[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, Mr. Justice Bayley, Mr. Justice Green, and Mr. Justice West.

1877. October 13.

IN THE MATTER OF THE PETITION OF RATANSI KALIA'NJI AND SIX OTHERS.

Act VIII. of 1859, *Sections* 273 *to* 281—*Act X. of* 1872, *Sections* 3, *and* 223 *to* 343—*Act I. of* 1868, *Section* 6—*Construction—Procedure—Retrospective enactment—Judgment-creditor—Judgment-debtor—Decree—Execution—Imprisonment for debt—Discharge from arrest.*

Held, by a majority of the full Bench, (Sargent and Bayley, JJ., dissenting,) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII. of 1859, is not entitled, under Act X. of 1877, to be released on the coming into operation of the latter Act, if he have then been imprisoned for more than six months but less than two years.

Per WESTROPP, C. J.—The judgment-creditor has, under Act VIII. of 1859, the right (subject to be divested only under the circumstances stated) to have such judgment-debtor as the above detained in custody for two years unless he in the meantime fully satisfy the decree. Chapter XIX. of Act X. of 1877, *subdivision I., is essentially prospective throughout. Section 342 must*, therefore, be construed as relating only to future imprisonment, consequent on arrests to be made under Act X. of 1877. There is not in Chapter XIX. of that Act any trace of an intention on the part of the Legislature to deal with imprisonment commenced before the coming into force of the Act. Notwithstanding the repeal of Act VIII. of 1859 by Act X. of 1877, Act I. of 1868, section 6, saves the committal under Act VIII. of 1859, while that Act was in force, of a judgment-debtor, and also his consequent detention, commenced before the coming into force of Act X. of 1877, if such detention is to be regarded as "procedure." The effect of Act I. of 1868, section 6, and Act X. of 1877, *section* 3, taken in combination, is to remove from the scope of the latter Act all proceedings after decree initiated before its coming into force, and then still pending, and to leave within its range all proceedings after decree initiated after its coming into force, though the suits and decrees, in and under which such last-mentioned proceedings may be taken, were commenced and made before Act X. of 1877 came into force. Therefore, assuming the rule as to the retroactive force of enactments relating to procedure laid down in *Wright v. Hale* (6 H. & N. 227) to apply, still section 342 of Act X. of 1877 is not retrospective. But the question raised by the present application being one not merely of procedure, but of the divestment of the existing right of the judgment-creditor, the presumption is, (in the absence of express legislation, or direct implication to the contrary,) against giving retroactive force to section 342 of Act X. of 1877. The cases relating to questions of mere procedure, whereby a retroactive force has been given to enactments, reviewed, and distinguished from those by which no such force was given, by reason of their raising questions which affected vested rights.

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Per SARGENT, J.—Sections 1 and 3 of Act X. of 1877, taken in connexion with Act I. of 1868, section 6, show that, whilst saving all acts already done in execution of a decree in a suit instituted before Act X. of 1877 came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. The question raised by the present application is one of procedure, for the conditions and period under and for which the writ of imprisonment remains in force are as much matters relating to procedure as the issuing of the writ. Neither the wording of section 342 or the heading to Chapter XIX. of Act X. of 1877 necessarily confines the "imprisonment," therein referred to, to imprisonment commenced since that Act came into force. Though the judgment-creditor, by the arrest and imprisonment of his debtor, acquires a right different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, yet the rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, and must yield to the intention of the Legislature. It is difficult to suppose that the Legislature, when introducing a benign change into the law of debtor and creditor, in harmony with modern legislation, could have intended that two laws should continue for the next two years to operate concurrently, and that debtors imprisoned on the day before the latter Act came into force should be liable to be detained under the severer enactment.

Per BAYLEY, J.—Cases on the construction of statutes relating to procedure reviewed. History of imprisonment for debt before recent legislation in England, and before the abolition of the Supreme Court in Bombay. The change effected by Act VIII. of 1859 in the relative positions of debtor and creditor pointed out. *Coombe* v. *Caw* (13 Beng. L. R. 268) is inconsistent with the inviolable right claimed by the judgment-creditor to detain the judgment-debtor for two years. The sections of Act VIII. of 1859, relating to imprisonment for debt and its duration, are concerned with procedure alone. The definitions of "decree" and "judgment-debtor" in Act X. of 1877 are wide enough to include decrees passed, and judgment-debtors who have become such, before the coming into force of the Act. Sections 341 and 342 of Act X. of 1877 are applicable to proceedings pending when the Act came into force. The Legislature intended that the improvements introduced by the new Code should apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable. Section 3 of Act X. of 1877 implies that the procedure after decree shall be according to the provisions of that Act. *Sumboochundar Haldar* (1 Bourke 69) and *Williams* v. *Smith* (4 H. & N. 559) distinguished. Section 6 of Act I. of 1868 does not apply in the present case. When of two possible constructions, one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the Legislature at all, the former is to be preferred.

Per GREEN, J.—Apart from section 1, and the proviso to section 3, there is not, in Act X. of 1877, any provision as to its operation with regard to pending or past proceedings. Section 1 does not alter or abridge the legal effect, after 1st October 1877, of proceedings had and completed before that date; and in construing sec-

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tion 3 regard must be had to Act I. of 1868, section 6, though the general rule of construction contained in the last-mentioned section must yield to the intention of the Legislature expressed in any subsequent Act. The proviso to section 3, coupled with section 1 of Act X. of 1877, shows that the intention of the Legislature was that the repeal of the old Procedure Acts was to affect, to some extent, the procedure, other than that prior to decree, in suits instituted before Act X. of 1877 came into force. Ample effect would be given to this intention, while regard would still be had to section 6 of Act I. of 1868, by holding that in all steps and proceedings, not prior to decree, had and taken after the 1st October 1877 in suits instituted before 1st October 1877, the provisions of the new Code are to be operative. Cases giving a retroactive force to enactments relating only to procedure reviewed and distinguished. The right of an execution-creditor to detain his debtor till satisfaction of the decree for a period not exceeding two years, under a warrant issued before 1st October 1877 by virtue of Act VIII. of 1859, is in no wise affected by the new Code coming into operation.

Per WEST, J.—Cases on the retroactivity of enactments reviewed. Act VIII. of 1859 must have clothed the Court's orders with an abiding validity, and the judgment-creditors with an abiding right, or else with none at all. The ministerial officer is to act on the order of the Court according to its original purport. The order, in the absence of an express provision to the contrary, retains its validity, until it is withdrawn or varied. The new procedure, therefore, does not apply, whether as touching person or property, except, perhaps, in matters of mere administration or provisional arrangement. It cannot, at any rate, apply so as to deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. Any change in the relations of the parties can be made only in accordance with the later and existing law, but their previously subsisting relations continue to subsist as before. It is unlikely that the Legislature intended section 342 of Act X. of 1877 to apply to cases of imprisonment other than those arising under that Act. Section 342 is simply a negative provision, and the affirmative provisions with which it is to be read are to be found in the same chapter of the Act, and these can only be applied to cases arising after the Act has come into force. The close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The imprisonment under Act VIII. of 1859, as a "proceeding commenced," comes within the scope of section 6 of Act I. of 1868. Act VIII. of 1859, therefore, and not Act X. of 1877, governs the enforcement of the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment under the former Act. If the present application for discharge be a proceeding commenced since the new Act came into force, it is not integral with the previous proceedings in execution. If, on the other hand, it is integral with them, it is part of a proceeding commenced before the new Act *came into* force. In neither case can it bring within the new Act orders deriving their validity from another law.

RATANSI KALIA'NJI and six other persons, all of whom were debtors confined under the provisions of Act VIII. of 1859, on the Civil Side

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of the Common Gaol in Bombay, in execution of separate decrees passed against them, respectively, in different suits for amounts in each case exceeding Rs. 500, joined in a petition to the Chief Justice and Judges of Her Majesty's High Court of Judicature at Bombay, praying that the petitioners might be discharged, on the ground that they had all been in custody for upwards of six months, though less than two years, on the 1st October 1877, the date of the coming into force of the new Code of Civil Procedure, Act X. of 1877. The petition was presented to Mr. Justice Green, the sitting Judge in Chambers, who directed notice of it to be given to the respective judgment-creditors. This was accordingly done; but of the judgment-creditors only Trikamdás Shivrám and others, his co-plaintiffs in suit No. 212 of 1876, in which the petitioner Ratansi Kaliánji was a defendant, appeared to oppose the prayer of the petition.

Considering the importance of the question involved, viz., whether judgment-debtors, imprisoned under Act VIII. of 1859, who, on the coming into force of Act X. of 1877, had been in custody under civil process towards satisfaction of their judgment-debts for a period of six months or upwards, then became entitled, under sections 3 and 342 of the latter Act, to be discharged, the Chief Justice convened a full Bench of five Judges to hear it argued.

Their Lordships, though of opinion that the petition was unsustainable in form, seeing that there was not any unity of interest amongst the petitioners, except their detention under final process, and that, strictly speaking, each should have made a separate application for his discharge in the suit in which the decree in satisfaction of which he was detained had been made, yet deemed it advisable to consider the joint application on its merits, irrespectively of its infirmity in form.

Macpherson appeared on behalf of the petitioners to move the prayer of the petition.

Inverarity, for the plaintiffs in suit No. 212 of 1876, appeared to oppose the discharge of the petitioner Ratansi Kaliánji only. The question raised by the petition was, therefore, argued in reference only to the application of Ratansi Kaliánji; but it was under-

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stood that the decision would be binding on the other petitioners also.

Macpherson, for the petitioners:—Act VIII. of 1859, section 276, declares what it is necessary for the judgment-creditor to do after the judgment-debtor has been committed to prison in execution of the decree. Act X. of 1877, section 3, cl. 3, saves only the procedure prior to decree in suits instituted before 1st October 1877. The general principle in the construction of statutes is that no retrospective force is to be given to them so far as they affect existing rights, unless the language of the enactment shows that to have been the intention of the Legislature: *Moon* v. *Durden*. (1) But there is an exception in the case of statutes which deal only with procedure, and these have been construed so as to affect pending proceedings which had been commenced under prior enactments: *Kimbray* v. *Draper*, (2) *Ex parte Anderson*. (3)

[WESTROPP, C. J.:—How is this a question of procedure? There is no fresh proceeding necessary to detain the prisoners after they have been once committed to prison.]

The period during which the prisoners are detained, is a part of the procedure; so are the payments which have from time to time to be made by the execution-creditors in order that the prisoners may be detained. The warrant, under which the prisoners are committed to prison, orders their detention "till the further order of the Court," and a fresh proceeding is necessary for their liberation. The coercive power exercised by the Court on the prisoners is a part of the execution of the decree, and continues from day to day till the liberation of the prisoners when the decree is satisfied, or they have been detained for the full period allowed by the Act, or the detaining creditors fail to pay the subsistence money.

[WESTROPP, C. J.:—The creditor has, under Act VIII. of 1859, an existing right to detain his debtor till payment of the debt or the expiration of two years. To shorten that period would be to give Act X. of 1877 a retrospective force affecting this existing right.]

(1) 2 Ex. 22. (2) L. R. 3 Q. B. 160.
(3) L. R 5 Ch. Ap. 473.

The right to enforce a cause of action is not such a right as, under the rule of construction first cited, must be preserved in spite of a subsequent enactment, for the enforcement of a cause of action is merely procedure. The procedure continues till the decree is satisfied or the prisoner discharged. The creditor's right to imprison his debtor is only a means of enforcing the decree, and, therefore, is a part of the procedure : *Wright* v. *Hale*. (1)

[SARGENT, J., referred to *Attorney General* v. *Sillem*. (2)

BAYLEY, J., referred to *Framji Bomanji* v. *Hormasji Barjorji*. (3)

WESTROPP, C. J., referred to *Williams* v. *Smith*. (4)]

There is a distinction between seizure of goods and imprisonment of the person, for the former is an actual satisfaction of the decree : *Kimbray* v. *Draper*, (5) *Freeman* v. *Moyes*. (6)

[WESTROPP, C. J., referred to 32 and 33 Vic., c. 62.

BAYLEY, J., referred to *Pardo* v. *Bingham*. (7)]

Act X. of 1877, sections 341 and 342, provide that, on the expiration of six months from the date of his imprisonment, the judgment-debtor is to be at once discharged. The terms "judgment-debtor" and "decree" are defined in section 2. Section 3 shows that the term "decree" is not to be confined to decrees passed under Act X. of 1877, and section 340 applies to sums disbursed before the coming into force of this Act. Act I. of 1868, section 6, is wide enough in its terms to make it possible to argue that *Wright* v. *Hale*(8) should not apply in India; but the real object of the Legislature in enacting Act I. of 1868 was that it should apply only to those Acts which are not inconsistent with it, as Act X. of 1877 is. This Act, therefore, must be construed independently of Act I. of 1868. The term "procedure" does not necessarily imply the taking of any step by either party, and the procedure in a suit does not terminate till satisfaction of the decree.

(1) 30 L. J. Ex. 40; S. C. 6 H. & N. 227.
(2) 33 L. J. Ex. 226; S. C. 10 H. L. 704.
(3) 3 Bom. H. C. Rep. 49 O. C. J.
(4) 28 L. J. Ex. 286; S. C. 4 H. & N. 559.
(5) L. R. 3 Q. B. 160. (6) 1 A. & E. 338.
(7) L. R. 4 Ch. Ap. 735. (8) 30 L. J. Ex. 40; S. C. 6 H. & N. 227.

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[WEST, J., referred to *Reg.* v. *Vine* (1) and *Phillips* v. *Eyre.* (2)]

There is no right vested in the plaintiff within the meaning of those decisions which rule that no retrospective force is to be given to a later Act so as to affect a vested right existing under a prior enactment; even if there were, the sections relating to imprisonment being of a penal nature must be construed liberally, that is, in favour of the petitioners.

