd section of the English Bankruptcy Act of 1861, are not in point here. Those enactments made composition deeds, executed in compliance with the statutory requisites, obligatory upon all of the creditors, whether assenting or non-assenting to the deed, and prevented them from suing the traders who executed such deeds. Hence those deeds are canvassed with greater strictness by the courts than deeds, such as the deed here, executed under a different state of law, which does not deprive the non-assenting creditor of his right of action.

For these reasons, we affirm the order of Mr. Justice Pinhey with costs.

This case was again mentioned on the 21st August, and the following supplementary remarks made by :—

WESTROPP, C.J.:—The indisposition of the learned Advocate General having unfortunately prevented him from attending in Court on the last day on which this case was argued, and then disposed of by the Court of Appeal (consisting of my brother GREEN and myself), he has since been so kind as to mention to us four cases, *Binns* v. *Towsey* (*d*), *Gibson* v. *Muskett* (*e*), *Jackson* v. *Thompson* (*f*), and *Thompson* v. *Jackson* (*g*), which, if he had been present, he had intended to cite on the question whether a conveyance, in trust for the benefit of all creditors who may sign the same, is a voluntary conveyance, and therefore void within the 24th section of the Indian Insolvent Debtors' Act.

There cannot be any doubt that where the trader so assigning has acted under pressure of his creditors, or where, as in *Arnell* v. *Bean* (*h*), some new consideration for the assignment has been given, such deeds have been upheld. On the other hand, where neither of those circumstances existed, similar deeds have been held voluntary, and, therefore, void.

(*d*) 7 A. & E. 869.
(*e*) 4 M. & Gr. 160.
(*f*) 2 Q. B. 887.
(*g*) 3 M. & Gr. 621; S. C. 4 Scott N. R. 234.
(*h*) 8 Bing. 87.

The four cases furnished to us by the Advocate General were of the latter kind. At page 871 of the report in 7 Ad. & E. of *Binns* v. *Towsey*, it is expressly stated that no evidence was given of the insolvent (who was in custody at the time) having executed the composition deed under pressure from creditors, and it was not contended that there was any new consideration; and, indeed, the deed recited that the proposal to assign emanated from the insolvent himself. Littledale, J., said: "If there were a new consideration, I should say that the assignment was not of itself voluntary: but the absence of such a new consideration makes it voluntary. If the assignment were made under the pressure of creditors, that also would make it not voluntary. These two circumstances, pressure of creditors and new consideration, constitute the only cases, which occur to me, in which the assignment would not be voluntary." And Coleridge, J., said: "Now this is the case of a party assigning, not indeed for a particular creditor, but for all, spontaneously, and without pressure or new consideration." In *Gibson* v. *Muskett* (*i*), the decision turned upon the fact that the trader Harris, being indebted to Martin, the latter, who had thrice refused to agree to a composition of 7*s.* 6*d.* in the pound, filed in the Court of Bankruptcy an affidavit of the amount due to him from Harris, pursuant to the Statute 1 and 2 Vict., c. 110, sec. 8, and a copy thereof with a notice requiring immediate payment of the debt was served on Harris on the 15th of March. Harris's goods were advertised for sale by an auctioneer on the 21st. An hour before the sale, notice was served upon him, at the instance of Martin, that proceedings had been instituted for the purpose of making Harris a bankrupt. The sale, however, took place, and, out of the proceeds, the auctioneer, on the 5th April, paid to various creditors of Harris, including the defendant, the composition of 7*s.* 6*d.* in the pound. Harris not having complied with the requisites of the Statute 1 and 2 Vict. c. 110, sec. 8, a fiat in bankruptcy, at the suit of Martin, was issued against him on the

(*i*) 4 M. & Gr. 160.

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9th April. Subsequently, the plaintiffs, being appointed the assignees of Harris in bankruptcy, sued the defendant for the amount paid to him. The Jury returned a verdict for the defendant, which the Court of Common Pleas set aside, because Harris, on the 5th of April, when the payment was made on his account to the defendant, must have known that, at any rate on the 6th, he would be in a situation that Martin might, at any time within two months afterwards, sue out a fiat in bankruptcy against him, unless he performed one of the three conditions of the Act, none of which he was able to fulfil. The payment, therefore, was one made in contemplation of bankruptcy, and invalidated by Statute 1 and 2 Vict. c. 110, sec. 59. In India there is not any enactment similar to the 8th section of that statute. The enactment for India, which approaches most nearly to it, is the 9th section of the Indian Insolvent Debtors' Act, 11 and 12 Vict., c. 21, under which the opposing creditor here has not taken any steps whatever. That section relates exclusively to traders, whereas the 24th section is general.

As to *Gibson* v. *Muskett*, it should be further observed that we do not find that there was any pressure put upon Harris to enter into the composition, or that any deed of assignment to trustees for his creditors was actually executed by him, and, in fact, only fourteen out of thirty-three creditors had agreed to accept the composition; so the majority was against it. These circumstances sufficiently distinguish that from the present case.

Thompson v. *Jackson* (*j*) and *Jackson* v. *Thompson* (*k*) (which arose upon one and the same deed, executed in May 1839 by Franks, a trader, assigning all of his property, except leasehold, to Thompson, a creditor, in trust for such of the other creditors as should execute the deed, and authorizing him to carry on the trade for the benefit of the creditors) approach, in some respects, more nearly to the present case

(*j*) 3 M. & Gr. 621; 4 Scott N. R. 234.