Inverarity for the respondents who opposed:—A retrospective operation is not to be given to this Act: Broom Leg. Max. 34, *Evans* v. *Williams.* (3) Its whole phraseology shows that the sections relating to execution apply only to future applications for execution to be made under this Act. The argument for the petitioner is, at best, only an inference drawn from section 3 of Act X. of 1877. At the passing of that Act the decree had already been made and the defendant imprisoned under the old Act. The plaintiff, therefore, then had the right to detain the defendant for two years, though that right was liable to be divested either by the defendant paying the judgment-debt, or by the plaintiff failing to pay the subsistence money. Of that right, subject to such liability, no one could deprive the plaintiff under the old Act, and it is nowhere expressly taken away by the new. The sections relating to imprisonment relate to imprisonment under the new Act and not under the old. This appears clearly from the wording of section 339. That section occurs in Chapter XIX., which is headed "Of the Execution of Decree." This whole chapter must be held to refer to future executions, and, therefore, section 342 which occurs in this chapter, must be held to refer to future imprisonments to be made under this Act. As to consulting the heading of the chapter to assist in the construction of a section, see *Marriage* v. *Eastern Counties Railway Company,* (4) *Reg.* v. *Krishna Parashram,* (5) and *Krishnapa Santu* v. *Panchapa Gurpadapa.* (6) When Act VIII. of 1859 first came into force, it was held that pending proceedings in execution already commenced were to be governed not by it but by the

(1) L. R. 10 Q. B. 195.
(2) L. R. 4 Q. B. 225.
(3) 2 Dr. & Sm. 324.
(4) 9 H. L. 32.
(5) 5 Bom. H. C. Rep. 69 Cr. Ca.
(6) 6 Bom. H. C. Rep. 258 A. C. J.

former Acts. *Sumboochunder Haldar*,[1] which being a full Bench ruling, would seem to throw doubt on *In re Muddoosooden Dass*.[2] See also *Attorney General* v. *Sillem*.[3] Act I. of 1868, section 6, prevents the repeal of Act VIII. of 1859 by Act X. of 1877 from invalidating any act or proceedings previously done or commenced.

Macpherson, in reply :—Section 339 of the Act of 1877 may be anomalous with regard to debtors imprisoned under the Act of 1859, but it is equally so with regard to those imprisoned under the new Act, section 338. It does not follow that, because some sections of the new Act apply only to persons imprisoned under it, therefore no section can apply to those imprisoned under the old Act.

Cur. adv. vult.

WESTROPP, C.J. :—On the 1st of May 1876 a warrant of arrest, under section 201 of the old Civil Procedure Code (Act VIII. of 1859), was issued against Ratansi Kálianji pursuant to a Judge's order of the 29th April 1876, upon an application for execution of a decree of the 27th April 1876. Ratansi Kaliánji was arrested upon the 30th of October 1876, was brought before a Judge in Chamber on the 31st October 1876, and then finally committed by the Judge, "until he (Ratansi Kaliánji) satisfy the amount of the decree passed against (him) the said Ratansi Kaliánji in the above suit." Then followed in the same order the usual direction, under section 278 of Act VIII. of 1859, that the plaintiffs should pay to him subsistence allowance at the rate of 4 annas *per diem*, by monthly payments in advance. The receipts indorsed on the Judge's order by Mr. Lake, for the superintendent of the gaol, and by the sheriff, and the certificate of the latter, show that the detention of the prisoner Ratansi Kaliánji commenced more than six months previously to the 1st October 1877, and has not yet reached two years. Similar receipts indorsed on the Judge's orders, under which the other six petitioners, namely, Gulabchand Nemchand, Soodershun Santookrám, Premji Nandoo, Rustomji Jámásji, Motilál Kaliándás, and Ezekiel Solomon, have been finally committed in execution, show that they also have, respectively, been detained for more than six

(1) 1 Bourke 69. (2) 2 Hyde 215. (3) 10 H. L. 704.

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months and less than two years. Their judgment-creditors have not appeared; but as those creditors have not assented to the discharge of the six last-named petitioners, we must consider with respect to them, as well as with respect to Ratansi Kaliánji, whether they are, under the new Civil Procedure Code, entitled to be discharged from custody. As there is not, for the purpose of the present application, any substantial difference between their cases and that of Ratansi Káliánji, it will be sufficient if in the following remarks I name him only.

When he was finally committed on the 31st October 1876, his judgment-creditors, the plaintiffs, had, on the condition of regularly paying the subsistence-money, then by the Judge, in the order of that date, directed to be paid, the right under section 278 of the old Code combined with section 201 of the same to have him detained in custody for two years, if he did not in the meantime fully satisfy the decree. Section 201 enacts that "if the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary; and, if such party be other than a defendant, the decree may be enforced against him in the same manner as a decree may be enforced against a defendant." Section 278 provides that "a defendant shall be released at any time on the decree being *fully satisfied*, or at the request of the person at whose instance he may have been imprisoned, or on such person omitting to pay the allowance, as above directed. No person shall be imprisoned on account of a decree for a longer period than two years, or for a longer period than six months, if the decree be for the payment of money not exceeding Rs. 500, or for a longer period than three months, if the decree be for the payment of money not exceeding Rs. 50. This right of detention was subject to the prisoner's right to apply for his discharge under the Imperial Statute (11 and 12 Vic., c. 21) for the relief of insolvent debtors in the Presidency towns in India, or, at his option, to such relief as he might obtain under sections 280 and 281 of the old Civil Procedure Code. It was not subject to the relief contemplated by sections 273 and 274 of that Code, and by section 8 of Act XXIII. of 1861, inasmuch as those sections are applicable only to the judgment-

debtor, when he is first arrested and brought before the Judge or Court, and not after the Judge has made his final order of committal. This is manifest upon reading those sections, and there is an express decision on the point with regard to the last of them (section 8 of Act XXIII. of 1861) by Mr. Justice Norman: *Smith* v. *Boggs*. (1)

There is nothing inconsistent with this in the case of *Coombe* v. *Caw* (2) which arose under section 273, when the debtor was first arrested under the decree and brought before the Judge previously to committal. In fact, Couch, C.J., there mentions section 280 as the section which should be resorted to after committal. The question as to the applicability of that section, when the debtor has resorted to the Insolvent Court, has been considered in Calcutta (3) by Phear, J., but need not be now discussed, inasmuch as neither Ratansi Kaliánji nor any of the other petitioners have sought relief under the Insolvent Debtors' Act, or under sections 280 and 281 of the old Civil Procedure Code. Hence, up to the coming in force of the new Code, the right of detention on the part of the judgment-creditors was in full force. The faint contention on behalf of Ratansi Kaliánji, that his present detention is of a penal nature, is wholly unsustainable. His imprisonment is purely civil, being a detention towards satisfaction of a judgment-debt. The original warrant of arrest directs his arrest so that he may be brought before the Court "to answer unto the plaintiffs for the sum of Rs. 11,995-13-8, being the amount of the said decree;" and the subsequent order of committal, signed by the Judge, runs thus: "I do order that the sheriff do detain the said Ratansi Kaliánji *until he satisfy the amount of the decree* passed against the said Ratansi Kaliánji in the above suit." The order of committal of the petitioner Ezekiel Solomon, signed by my brother Sargent, directs detention until satisfaction of the warrant of arrest. The warrants against all of the petitioners are in the same printed Court form as in the case of Ratansi Kaliánji, and mention the amount of each decree. The Judge's orders of committal slightly vary in form—some directing detention until satisfaction only, others until satisfaction or further order; others until payment (which would be satisfaction) or further order. Thus it will be

(1) 5 Beng. L. R. Appx. 21.
(2) 13 Beng. L. R. 268; S. C. 22 Calc. W. R. 257 Civ. Rul.
(3) 1 Ind. Jur. N. S. 247; 2 Ind. Jur. 91.

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seen that they all sound in satisfaction, and none in penalty. I treat the variations in form as of no importance. The question in all of the cases is one and the same, viz., whether by the operation of the new Code the judgment-creditors have been deprived of their right of detention of the judgment-debtors for two years from the respective dates of their committals by the Judge, subject to the qualifications which I have already stated. If we decide this question in the affirmative, we must give a retrospective effect to the 342nd section of the new Code.

On the subject of giving such a construction to statutes, Baron Rolfe (afterwards Lord Cranworth) in *Moon* v. *Durden*, (1) a leading case on that topic, said: "The general rule on this subject is stated by Lord Coke in the Second Institute 292 in his Commentary on the Statute of Gloucester: '*Nova constitutio futuris formam imponere debet non præteritis;*' and the principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." Baron Aldersen pointed out in that case the extensive and dangerous consequences that might follow if the Courts did not abide by that general rule, and Baron Parke (Lord Wensleydale) said that it "is deeply founded in good sense and strict justice, and has been acted upon in many cases." *Moon* v. *Durden* (2) has received the approbation of many Courts, also of H. M.'s Privy Council (*Doolubdass* v. *Ramloll* (3) and of the American Courts (1 Kent. Comm. 511, 10th ed.), and is now indisputable law.

While this is conceded on behalf of the plaintiffs, and that accordingly, as a *general* rule, a retroactive effect should not, in the absence of express language or necessary implication showing that the intention of the Legislature is otherwise, be given to statutes or Acts, it is contended that this rule is not *universal*, and is not only inapplicable to statutes or Acts regulating procedure, but that the presumption is that, *primâ facie*, enactments regulating procedure are intended to be retrospective.

(1) 2 Exch. 22; see p. 33. (2) 2 Exch. 22.
(3) 7 Moore P. C. 239; see p. 256.

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For the present, assuming that exception to the general rule against giving retroactivity to enactments to be true in its full breadth as thus propounded, I purpose to consider whether the new Civil Procedure Code, when taken in connexion with the general Clauses Act (I. of 1868), section 6, and also, (in order to avoid being misled by limiting the tests to a single rule), when subjected to the other recognized canons for the interpretation of statutes, is, as to the duration of civil imprisonment, retrospective, and entitles the petitioners to succeed in their application.

I have read with minute attention the whole of chapter XIX. of the new Code, extending from section 223 to section 343 (both inclusive), and with the single exception of the last clause in section 230, which is of a saving character, and has no bearing upon the present question, I find the language of that chapter to be purely prospective, *i.e.*, to deal with the future only, and not to touch any proceeding already taken in execution of decrees. Bearing in mind the rule as stated by Burton, J., in *Warburton* v. *Lowland d. Ivie*, (1) and commended by Parke, B., (2) and Jervis, C. J., (3) that in the construction of statutes, "in the first instance, the grammatical sense of the words is to be adhered to;—if that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged so far as to avoid such an inconvenience, but no further," I proceed to consider the portion of that chapter which is especially material with respect to the present application. That portion is subdivision I., which treats "of arrest and imprisonment," and which commences with section 336 and ends with section 343. That subdivision appears to me to be essentially prospective throughout, and to refer to future arrest and future consequent imprisonment, and future discharge from the same arrest and same imprisonment, and no other. It preserves an unbroken silence with regard to imprisonment and discharge from the same, where such imprisonment was a continuing imprisonment at the time when the Act came into force. Section 336 commences thus:—"A judgment-

(1) 2 Hud. & Br. 648. (2) 1 M. & W. 264. (3) 15 C.B. 484.

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debtor *may be* arrested in execution of a decree," &c. All of the provisoes in the subsequent clauses of that section also sound in the future. Section 337 runs thus :—"Every warrant for the arrest of the judgment-debtor *shall* direct the officer entrusted with its execution to bring him before the Court with all convenient speed," &c. Section 338 :—"The Local Government *may* from time to time prescribe scales, graduated according to rank, race, and nationality, of monthly allowances payable for the subsistence of judgment-debtors." Section 339 :—"No judgment-debtor *shall* be arrested in execution of a decree unless and until the decree-holder pays into Court" subsistence-money, &c. The subsequent clauses in that section all sound *in futuro*, ex. gr.: "The first payment *shall* be made for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail." Section 340, further treating of subsistence-money, is also in the future. Section 341, to which we next come, is an important section, relating, as it does, to the circumstances under which the debtor may be discharged: "*The judgment-debtor* shall be discharged from jail, &c." "The judgment-debtor," here spoken of, appears to me, by all the usual rules of grammatical construction, to be the only judgment-debtor of whom the sub-chapter (Division I.) has theretofore treated, namely, a judgment-debtor arrested and committed to prison under the new Code. This section proceeds to state the circumstances under which the judgment-debtor shall be discharged, viz :—

"(*a*) on the decree being fully satisfied," or

"(*b*) at the request of the person on whose application he has been imprisoned," or

"(*c*) on such person omitting to pay the allowance as *hereinbefore* directed," or

"(*d*) if the judgment-debtor be declared an insolvent, as hereinafter (Chapter XX.) provided," or

"(*e*) when the term of his imprisonment, as limited by section 342, is fulfilled."

Here in clause (*e*) the Legislature, in using the phrase "his imprisonment," appears to me to speak of the imprisonment of no other judgment-debtor than of him of whom the whole of the

preceding part of this section (341) and of the preceding part of sub-chapter I. have been conversant, namely, a judgment-debtor arrested and committed in execution under the new Code. The two remaining provisions in section 341 are not material in the present question. Before discussing section 342, it is convenient to mention section 343, which closes the sub-chapter I. on arrest and imprisonment. Section 343 is conversant only of future arrests, and enacts that "the officer entrusted with the execution of the warrant *shall* endorse thereupon the day on, and manner in, which it was executed," and provides for the return to be made to it in certain events, &c. Reverting, then, to section 342, upon which the petitioners ground their application, we find that it runs as follows :—"No person shall be imprisoned in execution of a decree for a longer period than six months; or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees." Finding this section in a sub-chapter, the whole of the rest of which appears to treat of future arrest and the imprisonment consequent upon that future arrest, it seems to me to be the most natural construction of section 342 to hold that to such imprisonment only does it relate. It would be, I think, a forced construction to apply it to any other imprisonment. I have failed to discover any trace, in the rest of sub-chapter I. or of the main chapter XIX., of which that sub-chapter forms a part, of any intention on the part of the Legislature to deal with imprisonment commenced before the new Code came into force. We have, however, been referred to section 3 in the first chapter of the new Code, which section repeals the enactments specified in the first schedule annexed to that Code; amongst which enactments are the old Civil Procedure Code of 1859, and Act XXIII. of 1861. The portion of section 3 of the new Code which is especially relied upon for the petitioners is the following proviso :—"Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force," *i.e.*, before the 1st October 1877. It is argued for the petitioners that this saving of procedure, prior to decree in suits commenced before the new Code came into force, implies that all proceedings subsequent to decree in such suits (including proceedings which had been initiated before the 1st October 1877, and have been continued after that

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day, as well as proceedings initiated after that day) must be governed by the new Code, inasmuch as the old Code stood repealed by the new Code on the 1st October 1877. But, in seeking to arrive at the true construction of the new Code, we are bound to keep in view the provisions of the General Clauses Act I. of 1868, of which the sixth section is of vital importance on the present question. It provides that "The repeal of any statute, Act, or regulation shall not affect *anything done*, or any offence committed, or any fine or penalty incurred, *or any proceedings commenced, before the repealing Act shall have come into operation.*" So far as that enactment preserves "anything done" previously to the repealing Act taking effect, it merely embodies the law as previously declared by eminent judges: for example, Lord Tenterden in *Surtees* v. *Ellison*[1] said:—"It has long been established, that, when an Act of Parliament is repealed, it must be considered (*except as to transactions past and closed*) as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the Legislature." That statement of the rule is adopted *in totidem verbis* by Lord Justice Turner in *Grisewood and Smith's case*.[2] The same clause in the General Clauses Act in preserving "proceedings commenced" before repealing Acts come into operation, seems to have been penned in the spirit of the doctrine laid down in 1837 by Lord Denman and his colleagues of the King's Bench in *Hitchcock* v. *Way*,[3] when they said that they were "of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in a suit, unless the Legislature expresses a clear intention to vary the relation of litigant parties to each other." The committal under the old Code, while yet in force, of a judgment-debtor by a Judge towards satisfaction of a decree against that debtor, being a *thing done* under that Code, is clearly within the language and meaning of, and saved by, the General Clauses Act, section 6, notwithstanding the repeal of the old Code under which that thing was done. And, further, I think that, if the continued detention of that judgment-debtor is to be regarded as procedure, that detention, having com-

(1) 9 B. & C. 750; see p. 752. (2) 4 De G. & J. 544; see p. 557.
(3) 6 A. & E. 943, 951.

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menced before the new Code, which repealed the old Code, came into force, is expressly saved by the General Clauses Act, and cannot be governed by the new Code. There would, indeed, be some weight in the argument that the express saving, in section 3 of the new Code, of procedure previous to decree, in suits commenced before the new Code came into operation, excluded by implication the operation of section 6 of the General Clauses Act as regards procedure after decree, which procedure had been commenced before the 1st October 1877 and was still pending at that date, if the new Code had made any provision for proceedings, after decree, commenced before the 1st October 1877 and then still pending. But the new Code has not made even the semblance of such a provision. For instance, that Code is completely silent as to the continuance of custody under arrests and committals (after decree) made before the new Code came into operation. If that continuance of custody be not sustained by the repealed Code taken in combination with the saving of things done and proceedings commenced, contained in section 6 of the General Clauses Act, such continuance of custody would be wholly without support. In illustration of the results of leaving out of view the General Clauses Act, I will take first the case of a debtor arrested by the sheriff late in the afternoon of the 30th of September 1877 under a warrant issued under section 201 of the old code and when it is too late to bring him before the Judge sitting in Chamber to be dealt with under section 273 of that Code. After 12 o'clock that night his detention by the sheriff would become illegal, and he could not lawfully keep him in custody sufficiently long to bring him before the Judge at the opening of the Court on the following morning; and, even if he did so, inasmuch as section 336 of the new Code relates only to arrests made after the 1st October 1877 and to committals upon those arrests, the Judge could not commit the debtor to prison unless the old Code be, as regards proceedings (after decree) commenced before the 1st October 1877, kept alive by section 6 of the General Clauses Act. Take, again, the case of a debtor whose arrest by the sheriff and committal by the Judge were complete before the 1st October 1877. The committal having taken place on the 30th September, if the continuance of the custody under that committal be not supported by the old Code taken together with section 6 of the

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General Clauses Act, the debtor would have become entitled to his discharge on the 1st October 1877 after having spent but one night in prison.

These, in consequence of no provision having been made in the new Code as to the continuance of custody commenced before the 1st of October 1877, (section 336 of the new Code, which regulates arrest and committal, relating exclusively to future arrests and future committals following on such future arrests), would, (on the theory that the detention under the arrest and the detention under the committal are, so long as they endure, to be deemed constantly continuous procedure on the part of the Court, which theory is contended for on behalf of the petitioners,) be amongst the results of holding that the repeal of the old Code was complete as well with respect to proceedings (after decree) pending when the new Code came into operation, as with respect to proceedings (after decree) commenced subsequently to that event. The petitioners' counsel, however, felt himself compelled to admit that neither fresh warrants of arrest nor fresh orders of committal would be necessary in order to legalize the continuation, after the 1st October 1877, of the imprisonment of judgment-debtors, towards satisfaction of decrees exceeding Rs. 500, committed before the 1st of October 1877, and who had not been in prison for six months. Yet that continuation of imprisonment has nought save the committal made under the old Code to support it, which committal would cease to be operative for that purpose unless proceedings (after decree) commenced before the 1st of October 1877, but continuing beyond that day, are supported by the repealed Code combined with section 6 of the General Clauses Act. It has already been pointed out that the directions in the new Code as to the payment of subsistence allowance relate only to debtors arrested and committed under the new Code. Section 339, which alone regulates the order to be given by the Judge as to subsistence money, is dumb as to the continuance of the payment of it to debtors committed under the old Code; and sections 338 and 340, which also relate to that money, are equally silent as to such debtors. Section 341, cl. (*c*), lays down only what shall be the result of an omission to pay the allowance as *hereinbefore* directed, *i.e.*, previously directed in the new Code; which direction

is contained in section 339, and is in respect of persons arrested under the new Code.

It seems to me impossible to account, in a manner respectful to the Legislature, for its silence in the new Code on these matters, except on the highly reasonable supposition that it deemed them to be sufficiently provided for by section 6 of the General Clauses Act, either as things done, or proceedings commenced before the new Code, which repealed the old Code, came into operation. This hypothesis is perfectly consistent with the existence of an ample field for the operation of section 3 of the new Code, removing, as such a supposition would, from the scope of that Code such proceedings (after decree) as had been initiated before and were pending when the new Code came into force, and leaving within its range all proceedings (after decree) initiated subsequently to its coming into force, even though the suits, in which such last-mentioned proceedings may be taken, are suits which were commenced and the decree itself was made before the new Code came into operation. Such an interpretation of section 3 of the new Code would be in complete harmony with the elementary rule, that construction is to be made of all the parts of a statute together, and not of one part only by itself,—a stringent principle of English law. It is given as the foremost rule by Lord Coke for arriving at "the most natural and genuine exposition of a statute," Co. Lit. 381 *a*; and in *Lincoln College Case* it was resolved by the Common Pleas "that the office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself; "*nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit.*"(1) This canon of interpretation has been exemplified by numerous instances collected by Sir P. Benson Maxwell in his recent useful treatise on statutes, p. 25 *et seq.*, and has the advantage of being founded on the strongest common sense, and of an antiquity not less than the age of Justinian:— "*Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere,*" being the *dictum* of Celsus as laid down in the Digest Lib. I., Tit. iii., pl. 24. We thus treat section 342 as in the same sense with the other sections of the chapter and sub-chapter of

(1) 3 Rep. 59 *b*.

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the new Code amongst which we find it set. We apply to section 3 in the first chapter an interpretation which does not give to section 342 a complexion different from its surrounding context, yet which assigns to it an ample operation, without, by a forced and unnecessary implication, extending its scope to the extinction of proceedings commenced under the old Code and pending when the new Code came into force, for which proceedings the new Code has not provided any substitute, nay more, as to which it is absolutely voiceless. And, lastly, we respectfully regard the Legislature as keeping steadily within its view the law, which, considerately and justly, it has prescribed in the General Clauses Act for the interpretation of repealing enactments passed by itself, whereby proceedings, founded on costly decrees, and commenced before the repealing statute becomes law—proceedings themselves the products of further expense to the creditor—are saved from becoming nugatory when the Legislature repeals the laws under which they were instituted. The Legislature is thus shielded from the imputation of a hasty and capricious alteration of the law without regard to the interests of those who have, in pursuance and on the faith of that law, been with all due diligence seeking the enforcement of their just rights, as already ascertained by judicial determination, and who had, as in the present instance, perfected those proceedings, and whose consequent right of detention of their defaulting debtors was in course of actual fulfilment. It may be said that we ought to promote the development of the latest policy of the Legislature, in diminution of civil imprisonment, as indicated in section 342 of the new Code, because it is a humane and indulgent policy. It is our undoubted duty loyally to carry into effect the intentions of the Legislature. But where those intentions, as disclosed in the Code itself, wear an aspect purely prospective; were we, in advancement of a supposed policy, to give to them a retroactive effect, we should travel beyond our powers, and, instead of limiting ourselves to the duty of expositors and administrators of the law, should usurp the office of supplementary legislators. Again, our consciences are equally bound to notice as well the earlier, while yet in force, as the later ordinances of the Legislature, and so to administer both, where they may consistently stand together, as to give to each a full and fair operation, without undue curtailment of the intended effect of

either. If their respective provisions admit of reconcilement with each other, it is, I venture to think, our bounden duty so to reconcile them. Should the Courts, departing from rules of exposition, venerable by time and justified by experience, in the pursuit of the phantom of some possible, but unexpressed and unindicated, policy of the Legislature, yield themselves up to the guidance of simple conjecture, there cannot be much safety in their construction of written law. In recapitulation, then, I would say that, to me it appears that the location of section 342 in the context of a chapter and sub-chapter purely prospective,—the absence of any provision in the new Code in respect of the continuance of imprisonment, whose inception was before the new Code came into force,—the facility of reconciling its third section with the 6th section of the General Clauses Act, which protects things done and proceedings commenced under repealed Acts, and thus directly controls the provision in the new Code whereby the old Code is repealed,—are circumstances which, taken together, completely repel and exclude the application to section 342 of the new Code of the alleged rule that *primâ facie* all Acts regulating procedure should be presumed to be retrospective.

It appears also to be improbable that the Indian Legislature would, by such a side wind as the petitioners seek to raise out of section 3 of the new Code, have sought to effect the intention which those petitioners attribute to that Legislature. When the Imperial Legislature in 1869 was abolishing thenceforward imprisonment for debt in England, and resolved also on dealing with persons in custody at the passing of the statute for thus altering the law (32 and 33 Vic., chap. 62), it did not leave this latter intention to any slender or imperceptible inference, but provided by the seventh section of that statute in express terms for the discharge of such persons. There is not any reason for supposing that the Indian Legislature would, if its policy were the same, be less candid and bold in its avowal.

So far I have discussed the enactments bearing upon this case on the assumption that the usual presumption against a retrospective construction of statutes and legislative Acts is not applicable to it. And I have, independently of the aid of any such

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presumption, and upon the hypothesis that the presumption is *primâ facie* the other way, arrived at the conclusion that section 342 of the new Code is not retrospective. I am, however, further of opinion, that were it necessary to resort to the usual presumption against a retrospective interpretation, we might legitimately and in conformity with the preponderance of authority call it in aid in this case. In support of the proposition that the rule against a retrospective construction, unless the language be express or the implication be so direct that without such an interpretation the thus manifested intention of the Legislature would be frustrated, is not applicable to enactments regulating procedure, *Wright* v. *Hale* (1) has been cited. It arose upon the Stat. 23 and 24 Vic., c. 126, sec. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than £5, he shall not be entitled to any costs, if the Judge certifies to deprive him of them, and enables a Judge so to certify in an action commenced before, but tried after, the passing of that Act. Pollock, C.B., said:—"There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts." After referring to such matters as mere regulations of practice, he continued thus:—"Rules as to costs, to be awarded in an action, are of that description, and are not matters in which there can be vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing his suit, &c." Speaking of the certificate, he said:—"That is an act to be done at the trial which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an *ex post facto* law does not arise." Barons Channell and Wilde based their judgments on the distinction between enactments dealing with procedure and those dealing with rights. And it should be noted that *Williams* v. *Smith*, (2) a decision of the

(1) 6 H. & N. 227; S. C. 30 L. J. N. S. Exch. 40; 6 Jur. N. S. 1212.
(2) 4 H. & N. 559; S. C. 28 L. J. Ex. 286.