(*k*) 2 Q. B. 887.

than either of the two cases already mentioned, but differ from the present case in some important particulars. There was some conflict of evidence between Franks and his agent, an accountant named Jones, as to the quarter whence the suggestion proceeded that the deed should be executed. Franks said that the suggestion came from a creditor at the second meeting of creditors, whereas Jones, the agent, said that he proposed it at the first meeting on the part of Franks (see 2 Q. B. p. 890); and the Court and Jury would seem to have accepted the latter statement as the true history of what occurred. The question, whether the assignment to Thompson was voluntary or not, was, in *Jackson* v. *Thompson*, submitted to the Jury with a strong intimation of opinion by the Judge in favour of the affirmative. Most of the creditors had verbally agreed at the first meeting to accept a composition of 6s. 8d. in the pound, but none of them except Thompson executed the deed. It contained a clause that in the event of Franks subsequently taking the benefit of the Bankruptcy or Insolvency Laws, the release in the deed by the creditors should become void. In pursuance of the deed, Thompson carried on the trade at Franks' shop, but never took possession of the furniture in his dwelling-house. Franks, being arrested for debt on the 24th June 1839, took the benefit of the Insolvent Debtors' Act. Jackson and Garnett (creditors who had declined to accede to the composition) sued, as Franks' assignees in insolvency, to recover from Thompson the property of Franks. The Jury found the assignment to Thompson to be voluntary, and accordingly gave their verdict for the plaintiffs. The Court of Queen's Bench, being satisfied with the finding that the deed was voluntary, upheld the verdict, but admitted the soundness of the decisions by which general deeds of composition obtained by pressure of creditors, or for some new and valuable consideration, had been supported. In that case, the Court of Queen's Bench, and in *Thompson* v. *Garnett* (*l*) the Court of Common Pleas, deemed Franks to be the

(*l*) 3 M. & Gr. 621; 4 Scott N. R. 234.

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originator of the deed, and laid much stress on that fact, and on his having convened the meetings and instructed Jones to prepare the deed, and were of opinion that he was not subjected to any pressure to execute it. In the present case, however, we have clearly arrived at the conclusion that the insolvents were subjected to pressure for payment by their creditors, and under that pressure convened a meeting of their creditors in order to consult them as to the course which they should pursue; that the creditors then passed a resolution that the insolvents' affairs should be liquidated under a private deed of trust, as a more advantageous course for the general body of creditors, than that the winding up should be effected through the instrumentality of the Insolvent Court; and that the opposing creditor, on whom lay the burden of proof that the deed was voluntary, had failed to show that the insolvents suggested the passing of that resolution. The insolvents did execute such a deed, it has been signed by almost all of their creditors, and the only person who now objects to it, is the uncle of one of the insolvents, and, as already fully expressed by us, so objects for no other reason, in our opinion, than anger, because he failed in inducing the insolvents to give him a fraudulent preference over the other creditors. The 24th section of the Insolvent Debtors' Act declares such voluntary conveyances as therein mentioned to be fraudulent and void as against "the assignees" in insolvency. Here the assignee does not complain of the deed and was no party to the opposing creditor's application to Mr. Justice Bayley. In all of the cases recently mentioned by the Advocate General to us, it is observable that the assignees in bankruptcy or insolvency were, either as plaintiffs or defendants, parties to the suit; but in this case it is not so, and, under such circumstances as exist here, it would, we think, have been very difficult, indeed, to induce the Court of Insolvency to direct the Official Assignee to take proceedings for the purpose of frustrating the deed of trust and promoting the purpose of the opposing creditor, and thus defeating the wishes of the great majority of creditors.

It should also be noted that there is not here any such provision as to carrying on trade as in *Thompson* v. *Jackson* and *Jackson* v. *Thompson*, and as was held to invalidate a deed of composition against non-executing creditors in *Owen* v. *Body* (*m*).

The dicta of some of the Judges in *Davies* v. *Acocks* (*n*) to the effect that generally an assignment by a debtor, he being at the time in a state of insolvency, of all his property for the benefit of *all* his creditors, was not void within the meaning of the Statute 7 Geo. IV., c. 57, sec. 32 (similar to the 59th section of Statute 1 and 2 Vict., c. 110), were not approved in the four cases lately mentioned by Mr. Scoble, but, in all of those cases, the decision in *Davies* v. *Acocks* that the deed of composition, having been there executed under considerable pressure used by the creditors, was not voluntary, and was therefore not invalidated by the Statute 7 Geo. IV., c. 57, sec. 32, was approved. To the same effect is *Knight* v. *Fergusson* (*o*), where notwithstanding an erroneous recital that the proposition to assign originated with the insolvent, yet it being proved that the proposal emanated from a creditor, the deed of composition for the benefit of all of the creditors was upheld. See also *Doe* v. *Gillett* (*p*), *Mogg* v. *Baker* (*q*).

(*m*) 5 Ad. & E. 28.

(*n*) 2 C. M. & R. 461; S. C. 1 Gale 251.

(*o*) 5 M. & W. 389.

(*p*) 2 C. M. & R. 579.

(*q*) 4 M. & W. 348.