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same Court (the Exchequer), and to which I shall presently again advert, was cited to the Court by Mr. Montague Chambers; and of it, and of *Jackson* v. *Woolley*, [1] and other cases also cited by him, Baron Wilde (now Lord Penzance) said:—"The cases cited by Mr. Chambers are cases relating to rights, which were not affected; those referred to by Mr. Hawkins were cases relating to procedure:" so it is very evident that Baron Wilde had no intention of denying the authority of *Williams* v. *Smith*; [2] and even if he and the Judges of the Exchequer, in 1860, when *Wright* v. *Hale* [3] was decided, had been disposed to overrule *Williams* v. *Smith*, [4] they had not authority so to do, as the decision in *Williams* v. *Smith* [5] of their own Court, the Exchequer, in 1857, had been affirmed by a superior tribunal—the Exchequer Chamber—in 1859. It is also to be noted that in *Wright* v. *Hale*, [6] which is always cited as the authority for giving a retrospective operation to Acts relating to procedure, Chief Baron Pollock justified his decision by saying that he was not giving a retrospective operation to the statute, because the certifying for costs was an act to be done at the trial, *which did not take place until after the statute came into force.* In the *Attorney General* v. *Sillem*, [7] *Wright* v. *Hale* [8] was approved by Lord Wensleydale, who, however, was careful to say that the decision there did not take away any right, but was disapproved by Lord Cranworth, who said:—"The authorities show that when new arrangements come into force for regulating procedure, they operate on pending as well as future suits. Where this principle has been acted on with reference to costs I cannot quite reconcile my mind to what has been done." The latest English case in which *Wright* v. *Hale* [9] has been followed is *Kimbray* v. *Draper*. [10] It is manifest, however, that the Queen's Bench thought that the Exchequer in deciding *Wright* v. *Hale* [11] had carried the principle there laid down to the utmost verge

(1) 8 E. & B. 784. (2) 4 H. & N. 559; S. C. 28 L. J. Ex. 286.
(3) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(4) 4 H. & N. 559; S. C. 28 L. J. Ex. 286.
(5) *Ibid.*
(6) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(7) 10 H. L. 704, 738, 763, 764; S. C. 33 L. J. Ex. 209, 218, 227.
(8) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(9) 6 H. & N. 227. (10) L. R. 3 Q. B. 160.
(11) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.

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that it could be carried with safety. Cockburn, C.J., intimated that he should have had great doubts as to holding the statute, the subject of decision in *Wright* v. *Hale*, (1) to be retrospective; and Blackburn, J., after stating the principle upon which it was decided, said:—"Whether the Court of Exchequer applied that test properly in holding it was matter of procedure where a statute enabled a Judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right." And then he proceeded to congratulate himself on the case before the Queen's Bench not being so strong an application of the principle as *Wright* v. *Hale*, (2) by adding: "The present case, however, is far more clearly matter of procedure, as the statute only imposes on the plaintiff the alternative of giving security for costs or proceeding in the County Court. That is certainly much more mere matter of procedure than was the case in *Wright* v. *Hale*, (3) and we are bound by the principle of that case." In *Kimbray* v. *Draper*, (4) Lush and Mellor, JJ., arrived with doubt at their conclusion.

Assuming, however, as I think we must, that *Wright* v. *Hale* (5) is law in England, it is evident from *Kimbray* v. *Draper* (6) that the principle laid down in the Exchequer in *Wright* v. *Hale* (7) will not be extended any further. To apply that principle to this case would be to extend it very much further. In *Wright* v. *Hale*, (8) although the action had been commenced before the statute, the trial took place after the statute; the right of the plaintiff there to costs when the statute was passed was only inchoate. Until he obtained a verdict for damages (which occurred after the passing of the statute), it was uncertain whether or not there might be a verdict with costs for the defendant, and his right, therefore, had not vested when the statute passed and was then merely contingent. If, then, the Judges of the Court of Queen's Bench and Lord Cranworth doubted as to the propriety of

(1) 6 H. & N. 227.
(2) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(3) 6 H. & N. 227.
(4) L. R. 3 Q. B. 160.
(5) 6 H. & N. 227.
(6) L. R. 3 Q. B. 160.
(7) 6 H. & N. 227.
(8) 6 H. & N. 227.

giving a retrospective interpretation to the statute, it is tolerably evident that, in such a case as the present, where the judgment-debtors had not only brought their actions, but obtained decrees and execution of them before the passing of the new Code, those learned Judges would shrink from giving a retrospective construction to section 342, set, as it is, in a chapter and sub-chapter, in both of which every other provision is exclusively prospective. To give to such an enactment as section 342 a retrospective construction, would be no mere alteration of procedure, but a distinct deprivation of a vested right to keep the debtor in prison for two years, subject to such application as he might make under the Insolvent Debtors' Act, or sections 280 and 281 of the old Civil Procedure Code, both of which enactments involve a *cessio bonorum* or surrender of his property for the benefit of creditors before the debtor applying for the benefit of those enactments could obtain his discharge.

The postponement of the operation of the statute, referred to in *Wright* v. *Hale*[1] by Pollock, C.B., as a reason for holding it to be retrospective, because the plaintiff might have discontinued his action on the passing of the statute, cannot be successfully resorted to in this case, although the operation of the new Civil Procedure Code was deferred for some months after it was passed. No effort that the judgment-creditors here could have made, would have enabled them to detain their debtors for two years in a few months. For the same reason the deferring of the operation of the statutes on which *Towler* v. *Chatterton*,[2] and lately here *Ramchandra* v. *Soma*,[3] and *Abdul Karim* v. *Manji Hansraj*[4] were decided, is an argument inapplicable here. Those two Bombay cases arose on a Limitation Act, and by construing that Act to be retrospective in those cases, we took away no vested right. But when such a construction even of a Limitation Act would divest such a right, that construction will be avoided, as it lately was in *Sitárám Vásudev* v. *Khanderáv Bálkrishna*,[5] and this was so held in that and many other cases there mentioned, although Statutes of Limitation are regarded as Acts regulating

(1) 6 H. & N. 227. (2) 6 Bing. 258.
(3) I. L. R. 1 Bom. 305, note. (4) I. L. R. 1 Bom. 295, 302.
(5) I. L. R. 1 Bom. 286.

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procedure: *H. H. Ruckmaboye* v. *Lulloobhoy Motichund.*[1] That such a statute ought not, if possible, to be retrospectively construed, was so recently as the 14th May 1877 decided by the tribunal to which we especially owe allegiance. H. M. Privy Council, which then in *The Delhi and London Bank* v. *Orchard*[2] struggled with the very difficult language of sections 20 and 21 of Act XIV. of 1859, and, preferring the F. B. Calcutta decision in 7 Calc. W. R. 515 and the decision in 5 Madras H. C. Rep. 105 to the decision of Couch, C.J., and Newton, J., in 5 Bom. H. C. Rep. 102, made the following remarks:—

"It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay and by the Chief Court in the Punjab, is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV. of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature."

Freeman v. *Moyes* [3] and *Grant* v. *Kemp* [4] were both cases of costs, and stand on much the same basis as *Wright* v. *Hale.*[5] The trial in both of those cases was subsequent to the passing of the statute. Those cases, therefore, are inapplicable on this occasion.

(1) 5 Moore I. A. 234. (2) L. R. 4 Ind. Ap. 127, 135.
(3) 1 A. & E. 338. (4) 2 Cr. & M. 636.
(5) 6 H. & N. 227.

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Ex parte Anderson, (1) cited for the petitioners, is not in point. The interlocutory injunction, there upheld, was a merely temporary proceeding to secure the property during litigation, and neither affected nor took away any right, which circumstance, with respect to the enactments there concerned, was especially noted by Lord Justice Giffard.

The Mercantile Law Amendment Act, 1856, (19 and 20 Vic., chap. 97, sec. 1.) enacts that "no writ of *fieri facias* or other writ of execution and no writ of attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ," provided that he had no notice of such writ, &c., which section is expressed in at least as wide language as section 342 of the new Civil Procedure Code, but was, nevertheless, held in *Williams* v. *Smith* (2) not to apply where the writ of execution (a *fieri facias*) was delivered to the sheriff before the passing of the Act. That decision was made in the Exchequer by Pollock, C.B., Bramwell, B., Martin, B., and Watson, B., of whom the two former subsequently took part in *Wright* v. *Hale.* (3) They so decided *Williams* v. *Smith* (4) on the 1st section of the Act, although Kindersley, V. C., had in *Thompson* v. *Waithman*(5) held the 14th section to be retrospective. The Exchequer Chamber, consisting of Erle, J., Vaughan Williams, J., Crompton, J., Crowder, J., Willes, J., and Hill, J.,—a very strong Court,—affirmed the decision of the Exchequer, (6) adopting the doctrine in *Moore* v. *Durden,* (7) that a statute is not to have a retrospective operation unless the intention be clear and express, and approving of *Jackson* v. *Woolley,* (8) in which the Exchequer Chamber overruled *Thompson* v. *Waithman,* (9) they held the 1st section of the Act not to be retrospective. Williams, J., observed: "The *fieri facias* had begun to operate before the statute passed, and was in full vigour at that time. We cannot give the statute a retrospective effect so as to deprive the defendant of any right he possessed under his writ." Before the statute (Mercantile

(1) L. R. 5 Ch. Ap. 473.
(2) 2 H. & N. 443.
(3) 6 H. & N. 227.
(4) 2 H. & N. 443.
(5) 3 Dr 628.
(6) 4 H. & N. 559.
(7) 2 Ex 22.
(8) 8 E. & B. 784.
(9) 3 Dr. 628.

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Law Amendment Act, 1856,) the delivery of the writ to the sheriff bound the goods as is said in the passage in 1 Wms. Saunders 219, g., 6th ed., quoted by Martin, B., in 2 H. & N. 444:—"The meaning of the expression (in 29 Car. 2, c. 3, s. 16) that the property in the goods is bound, is not that the property in them is *altered*, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ: but that the defendant, from the time they are bound, cannot dispose of them unless in market overt, so as to prevent their being taken in execution." (1) It was necessary before the execution was consummated to sell the goods, a proceeding by the Court, through its officer the sheriff, which yet remained to be taken after the Act was passed, and yet the Court of Exchequer and the Exchequer Chamber did not apply the principle that because the Act related to procedure (viz. by regulating the manner in which its writ of *fieri facias* should affect the goods of judgment-debtors) it should receive a retrospective construction, and the reason that influenced the Court was that, albeit the Act related to procedure, yet it would, if construed retrospectively, have deprived the creditor of his vested right under the previous law. The argument was, in that case, in vain used that the Court, by refusing to construe the statute retrospectively, was virtually interpolating after the words "no writ of execution" the words "hereafter issued," which were not to be found in the statute, (2) and it was general in its terms. *Freeman* v. *Moyes* (3) and *Towler* v. *Chatterton* (4) were then cited in vain. The present case is more strongly in favour of the creditors than *Williams* v. *Smith*, (5) for in this case the judgment-creditors had not to call upon the Court to take any further steps to perfect their executions against the persons of their debtors, who had been finally committed towards satisfaction of the decrees before the new Code came into force. To construe section 342 of the new Code retrospectively, and thus to shorten the imprisonment of the debtors, would be to stop the satisfaction of their decree and to destroy their vested

(1) And see *per* Alderson, J., 9 Bing. 160, and *per* Patteson, J., 9 Bing. 137, in *Giles* v. *Grover*; also 2 Bom. H. C. Rep. 155, 2nd Ed., 5 Bom. H. C. Rep. 27 O. C. J.

(2) 2 H. & N. 445.
(3) 1 A. & E. 338.
(5) 6 Bing. 258.
(4) 2 H. & N. 443.

right. The fact that their right to detain was qualified and controlled by the Insolvent Debtors' Act and by sections 280 and 281 of the old Code, cannot affect the argument. The existence of that qualification only, in certain contingencies that have not happened, narrows, but does not destroy, the right of detention, which still remains though so qualified and controlled.

Pardo v. *Bingham*,(1) which held the 10th section of the Mercantile Law Amendment Act to be retrospective, and which was founded on *Cornill* v. *Hudson*,(2) cannot be regarded as in any respect affecting the authority of *Williams* v. *Smith*,(3) which was decided on the 1st section of that Act, or of *Jackson* v. *Woolley*,(4) which was decided on the 14th section of it; and although Lord Hatherley in *Pardo* v. *Bingham* observed that in *Jackson* v. *Woolley*(6) the Judges omitted to mention *Cornill* v. *Hudson*,(7) yet it having been decided in November 1857 by Lord Campbell, C.J., Coleridge, Wightman, and Erle, JJ., of whom the three first named, together with Crompton, J., decided *Jackson* v. *Woolley*(8) in January 1858, must have been distinctly present in the mind of the Court on the latter occasion, more than three months not having intervened between the two cases. The Court of Queen's Bench, in deciding *Jackson* v. *Woolley* (9) as it did, and in not then mentioning *Cornill* v. *Hudson*,(10) its earlier decision, showed that it considered that the one did not conflict with the other. Lord Hatherley, moreover, is careful to note that the decisions in *Moon* v. *Durden*(11) and in *Jackson* v. *Woolley*(12) turned upon the circumstance that, to have in these cases held the enactments, there under consideration, to be retrospective, would have been to take away a vested right of action. His Lordship did not venture to impeach either of those decisions, or *Williams* v. *Smith*, (13) which was also cited to him. *Cornill* v. *Hudson* (14) was cited to the Exchequer

(1) L. R. 4 Ch. Ap. 735.
(2) 8 E. & B. 429.
(3) 2 H. & N. 443
(4) 8 E. & B. 784.
(5) L. R. 4 Ch. Ap. 735.
(6) 8 E. & B. 784.
(7) 8 E. & B. 429.
(8) 8 E. & B. 784.
(9) 8 E. & B. 784.
(10) 8 E. & B. 429.
(11) 2 Ex. 22.
(12) 8 E. & B. 784.
(13) 2 H. & N. 443.
(14) 8 E. & B. 429.

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Chamber in *Jackson* v. *Woolley* (1) without effect, no doubt for this manifest reason, that it was not in point. Nor is *De Wolf* v. *Lindsell* (2) in point, it having been decided on the 5th section of the same Act. The authority of *Williams* v. *Smith* [3] was, however, there distinctly recognized by Lord Romilly. Even if *Cornill* v. *Hudson* (4) were in point (which it is not), it, having been decided by the Queen's Bench, rests upon authority inferior to *Jackson* v. *Woolley*(5) and *Williams* v. *Smith*, (6) both of those cases having been decided by the Exchequer Chamber.

The case of *Pryor* v. *Pryor*, (7) decided by Vice-Chancellor Bacon in 1875, is illustrative of the same principle as *Williams* v. *Smith*. (8) The usual decree had been made in 1864 in the suit for partition, with liberty for any of the parties before the commission for partition issued "to carry in proposals for a sale or for a partition before the Judge in Chambers." Before any commission for partition issued in execution of that decree some of the parties sought from the Court, by supplemental bill filed in 1873, a sale in lieu of a partition, and relied on the New Partition Act (31 and 32 Vic., c. 40) passed in 1868, of which the 3rd section empowers the Court of Chancery "in a suit for partition, where, if this Act had not been passed, a partition might have been made," if it thinks such a course desirable to direct a sale of the estate and distribution of the proceeds in lieu of a partition of the estate "on the request of any of the parties interested and notwithstanding the dissent or disability of any other of them." Some of the parties in the suit did object to a sale, and the Vice-Chancellor, being of opinion that, under the decree, a sale could not have been made against the will of any party, refused to give such a retrospective effect to the subsequently passed statute of 1868 as to hold himself authorized to take away their vested right to prevent a sale and to insist upon a partition. Although, as I have said, the commission of partition had not yet issued, he said:—"This was a suit which was over and done with and gone before the Act of Parliament was passed. In my opinion, there-

(1) 8 E. & B. 784, 786.
(2) L. R. 5 Eq. 209.
(3) 2 H. & N. 443.
(4) 8 E. & B. 429.
(5) 8 E. & B. 784.
(6) 2 H. & N. 443.
7 L. R. 19 Eq. 595.
(8) 2 H. & N. 443.

fore, against the will of the parties interested there can be no sale, or anything but a partition." His decision was affirmed on appeal by Lords Justices James and Mellish.[1] That case deserves attention; the section in the new statute relied upon being strictly one to regulate procedure, and the language of that section being not insusceptible of a retrospective construction. Yet the Courts refused to give that construction, because it would take away an existing right under a then unexecuted decree, and that, too, a right to insist upon a particular course of procedure after decree, viz., a partition of the estate in preference to a sale of it and distribution of the proceeds.

In *Moon* v. *Durden* [2] Rolfe, B., said:—"I do not mean, of course, to say that an enactment may not be so made as to have a retrospective operation. In some cases the Legislature has thought it just to make enactments retrospective even at some sacrifice of general principles. But then it does so in express terms; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits." He then proceeds to say that the statute then under consideration of the Court of Exchequer was an illustration of his last-quoted observation. [3] Baron Parke, while admitting that the rule against a retrospective construction "will certainly yield to the intention of the Legislature; and the question in this and in every other similar case is whether that intention has been sufficiently expressed," and that he felt "considerable doubt" whether or not that was so as to the Act then under consideration (Statute 8 and 9 Vic., c 109, section 8,) declaring that all wagering contracts shall be void, and that "no suit shall be brought *or maintained*" upon them; and while on the one hand noticing the hardship of holding that past wagering contracts should be rendered void, and the still greater hardship that a party should not be permitted to continue a suit already commenced on such a contract, and on the other hand that the previous toleration of such actions had been a reproach to the law of England, and that "one considers the clause, therefore, not quite in the same spirit as if the enactments related to ordinary contracts," and that in con-

(1) L. R. 10 Ch. Ap. 469. (2) 2 Ex. 22.

(3) 2 Ex. 39.

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struing the enactment prospectively the word "maintained" is rendered inoperative, whereas in construing it retrospectively it is not, nevertheless said: "I think it best to abide by the sound rule of construction above referred to" (the rule against a retrospective (interpretation) "notwithstanding the conjectures as to the real intention of the Legislature which the nature of the subject occasions." It is not pretended that there is any such cloud upon the claims of the judgment-creditors here as Baron Parke pointed out in that of parties suing upon wagering contracts as that of the plaintiff in *Moon* v. *Durden*[1] against whom the Court declined to construe the statute retrospectively.

The case of *Sumboochunder Haldar and others*,[2] although, in so far as it turned upon the 12th section of the High Court's Act 24 and 25 Vic., c. 104, it is not in point here, yet is in another respect very useful in showing how very far the High Court of Calcutta was prepared to go, and did go, in determining what should be regarded as a "proceeding pending" at the abolition of the Supreme Court. A decree had been obtained in the Supreme Court against Sumboochunder Haldar, and a writ of *fieri facias* issued upon that judgment against his goods, before the abolition of the Supreme Court, to which writ the sheriff had returned *nulla bona*. Subsequently to the establishment of the High Court a writ of *capias ad satisfaciendum*, in the old form, was issued against him in December 1863, and he was arrested upon it on the 11th February 1864, and the question was whether his arrest should be regulated by Act VIII. of 1859 or by Act VII. of 1855, and it was unanimously held by the court (Peacock, C. J., Morgan and Phear, JJ.) that although the *ca. sa.* was issued against his person by the High Court, it must be regarded as a continuation of the former process of execution commenced in the Supreme Court against his property, and, as such, must be deemed a proceeding pending at the time of the abolition of the Supreme Court, and was accordingly saved by section 12 of the High Court's Act, and, therefore, regulated by Act VII. of 1855 and not by Act VIII. of 1859. In coming to this conclusion, Phear, J., seems to have departed from the view which he took in

(1) 2 Ex. 22. (2) 1 Bourke 69.

1864 in a previous case, *in re Muddoosoodan Dass,* (1) which he passed over in silence in *Sumboochunder Haldar's case.* (2) In the case in 2 Hyde's Reports, section 12 of the charter is named by mistake for section 12 of the High Court's Act. In the case before us it is unnecessary to go so far in construing the words "proceedings commenced" contained in the General Clauses Act, section 6, as the High Court at Calcutta went in holding the *ca. sa.* issued by itself to be a proceeding pending at the abolition of the Supreme Court within section 12 of the High Court's Act in virtue of its having been preceded by a *fieri facias* issued by the Supreme Court and a return of *nulla bona* by the sheriff. Here both the arrest and committal had taken place before the new Code came into force.

In conclusion, let me ask whether, if section 342 of the new Code instead of the words "six months" had used the words "four years," we should have been invited to construe that section retrospectively? And yet the substitution of the one period for the other could not in any wise affect the question whether that section ought to be construed prospectively or retrospectively. The possibility of such a change of period is a caution to us not to depart from the established rules of construction, and to set sail upon the ocean of conjecture. It is notorious that supposed hard cases have a tendency to make bad law, or, in other words, to produce erroneous decisions. The very case now suggested, which would be the converse of that before us to-day, arose in France. A law of the time of the First Revolution limited civil imprisonment to five years, but subsequently by the Code Civil of Napoleon the duration of it was prolonged. The Judges, declining to give retroactivity to the new provision, held debtors imprisoned under the previous repealed law to be entitled to the benefit of it. (Dalloz Repertoire, Vol. 30, Tit. Lois, Chap. Art. 2, section 8, plac. 394, p. 152.) The doctrine, then, that laws regulating procedure are in all cases, unless the contrary distinctly appears on the face of the enactment, to be deemed to look backwards as well as forwards, was not then permitted to prevail in the French Courts, even when under the despotic *régime* of the First Empire. With-

(1) 2 Hyde 215. (2) 1 Bourke 69.

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out hesitation it must be admitted that the Governor-General in his Legislative Council has full authority to pass retrospective laws, even to the divestment of vested rights; but we are entitled to expect that, when such is the intention, it will be rendered apparent either by expression or unmistakeable indication on the face of the law itself. In the absence of any such guides to the ascertainment of the intention, the presumption is that a statute depriving the subject of a vested right is not retrospective. It may well be that such a presumption does not exist where a statute is remedial and merely alters procedure, and that the Courts are bound to advance the remedy and apply the improvement in procedure retrospectively as was done to a limited extent in *Wright* v. *Hale* (1) and the cases dependent on its authority; but if the change in procedure, when sought to be applied retrospectively, be complicated by the divestment of a pre-existing right, then I think that the presumption against such an intention revives in its full strength, and that the decided cases do not justify any other doctrine. It would be arrogant, and more especially so when there is a divided Court, to claim any certain knowledge of the intention of the Indian Legislature when it placed section 342 of the new Code on the statute book with respect to its retroactivity. The provision, which we find in the General Clauses Act, prevents any *à priori* argument that the Indian Legislature would lightly set aside or interfere with things done or proceedings pending under Acts which it repeals. That Legislature had before it two examples afforded by Parliament, which, in the High Court's Act *passed for India*, section 12, carefully kept alive proceedings pending in the Supreme Court at its abolition, and in the Act for the abolition of imprisonment for debt, *passed for England*, expressly interfered with pending proceedings, in declaring persons then in civil custody entitled to their freedom. To the best of my judgment, the Indian Legislature has, in passing section 342 of the new Code with no further explanation than section 3 of the same, followed the former example, and has silently but intentionally left the new Code to the operation of the provision in the General Clauses Act which it has in distinct and positive terms

(1) 6 H. & N. 227.

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laid down for the guidance of Courts of justice in construing its ordinances—a provision which does not war with the special enactment contained in section 3 of the new Code.

For these reasons I think that section 342 should be read as prospective only, and that the petitioners must consequently fail in their application for discharge from prison. The general importance of the question and the division of opinion in the Court will furnish the apology for the length of my remarks.

SARGENT, J.:—The question which the Court has to determine is whether judgment-debtors who had been in prison, in execution of the decrees obtained against them, for more than six months at the date on which the New Civil Procedure Code (Act X. of 1877) came into operation, are entitled to be discharged from prison under sections 341 and 342 of that Act or either of them.

The 1st of those sections says that "The judgment-debtor shall be discharged from jail when the time of his imprisonment as limited by section 342 is fulfilled," and section 342 declares that "No person shall be imprisoned in execution of a decree for a longer period than six months." The case of the petitioners, it must be admitted, comes rather within the spirit than the exact terms of section 341; the language of that section, however, does apply with perfect accuracy to a case which cannot be distinguished in principle from that of the petitioners, viz., that in which the term of six months, although commencing before the Act came into operation, expires subsequently to that date. Section 342 is in terms strictly applicable to all persons under imprisonment. I think, therefore, the answer to the petitioner's application ought to depend upon the determination of the question whether the sections are applicable to the case of judgment-debtors imprisoned before the Act came into operation.

Now, sections 1 and 3 show a clear intention of the Legislature to enact a new Code of Civil Procedure which should take the place of all existing enactments on that subject. Section 3, however, concludes with a proviso in the negative form that "nothing therein contained shall affect the procedure prior to decree in any suit instituted before the Act came into force." I think that the natural conclusion from the language of these sections

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taken in connexion with Act I. of 1868, section 6, is that whilst saving all acts already done in execution of a decree in a suit instituted before the Act came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. Before proceeding further to consider the construction of the Act, I may say that I can entertain no doubt that the question before the Court is one of procedure. The writ of imprisonment is by its very nature continuous in its operation, and the conditions and period under and for which it remains in force and activity are as much matters relating to procedure as the issuing of the writ itself. The term "procedure" has never, that I am aware of, been confined to mere proceedings; but in any case I cannot doubt that the maximum duration of a judgment-debtor's imprisonment is a matter of procedure in the sense in which that term is used in the present Act.

Whilst, therefore, the warrant of imprisonment, and all that has been done under that warrant, are unaffected by the repeal of Act VIII. of 1859, the further operation of the warrant becomes a question of procedure to be determined by the provisions of the new Code.

It was suggested during the argument by Mr. Justice West that sections 341 and 342 must, from their connexion with other sections, have been intended to apply only to cases where the imprisonment has commenced subsequently to the date at which the Act came into operation. It was said that section 342 being in the negative form, necessarily supposes a state of imprisonment previously created by the Act. This seems to me to be rather begging the question in dispute. I admit that the language of the section assumes an existing state of imprisonment, but not necessarily one under a warrant issued under the Act itself. In the same way, there is nothing which necessarily confines the term "imprisonment" in the heading of sub-chapter I., in which the sections are found, to imprisonment commenced since the Act came into operation. This time it is associated with arrest, which must mean arrest since the Act came into operation, but it is not necessarily associated with it otherwise than as one of the subjects to be dealt with by that sub-section. The order of arrest is distinct from that of imprisonment,

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and the latter does not necessarily follow upon the former. It is said, however, that if section 342 be applied to warrants of imprisonment before the Act came into force, the Act will operate to defeat an existing right, that right being, it is said, to detain the judgment-debtor in prison under the warrant for two years in default of his sooner satisfying his debts. This argument has, doubtless, considerable force, and has caused me to hesitate much in coming to my decision upon the construction of the Act. I think it is impossible to contend that the judgment-creditor does not by attachment of his debtor's property, as wall as by the arrest and imprisonment of his debtor, acquire a right of a very distinct and specific nature and different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, and which the Judges in *Wright* v. *Hale*[1] refused to recognize. The well-established rule, however, that an Act is not to be construed so as to defeat an existing right, is, as Parke, B., says in *Moon* v. *Durden*,[2] only a rule of construction, and must yield to the intention of the Legislature; and I think that intention may be gathered with sufficient certainty from the language of sections 1 and 3, as I have before explained, coupled with the strong presumption which, in my opinion, arises from the nature of the change in the law. It is difficult to suppose that the Legislature, when introducing a most important and benign change in the law of debtor and creditor, in harmony with modern legislation, could have intended that the two laws should continue for the next two years to operate concurrently, and that debtors who were imprisoned on the day previous to that on which the Act came into operation,—and there must be many throughout British India—should be liable to be detained under the severer enactment. Moreover, it is to be remarked that the Act received the assent of the Governor-General on 13th March 1877, but did not come into operation until 1st October, thereby giving judgment-creditors due notice of the altered character of their power of imprisonment, a circumstance to which some importance, at least, was attached in giving Lord Tenderden's Act a retrospective effect, as shown by the judgment of Parke, J., in *Towler* v. *Chatterton*.[3] Upon the whole, I think that sections 341 and 342

(1) 6 H. & N. 227. (2) 2 Exch. 22. (3) 6 Bing. 258.

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were intended to come into force at once from the time when the Act came into operation, and that the petitioners are entitled to their discharge.

BAYLEY, J. :—This matter was argued on the 5th instant before a full Court consisting of the Chief Justice, Sir C. Sargent, Green, West, JJ., and myself, by Mr. Macpherson for the petitioner Ratansi Kaliánji, and by Mr. Inverarity for Trikamdás Shivrám, the detaining creditor of Ratansi Kaliánji.

Ratansi Kaliánji was, on the 31st October 1876, duly imprisoned under an order and warrant in execution of a decree of the High Court issued in the usual form for non-payment of money under the provisions of the recently repealed Code of Civil Procedure (Act VIII. of 1859), and as he has now been in custody for a period of nearly twelve months, he claims the benefit of sections 341 and 342 of "the Code of Civil Procedure," Act X. of 1877, (which came into force on the 1st day of October 1877), the latter of which sections enacts that "no person shall be imprisoned in execution of a decree for a longer period than six months."

The warrant, under which the petitioner was sent to jail, does not specify any definite time of two years during which he is to be imprisoned. It was urged on behalf of Trikamdás Shivrám, the detaining creditor, that he had a right to detain his judgment-debtor, the petitioner Ratansi Kaliánji, in prison for two years, the period mentioned in section 278 of the Civil Procedure Code of 1859, unless he had before then paid the decree, or unless the detaining creditor failed to pay the subsistence-money. For the petitioner it was urged that clause 342 of the new Act was retrospective, the provision in it being one of mere procedure.

The principles of interpretation applicable to such a question did not appear to be disputed at the bar. The real contention was as to their application to the point at issue.

The canon of construction relied upon on the part of the petitioner is that stated in the case of *Wright* v. *Hale*,[1] decided by

(1) 6 H. & N. 227 ; S. C. 30 L. J. N. S. Exch. 40.

the Court of Exchequer at Westminster in 1860, the report in the Law Journal being by far the fullest and most complete.

The question there arose under the Common Law Procedure Act of 1860 (23 and 24 Vic., chap. 126, sec. 34) which enacted that when the plaintiff in any action for an alleged wrong in any of the superior courts, recovered by the verdict of a jury less than £5, he should not be entitled to any costs, in case the Judge certified that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or damage, in respect of which the action was brought, was not wilful and malicious, and that the action was not fit to be brought. The Court held that such section applied to actions tried after, although commenced before, that Act came into operation.

Pollock, C.B., said: "I have always understood that there is a considerable difference between laws which affect the vested rights and interests of parties and those laws which merely affect the procedings of Courts. For instance, if an Act of Parliament were to say that in matters of mere opinion and judgment no person shall be allowed to call more than three witnesses, I think that would apply to all actions whether then pending, or thereafter to be brought. It would be a matter regulating the practice * * * . I do not think that a matter of that sort can be called a right, nor do I think the title to costs can be called a right in any sense in which Lord Coke in his Institutes, or my Lord Chief Justice Truro, in the case referred to by Mr. Chambers (*Marsh* v. *Higgins*[1],) has spoken of rights * * * In this case the Act was not to take effect until the 10th October 1860, and then in October it is as if it had said, 'on the 10th October this Act of Parliament is to take effect.' What is the effect? Why, where the plaintiff in any action—'in any action' means in any action brought yesterday or seven years ago —for an alleged wrong in any of the superior Courts recovers less than £5, he shall not be entitled to costs, if the Judge shall certify certain facts. I think that when in any action the statute having come into operation the plaintiff recovers less than £5,

(1) 9 C. B. 551; see p. 567.

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that then he is subject to this clause. In my opinion it is not a retrospective Act at all. The sort of wrong which is supposed to be done by an *ex post facto* law, in my opinion, does not arise, and on this ground it appears to me that the rule ought to be discharged."

Channel, B., said he thought that the case was concluded by the authorities cited on the statutes which regulate costs, and he added:—"*Freeman* v. *Moyes*[1] is not distinguishable, I think, from the present case, and I believe that decision has been concurred in by all the Courts in Westminster Hall;" (that, I may state, was a decision upon the 3 and 4 Wil. IV., c. 42, s. 31, which enacted that, "in every action brought" by an executor, the plaintiff shall be liable to costs, and it was held that such provision was retrospective).

Wilde, B., (now Lord Penzance) in his judgment stated the rule of construction with great clearness and precision. He said:—

"I am prepared to decide the case on principle. And the principle that seems to me to be applicable to the case is this—that where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is that the Act does apply without reference to the former law or procedure. Now that that is the principle, appears from the cases that have been cited on both sides. Because the cases cited by Mr. Chambers are cases of rights of action not interfered with, and the cases on the other side are cases of procedure or evidence in which the Acts are held to be retrospective. The cases involve three or four analogies which are as close as analogies can be; one, the case of executors who, by an Act of Parliament, are made liable to pay costs, and all the Courts have applied that to the case of executors who brought actions before the Act. Another is the case where the rule made under the powers of an Act of Parliament prescrib-

(1) 1 A. & E. 338.

ed that the plaintiff should only have the costs on the issues on which he succeeded; and although the terms were just as general as the terms of the others, it was by all the Courts applied to all actions that were then pending. Mr. Chambers says this is taking away the right; and I do not agree with him, for this reason.—What is the right the suitor has? The right of action is the right to bring the action; and what is the right to bring the action? Why, to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of an Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing; the right of action does not involve the right to keep all the consequences of that right as they were before. It gives him the right to have the action conducted according to the rules that are then in force with respect to procedure. In this case, therefore, it seems to me there is no right taken away, and deciding the case strictly on the principle on which all other cases are decided that the rule" (which was to set aside a certificate of Bramwell, B., indorsed on the record) "clearly ought to be discharged." And it was accordingly discharged with costs.

In 1864 that decision was cited with approval by Lord Wensleydale in the House of Lords in the case of *The Attorney General* v. *Sillem and others.* (1)

He says (p. 763):—"There is no doubt of the justice of the rule laid down by Lord Coke (2 Inst. 292) that enactments in a statute are generally to be construed to be prospective and to regulate the future conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed that the Legislature meant to deprive a man of a vested right of action. This was laid down in *Moon* v. *Durden.* (2)

"But, on the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away, and when it is dealing with mere procedure to recover those rights, which

(1) 10 H. L. C., 704. (2) 2 Exch. 22.

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it may be quite reasonable to regulate and alter. This has been most clearly and satisfactorily explained in the case of *Wright* v. *Hale*,[1] particularly by Sir James Wilde." And then, after citing the decision, he adds:—"Sir James Wilde says, with truth, that this does not take away any right."

The principle of *Wright* v. *Hale*[2] was, in 1860, acted on by the Court of Queen's Bench in the case of *Kimbray* v. *Draper*.[3]

It was also expressly adopted in the High Court of Bombay by Chief Justice Couch, and Newton and Sargent, JJ., in the case of *Framji Bomanji*,[4] where a difficulty had arisen in consequence of a difference between the provisions of the Letters Patent of 1862 and the Amended Letters Patent of 1865 as to the right of appeal. The Court there held that a right of action is not taken away by a change in the law unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure.

Now, it was contended in behalf of the execution-creditor that he had, until satisfaction or failure in payment of subsistence-money, the right to detain his judgment-debtor for two years, and that to apply the doctrine of *Wright* v. *Hale*[5] to the present case and to give to section 342 of Act X. of 1877 a retrospective operation, would deprive him of that right, which, as I understood the argument, was said to be of almost as sacred and inviolable a nature as a right of action.

Is that contention reasonable, or is it not? Before considering the nature of execution of decrees by imprisonment under the Code of Civil Procedure of 1859, I will make a few remarks upon the practice as it stood in England before recent legislation there, and as it existed in the late Supreme Court in Bombay.

Speaking of the writ of *capias ad satisfaciendum*, Blackstone says that "the intent of this writ is to imprison the body of the debtor till satisfaction be made for the debt, damages, and costs." "It is" (he says) "an execution of the highest nature, inasmuch

(1) 6 H. & N., 227. (2) 6 H. & N., 227.
(3) L. R. 3 Q. B., 160. (4) 3 Bom. H. C. Rep. O. C. J., 49.
(5) 6 H. & N., 227.

as it deprives a man of his liberty till he makes the satisfaction awarded; and, therefore, when a man is once taken in execution under it, no other process can be sued out against his lands or goods." (1)

In *Taylor* v. *Waters* (2) Lord Ellenborough, Chief Justice, said:— "The taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor, and in like manner precludes a set off against him." And Mr. Justice Bayley said: — "The taking him in execution destroys all remedy against him during his life."

Those *dicta* were cited with approval in *Thompson* v. *Parish*, (3) in which case Sir Alexander Cockburn, Chief Justice, said (p. 692):— "The effect of taking the debtor in execution is to suspend all other remedies against him for the debt."

Even the dead body of an unfortunate judgment-debtor, who died in gaol while detained there under a *ca. sa.*, has been the subject of litigation, for, where a gaoler refused to deliver up the body to the executors of the deceased unless they would satisfy certain claims made against the deceased by the gaoler, the Court of Queen's Bench issued a *mandamus*, peremptory in the first instance, commanding that the body should be delivered up to the executors; and at the subsequent trial of Scott, the gaoler at the York assizes, before Maule, J., the Judge said that the notion of a gaoler being authorized to detain a dead body on account of pecuniary claims was a mistake; and that a gaoler doing so was guilty of a misconduct in his public character, for which he was liable to prosecution: *The Queen* v. *Fox*. (4)

The practice in the late Supreme Court of Bombay was different, and far more favourable to the creditor. By the charter establishing that Court, dated the 8th December 1823, clause XXXIV., power was given to the Supreme Court to award execution against the houses, lands, debts and other effects, real and personal, of the debtor, "or to take and imprison the body or bodies of such party or parties until he, she, or they shall make satisfaction, or to do both as the case may require."

(1) 3 Black. Com., 414.
(2) 5 M. & Selw., 103.
(3) 5 C. B. N. S., 685.
(4) 2 Q. B., 246.

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By Act VI. of 1855 of the Government of India, "*An Act to extend the operation of and regulate the mode of executing writs of execution in Her Majesty's Supreme Courts of Judicature,*" and which is published at p. 139 of Vol. I. of "The unrepealed General Acts of the Governor-General in Council," issued by the Legislative Department of the Government of India in 1875, section 8, it was enacted that "a plaintiff or defendant, arrested under any writ of *capias ad satisfaciendum* issued upon any judgment, order, decree or sentence of any of the said Courts, whereby money is ordered to be paid to any party, shall be entitled to his discharge from such arrest on payment or tender to such party or his attorney in the cause or to the sheriff or gaoler in whose custody such person may be under such writ of the amount directed to be levied by such writ."

Section 9 declares when a written order under the hand of the attorney issuing such writ shall be sufficient for the discharge of the party by the sheriff or gaoler.

It appears, therefore, that formerly in England and in Bombay, until the Supreme Court was abolished in 1862 on the introduction of the High Court, the power of the judgment-creditor to keep his judgment-debtor in prison lasted until the latter paid or tendered the amount directed to be levied, or unless he was released by virtue of the provisions of the Statute 11 and 12 Vic., chap. 21, the Indian Insolvent Act, and that if he failed to obtain his release in one of those modes, or unless he was discharged under the written order of the judgment-creditor's attorney (Act VI. of 1855, section 9), he might remain in gaol until his death.

It will be noticed, too, that, under the charter of the late Supreme Court, execution might issue by the attachment and sale of the judgment-debtor's moveable and immoveable property, or by his imprisonment, or by all those modes at once.

By the Letters Patent of 1862, establishing the High Court of Bombay, cl. 37, the proceedings in civil suits between party and party brought in the High Court were directed to be regulated by the Code of Civil Procedure, Act VIII. of 1859.

This brings me to the consideration of the recently repealed Code of Civil Procedure (Act VIII. of 1859), upon the provisions of which the judgment-creditor, in the case now before us, relies.

The sections relating to the imprisonment of the party against whom a money decree has been made, are familiar to all of us, and require no lengthened notice from me.

Section 201 relates to the execution of decrees for money. Section 212 provides for the form and contents of the application for execution. Section 221 for the issue of the warrants of execution. Section 273 (a new and important provision) enacts that any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge on the ground that he has no present means of paying the debt either wholly or in part, or if possessed of any property, that he is willing to place it at the disposal of the Court. It provides, too, for the form of the application which is to be subscribed and verified by the applicant in the manner prescribed for subscribing and verifying plaints.

By section 276, which is printed under the general heading "*Of the execution of decrees by imprisonment,*" provision is made for the subsistence money of a defendant in gaol. Section 277 gives power to the Court to vary the allowance in case of illness or for other special cause. Then follows the important section, section 278, as to the release of a defendant and the limit to imprisonment, and upon which so much turns. The section is in these words:—

"278. A defendant shall be released at any time on the decree being fully satisfied, or at the request of the person at whose instance he may have been imprisoned, or on such person omitting to pay the allowance as above directed. *No person shall be imprisoned on account of a decree for a longer period than two years,* or for a longer period than six months if the decree be for the payment of money not exceeding Rs. 500, or for a longer period than three months if the decree be for the payment of money not exceeding Rs. 50."

Section 279 provides that subsistence money shall be added to the costs of the decree, and shall be recoverable by the attachment

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and sale of the debtor's property, but that he shall not be detained in custody or arrested on account of any sums so disbursed.

Section 280 (also, I believe, a new provision,) gives power to any person in confinement under a decree to apply to the Court for his discharge on the surrender of his property, such application to be subscribed and verified by the applicant as plaints are subscribed and verified.

Section 281 states what procedure shall be adopted on such application, and under what circumstances the Court shall cause the defendant to be set at liberty.

Section 282 enacts that "a defendant once discharged shall not again be imprisoned on account of the same decree except under the operation of the last preceding section, but his property shall continue liable, under the ordinary rules, to attachment and sale until the decree shall be fully satisfied, unless the decree shall be for a sum less than Rs. 100 and on account of a transaction bearing date subsequently to the passing of this Act;" and power is then given to the Court to declare a defendant so discharged absolved from further liability under that decree.

Section 283, the last one of the series under the general heading "Of the execution of decrees by imprisonment," relates to the determination of questions as to mesne profits and interest and of sums paid in satisfaction of decrees, and was repealed by Act XXIII. of 1861, section 1, and section 11 of that Act was substituted for it.

It will thus be seen that these provisions which I have cited from chapter IV. of the Code of 1859 make several very important alterations in the relative position of judgment-creditor and judgment-debtor under money decrees of the High Courts as compared with the position of decree-holders and their debtors under the late Supreme Court; and, so far as I am aware, for the first time in the presidency towns, the term of imprisonment under a *ca. sa.* issued on account of a decree was (by section 278) limited to two years. The important provisions, too, in sections 273 and 280 were, I believe, novel, and they placed further limits upon the power of the creditor to detain his judgment-debtor in prison.

In a case which came before the High Court in Calcutta in 1874 upon the construction of section 273, it was held by Chief Justice

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Couch, Macpherson and Pontifex, JJ., that the general design of the provisions in section 273 and the following sections of Act VIII. of 1859 is that a man is not to be needlessly and uselessly detained in prison. Imprisonment is not to be arbitrary and capricious. There must be some object in it to oblige the debtor to make a full disclosure of his property, and to prevent him from fraudulently concealing property which might be taken in execution of the decree; and that the scope of those provisions does not require that he should be committed to prison for what would not be a legitimate advantage to the creditor, *e. g.*, in order to oblige him to borrow from others to pay his judgment-creditor: *Coombe* v. *Caw*. (1) I may remark that this language appears to me to be quite inconsistent with the right, the inviolable right, of the judgment-creditor, claimed for him by Mr. Inverarity.

The sections I have cited from the Code of 1859, including section 278, which limits the term of imprisonment to two years, are, in my opinion, clearly sections relating to procedure and to procedure alone. They set forth the practice which must be followed by a decree-holder who seeks the aid of the Court to enable him to reap the fruits of the decree which the Court has passed in his favour.

I do not consider that section 278 gives the execution-creditor any such right as that contended for by Mr. Inverarity. He can only work out his decree and obtain execution under it in the mode prescribed by the Indian Legislature,—a mode which differs greatly from that adopted for centuries and until a comparatively recent period in England.

To describe the power, which the execution-creditor in India has had in the Presidency towns since 1862, of putting and keeping his judgment-debtor in prison as an inviolable *right*, or anything equivalent to it, is, in my opinion, fallacious and calculated to lead to erroneous impressions. His power to invoke the aid of the Court for the purpose of placing his judgment-debtor in gaol, and of keeping him there for a period not exceeding two years (unless previously liberated by one of the several ways open to a debtor to obtain his discharge), was a power given to such

(1) 22 Calc. W. Rep., 257 Civ. Rul.; 13 Beng. L. Rep., 268.

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creditor by the Indian Legislature and by the High Court charters. The maximum limit of two years fixed by the Code of 1859 was in clear derogation of the creditor's power, under the law as it existed in the late Supreme Court, which placed no limit as to the time during which the judgment-debtor might be detained in gaol under a civil decree. And when, as in process of time, the feeling of the manifold injustice of lengthened imprisonment for making default in payment of a sum of money became stronger, one would naturally expect that such change of view would be adopted by the Indian Legislature, and that the limit of two years would be still further reduced.

I may here notice that by the Imperial Insolvent Statute 11 and 12 Vic., c. XXI., s. V., any person in prison within the limits of the towns of Calcutta, Madras, and Bombay, upon any process whatever for, or by reason of, any debt, damages, costs, or money which such person is liable to pay, and being in insolvent circumstances, may, at any time, apply, by petition, to the Court for the Relief of Insolvent Debtors for the benefit of the provisions of that Act.

Nearly midway between the passing of the Civil Procedure Codes of 1859 and 1877, viz., in 1869, the British Parliament passed for England and Wales "*An Act for the abolition of imprisonment for debt and for the punishment of fraudulent debtors and for other purposes*," 32 and 33 Vic., c. 62, and by section IV. it was enacted that, with the exceptions thereinafter mentioned, *no person* should, *after the commencement of that Act* (1st January 1870), *be arrested or imprisoned for making default in payment of a sum of money*. By section VII. provision was made for the discharge, without payment of any fees, from custody of persons who at the commencement of the Act were in custody in pursuance of any writ, attachment, or other process, and who would not be liable to be arrested or imprisoned after the commencement of that Act; but it was declared that "his arrest, imprisonment, or discharge, shall not affect the creditor's rights or remedies for enforcing the payment of any money due to him, or deprive the creditor of the benefit of any charge or security on any property of the debtor."

That statute was doubtless present to the minds of the framers of the new Code of 1877. More than one English statute has formed, not merely the model, but almost the text of Acts afterwards passed by the Supreme Legislature in India.

Any such clause in the Act of 1877 as section 7 of the 32 and 33 Vic., c. 62, would, of course, have prevented the point now at issue having arisen at all. The question now for determination is—have or have not the provisions of Act X. of 1877 sufficiently declared the intention of the Indian Legislature to be that, after the 1st October 1877, no person, whether in custody before or after that date, shall be detained under a money decree for a longer period than six months?

Part IX., chapter 48 of the new Civil Procedure Code (Act X. of 1877), contains "Special rules relating to the Chartered High Courts," which are comprised in a short series of sections from 631 to 639, both inclusive.

Section 632 enacts that, "Except as provided in this chapter, the provisions of this Code apply to such High Courts."

The definitions of "decree" and "judgment-debtor" in clause 2, the interpretation clause, are sufficiently wide to embrace decrees passed and judgment-debtors who have become such before the 1st October 1877, the day on which the Code is, by section 1, ordered to come into force.

Chapter XIX. relates to "The execution of decrees," and consisting of eleven sub-chapters or sub-divisions, extends from section 223 to section 343, both inclusive.

By section 341 it is enacted *(inter alia)* that the judgment-debtor *shall be discharged from jail, when the term of his imprisonment,* as limited by section 342, is fulfilled, and it is declared that a judgment-debtor discharged under that section (section 342) is not thereby discharged from his debt; but he cannot be arrested under the decree in execution of which he was imprisoned.

Section 342 enacts that "No person shall be imprisoned in execution of a decree for a longer period than six months, or for a longer period than six weeks, if the decree be for the payment of a sum of money not exceeding fifty rupees."

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No doubt the Code itself and the provisions of chapter XIX. "Of the execution of decrees" are mainly addressed to suits commenced after the 1st October 1877; but many of them, including the important ones in sections 341 and 342, are, in my opinion, equally applicable to proceedings pending when the Act came into operation. Each of the Codes of 1859 and 1877 is a "Code of Civil Procedure," regulating the procedure to be followed by the suitors who resort to civil Courts, and it appears to me to be impossible to suppose that the Indian Legislature did not intend the improvements which are in the new Code to apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable.

By section 3 of Act X. of 1877, which, by section 1, is declared to extend to the whole of British India, it is enacted that "Nothing herein contained shall affect the procedure prior to decree in any suit instituted, or appeal presented, before this Code comes into force," thereby implying that the procedure after such a decree shall be according to the provisions of Act X. of 1877. The present application is one made subsequent to decree, and must be regulated by the new Code.

I do not feel pressed by the case cited, by Mr. Inverarity, of *Sumboochunder Haldar and others*,[1] quoted at p. 230 of Mr. Broughton's Edition of the Civil Procedure Code of 1859, where it is stated to have been held that the proceedings in execution of a decree in a suit begun under the old Supreme Court Procedure were regulated by Act VII. of 1855 and not by the Civil Procedure Code of 1859, and for this reason. By the Imperial Statute authorizing High Courts to be established, 24 and 25 Vic., c. 104, section 12, provision was made as to pending proceedings in the then to be shortly abolished Supreme Courts, and it was thereby enacted that "Such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively."

(1) 1 Bourke 69.

The procedure provided by the Code of 1859 was so radically different from, and for the most part so inapplicable to, suits brought on the Plea Side or Equity Side of the old Supreme Courts, that one is not surprised to find the old procedure retained by the express direction of the statute. The same reason does not exist in the present case, where one procedure Code is merely substituted for and supplants another, with such alterations and additions as the Legislature has considered that time and experience have shown to be desirable.

In *Williams* v. *Smith*,[1] cited at the bar, the Exchequer Chamber held that the 1st section of "The Mercantile Law Amendment Act, 1856" (19 and 20 Vic., c. 97) did not apply to cases where the writ of *fi. fa.* had been delivered to the sheriff before that Act passed. Williams, J., then said (p. 563) that the *fi. fa.* had begun to operate before the statute passed, and was in full vigour at that time; and that they could not give the statute a retrospective effect, so as to deprive the defendant of any right he possessed under his writ.

In that case to have given the statute a retrospective operation would have entirely deprived the defendant of the fruits of his *fi. fa.* In the present case the construction which appears to me the sound one, does not prevent the imprisonment of the petitioner under the *ca. sa.* issued in October 1876, but merely says that he shall be in prison, not for two years under the old Code, but only for six months, the maximum limit fixed under the new Code. *Williams* v. *Smith*[2] is clearly distinguishable from, and in my judgment has no application to, the present case.

There would also be this further difficulty, viz., that when in October 1878, according to the usual practice, application would be made to the sitting Judge in Chambers for an order to release the petitioner at the expiration of his two years' imprisonment, the Judge would have to act upon section 278 of the old Code, whereas that Code, and along with it section 278, have been repealed as from the 1st October 1877 by section 3 of Act X. of 1877.

I have not overlooked "The General Clauses Act, 1868" (Act I. of 1868), but I do not think that section 6 of that Act is applicable to the present case.

(1) 4 H. & N. 559. (2) 4 H. & N. 559.

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There is a much more recent decision than the one of *Williams* v. *Smith*, (1) a decision in 1869, upon another section of "The Mercantile Law Amendment Act, 1856," a decision by Lord Chancellor Hatherley. He held that section X. of that statute was retrospective, and that even where the cause of action had accrued before that statute was passed, no person was entitled to any time within which to commence an action beyond the time fixed by the statute of limitations by reason of such person being beyond the seas when the cause of action accrued: *Pardo* v. *Bingham*.(2) The Lord Chancellor said that there had been a decision upon that 10th section by the Court of Queen's Bench in *Corvill* v. *Hudson*, (3) the Judges consisting of Lord Campbell, Coleridge, Wightman, and Erle, JJ., and they held that as regards the 10th section the statute was retrospective. That case, he says, was not carried further by error, and as far as he knew had been the ruling authority ever since. He then stated that the general rule of law was that, except there be a clear indication, either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction. The Lord Chancellor then cites *Moon* v. *Durden*, (4) and says that in that case Baron Parke did not consider it an invariable rule that a statute should not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed an intention. In fact (says Lord Hatherley) we must look to the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law and what it was that the Legislature contemplated. "I think" (he says) "that there is a considerable difference between this case and a case where a right of action is actually taken away. That is the ground of the decision in *Moon* v. *Durden*(5) and *Jackson* v. *Woolley*. (6) In each of those cases the persons had acquired by positive act *inter partes* a right of action, in the latter case by a co-contractor having made a promise, which, of course, the person had a right to rely upon, as the law then stood,

(1) 4 H. & N. 559.
(2) L. R. 4 Ch., App. 735.
(3) 8 Ell. & Bl. 429.
(4) 2 Exch. 23.
(5) 2 Exch. 22.
(6) 8 Ell. & Bl. 778.

as giving him a further period of six years for his remedy." I own that it appears to me that, to adopt the construction contended for by Mr. Inverarity in behalf of Trikamdás Shivrám, the execution creditor, would be to do little else than to hold that the various eminent legislators through whose hands the new Code passed during its preparation, and whilst in progress through the Legislative Council of India, had forgotten altogether to consider the case of the very large number of judgment-debtors who would be imprisoned in the gaols of the Presidency towns and throughout the rest of British India on the 30th September 1877. By adopting the interpretation which I have followed, effect is given to what I think the Legislature not only contemplated, but in positive and unambiguous terms enacted, when it passed the 341st and 342nd sections, and thereby said that "the judgment-debtor shall be discharged from jail when the term of his imprisonment, as limited by section 342, is fulfilled," and that "no person shall be imprisoned in execution of a decree for a longer period than six months."

When of two possible constructions, one is in strict harmony with the improvements contained in the Act, and is not merely not inconsistent with the plain grammatical language used in three of its sections (sections 3, 341, and 342), but follows the provisions and directions therein contained, as well as the benign spirit of modern legislation on the subject of imprisonment for debt, as exemplified in the English Statute 32 and 33 Vic., c. 62, section 7, and, moreover, prevents a grave injustice being inflicted upon the civil prisoners already in custody throughout British India when the Act came into operation; whilst the other construction treats the point under consideration as not having been considered by the Legislature at all, and in effect attributes to the Legislative Department and the Legislative Council of the Governor General what appears to be little short of crass negligence, I confess that I, for one, gladly adopt the former construction, based as it is upon a well-known canon applicable to the interpretation of statutes, and which was adopted in 1866 by Sir Richard Couch, when Chief Justice of this Court (a Judge of remarkable accuracy and acumen), in the case I have already referred to.[1]

(1) 3 Bom. H. C. Rep., O. C. J. 49.

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Being, therefore, for the above reasons, clearly of opinion that the petitioner Ratansi Kaliánji has been since the 1st October instant, and is now, illegally detained in prison, I think he ought to be immediately discharged from custody.

GREEN, J.:—It is contended on behalf of the petitioners here that sections 1, 3, 341, and 342 of the new Civil Procedure Code operated to effect, as on the 1st October instant, a legislative general gaol delivery throughout British India of all civil prisoners in custody under process issued by virtue of the Acts repealed by section 3 of the new Code, in cases where such prisoners had on the said 1st October been in custody for six months or upwards. The Legislature may or may not have had the intention that such general liberation of civil prisoners should take place; the question is, has such intention been manifested? and it is, in my opinion, *primâ facie* very improbable that the Legislature should have left such intention, if it existed, to be collected from inference, and should not have enacted an express provision embodying such intention. However this may be, such intention, though to be collected from inference only, must, of course, if manifested, have its effect. By section 1 of the new Code it is enacted that it shall come into operation on the 1st day of October 1877. By section 3 is repealed (amongst other Acts) so much of Act VIII. of 1859 and Act XXIII. of 1861 as had not already been repealed; but it is provided that "nothing herein" (by which I understand nothing in section 3) "contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force." Apart from section 1 and the proviso to section 3, I do not find in the new Code any provision as to its operation with regard to pending or past proceedings. Section 1 in itself merely says that the Code shall be in force from the 1st October 1877, and does not in any way affect past proceedings or their effect, and the repeal of the previously existing procedure Acts (under which, of course, any such past proceedings were taken) contained in section 3 is coupled with the proviso that such repeal is not to affect proceedings prior to decree in suits or appeals already instituted or presented on the 1st October 1877. The question raised here really is

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whether section 1, and the repeal of Act VIII. of 1859 and Act XXIII. of 1861 by section 3, are to be held to alter or abridge the legal effect, after the 1st October 1877, of proceedings had and finally determined under such repealed Acts before the new Code of procedure came into operation. It is quite clear, in my opinion, that section 1 cannot be held to do so, and that the question is, whether any such intention of the Legislature can be inferred from section 3 with its proviso? The question raised is one of great importance, affecting not merely the greater or less maximum length of the custody of all civil prisoners committed under the repealed Acts before the 1st October 1877, but, in many important respects, the validity and effect of executions and other proceedings posterior to decree ordered prior to the 1st October 1877 under the then existing legislation.

In construing the New Civil Procedure Code, as all other Acts of the Legislative Council of India coming into operation subsequently to the 3rd January 1868, we must always have regard to Act I. of 1868, "the General Clauses Act 1868," which contains, besides a clause interpreting certain terms and phrases of ordinary occurrence in Indian legislation, certain rules of construction to be applied to Acts of the Legislative Council coming into operation subsequently to the 3rd January 1868. By section 6 of this Act it is enacted as follows :—"The repeal of any statute Act or regulation shall not affect any thing done, or any offence committed, or any fine or penalty incurred, or *any proceedings commenced*, before the repealing Act shall have come into operation." The words "proceedings commenced" in this section have received a judicial interpretation by this Court sitting as an Appellate Court of four Judges in the case of *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*.[1] It was there held that the right of appeal to the District Court from a decree made before Act XIV. of 1869, "The Bombay Civil Courts Act, 1869," came into operation, by a Principal Sadar Amin, was not taken away by that Act, though the amount or value of the subject-matter exceeded Rs. 5,000. By section 26 of that Act it was enacted that in all suits decided by a Subordinate Judge of the first class, in the exercise of the jurisdiction therein mentioned, (and by section 30 the then present Principal Sadar

(1) 6 Bom. H. C. Rep. A. C. J. 166.

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Amíns were constituted the first Subordinate Judges of the first class) the appeal from his decision should, when the amount or value of the subject-matter exceeded Rs. 5,000, be direct to the High Court. It was held by the Court that the repeal, by the Act, of the laws and regulations under which there was a right of appeal in such a case in the first instance to the District Court, did not take away such right of intermediate appeal, and that such right was saved, notwithstanding such repeal, by reason of the operation of section 6 of the General Clauses Act, which I have already set out. This decision was in no wise inconsistent with the earlier one of *Framji Bomanji* v. *Hormasji Barjorji*,(1) where it was held that a right of appeal to the High Court itself, (*i.e.*, to three or more of its Judges,) from the decree of two of its Judges, in a suit heard and decided before, though the decree was sealed after, the Amended Letters of December 1865 came into force, (and which right of appeal existed under the former Letters Patent of June 1862) was taken away by the coming into operation of the amended Letters Patent. In that case, of course, no resort could be had to the General Clauses Act, as it was not then passed. It may further be observed that the General Clauses Act applies only to Acts of the Governor General's Legislative Council, and not to Royal Charters or Acts of Parliament. The decision in *Framji Bomanji* v. *Hormasji Barjorji* (2) was founded on the express words of the amended Letters Patent taking away such intermediate appeal to the High Court itself, by making the appeal from two Judges who agreed direct to the Privy Council, and providing further "that all proceedings commenced in the said High Court prior to the date of the publication of the Letters Patent (*i. e.*, the amended ones) shall be continued and depend in the said High Court as if they had *commenced* in the said High Court after the date of such publication."

It is, I think, much to be regretted that no such clause as the one last cited, or as section 387 of Act VIII. of 1859, was introduced in the new Code of Civil Procedure, clearly defining in a positive, and not merely in a negative, way what is to be its operation on proceedings already commenced. However this may be, in the case

(1) 3 Bom. H. C. Rep. O. C. J. 49. (2) 3 Bom. H. C. Rep. O. C. J. 49.

referred to, of *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*, [1] it was held that the words "proceedings commenced" in section 6 of the General Clauses Act included a suit in which a decree had been given, and that the word "proceedings" must be taken to include all the proceedings in the suit from the date of its institution to its final disposal.

But for the proviso to section 3 of the new Code, and having regard to the judicial interpretation which the words "proceedings commenced" in section 6 of the General Clauses Act, 1868, have, as aforesaid, received, and to the absence of any provision (unless section 1 can be considered such) in the new Code expressly applying its provisions to pending proceedings, I should have been disposed to hold that, as to all proceedings (*i.e.*, suits, applications, and matters of civil nature), commenced and pending in this Court on the 1st October 1877, their subsequent conduct and course, (including execution and appeal,) would be governed by the law theretofore in force, though the repeal of such law would be immediate as to proceedings not then commenced, and to such last-mentioned proceedings the new Code would apply. But, of course, the general rule of construction contained in section 6 of the General Clauses Act must yield to the intention of the Legislature expressed in any subsequent Act, that to a greater or less extent that rule is not to apply to such subsequent Act; and I am of opinion that in the proviso to section 3 of the new Code coupled with section 1 is to be gathered the intention of the Legislature that, to a certain extent at least, such rule was not to apply so far as concerned the repeal of the previous procedure laws effected by section 3. The frame and wording of this proviso appear to me sufficiently clearly to manifest the intention of the Legislature that the repeal of the old Procedure Acts, and in particular Acts VIII. of 1859 and XXIII. of 1861, *was* to affect to some extent the procedure (other than procedure prior to decree) in suits instituted or appeals presented before the Code came into force, and in the way that in respect to procedure not prior to decree the provisions of the new Code were to take the place of the previously existing law. But ample effect, in my opinion, would be given to the proviso and to such intention, while at the same

[1] 6 Bom. H. C. Rep. 163 A. C. J.

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time regard would still be had to section 6 of the General Clauses Act, by holding that in all *future* (*i.e.*, future with reference to the 1st October 1877) steps and proceedings not being prior to decree in suits instituted and appeals presented before the 1st October 1877, the provisions of the new Code are to be observed and operative. I cannot understand on what principle the Legislature can be supposed to have intended in any way to disturb acts or proceedings in suits already done and had, or the legal effect and operation which acts or proceedings already done and had would have had at the time they were so done and had.

A number of English authorities were cited to show that statutes concerned with judicial procedure, where of themselves they are capable of applying to pending proceedings, are an exception to the general rule of construction of statutes, that they are not to be deemed to have a retroactive operation; or, in other words, that statutes concerned with judicial procedure do, in a certain sense, and unless such operation be excluded, affect judicial proceedings pending at the time such statutes came into force. But these authorities all deal with the question whether, where some new step is taken in the course of pending proceedings after the new statute came into operation, and on which new step being taken, the new statute has imposed some restraint, or conferred some benefit, on one or other party to the proceeding, such restraint or benefit is not to have effect, and this for the reason that the action, suit, or proceeding itself, as a whole, had originated before the new statute came into operation.

In *Freeman* v. *Moyes*[1] an action was commenced by the plaintiffs as executors in Easter term 1832. On the 14th August 1833 came into operation 3 and 4 Wil.IV., c. 42, which *inter alia* enacted that executors and administrators bringing actions should be liable in their personal capacity to costs in case of nonsuit or verdict passing against the plaintiff. The action was tried at the sittings of the Michaelmas term, 1833, and so after the statute had come into operation, and the defendant having a verdict, it was held he was entitled to costs under the statute against the plaintiffs personally. This, then, was a case of a certain effect being given by a statute

(1) 1 A. & E. 338.

to a certain event, namely, a verdict for the defendant, in the course of a suit pending when the statute came into force, which event occurred after the statute came into operation. *Wright* v. *Hale*[1] again (which is a very strong case, and, though followed, was not quite approved of by the Queen's Bench in *Kimbray* v. *Draper*[2]) was a case of a statutory provision coming into operation between the commencement and the trial of an action. It was provided by 23 and 24 Vic., c. 126, section 34, that when a plaintiff in any action in any of the superior Courts for an alleged wrong recovers by the verdict of a jury less than £5 damages, he shall not be entitled to any costs if the Judge certifies to deprive him of them, and the question for the Court was whether the Judge trying the cause had power to give such a certificate with effect, having regard to the circumstance that the suit had been commenced when the statute in question came into operation. Here, again, it was a question of a certain disadvantage being imposed on a plaintiff, but as a result of a step in the suit which took place *after* not *before* the statute came into operation. The same observation applies to *Kimbray* v. *Draper*[3] already cited. So, again, in *ex parte Anderson*[4] it was held that the jurisdiction given by the Bankruptcy Act of 1869 to grant an injunction to restrain a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy, might be exercised in the course of the proceedings in a bankruptcy which had commenced before the Act. Then, in the case of *Attorney General* v. *Sillem*,[5] the question was whether an appeal to the Exchequer Chamber from the decision of the Court of Exchequer, on a motion for a new trial of an information by the Attorney General on the Revenue side, in a case where the verdict of the jury had been given at a trial had at the sittings after Trinity term, 1863, could be given by virtue of a general rule or order as to practice made by the Lord Chief Baron and Barons on the 4th November 1863, and expressed to be in pursuance of section 26 of the Statute 22 and 23 Vic., c. 21. The majority of the Lords who

(1) 6 H. & N. 227.
(2) L. R. 3 Q. B. 160.
(3) L. R. 3 Q. B. 160.
(4) L. R. 5 Ch. App. 473.
(5) 10 H. L. C. 704.

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heard the appeal were of opinion that the rule itself, giving the right to appeal in such a case, was not valid, as being a rule which the Barons had not under the statute power to make. But the opinion of all the Lords, who expressed any on the point, seems to have been that if the rule had been valid in itself, it would not have been an objection to it that it would affect a pending suit. But it must be borne in mind that the circumstances which the Lords, who so expressed an opinion, had before them were a verdict after Trinity term, 1863, a motion for a new trial mentioned but postponed on the 3rd November 1863, a new rule of the Exchequer Court of the 4th November 1863, giving an appeal to the Exchequer Chamber from a decision on such motion, the motion renewed, and a rule for a new trial granted, on the 5th November 1863, and the rule finally discharged in January 1864. There are certain propositions laid down by Lord Wensleydale, in moving the judgment of the house, which are material to be noticed for their bearing on the question of the construction of statutes concerning procedure. After referring to the principle that statutes are not to be construed retrospectively so as to deprive any person of a vested right of action, he notices the difference which exists between such a case and the case where a statute is dealing with new procedure to recover such right, which, the learned Lord says, "it may be quite reasonable to regulate and alter." He proceeds: "The right of the suitor is to bring the action and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure." But neither in this case of the *Attorney General* v. *Sillem*,[1] nor in any of the cases cited, is anything to be found involving this, that a statute concerned with judicial procedure,

[1] 10 H. L. 704.

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though affecting pending suits as to all future proceedings in such suits, interferes with or affects steps and proceedings already, at the time such statute came into operation, taken and determined. In fact, in *Wright* v. *Hale*,(1) (which decision, though, as I think, disapproved of in *Kimbray* v. *Draper*,(2) seems to be approved of by Lord Wensleydale), the Chief Baron denied that by its decision the Court was giving any retrospective operation at all to the statute then in question, and that for the reason that the decision only gave the effect provided by the statute to be given to an act to be done at the trila, which was *after* the passing of the statute. So Wilde, B., when in the same case he states the principle thus:—"The right of the suitor is to bring an action and have it conducted according to the practice of the Court. Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be," is evidently referring to proceedings to be taken after the statute introducing change of procedure comes into operation, and there is nothing in his judgment to indicate that he considered that the effect of a proceeding already had and concluded would be altered by a statute annexing greater or less effect to a similar proceeding taken subsequently to the statute. The case of *Wright* v. *Hale* (3) would have been in point for the present petitioners had the verdict been before the statute came into operation, but the certificate of the Judge depriving the plaintiff of costs had taken place after it.

Being of opinion, therefore, that the generality of the words in section 6 of the General Clauses Act is to be limited by the effect of the proviso to section 3 of the New Procedure Code to this extent, that the repeal of the old Procedure Acts does affect suits commenced before the 1st October 1877 so far as concerns proceedings (not prior to decree) in such suits to be taken subsequently to that date, and that by virtue of section 1 combined with the inference to be drawn from this proviso, the procedure to be applied to such subsequent proceedings are the provisions of the new Code (except with regard to procedure prior to decree), I think

(1) 6 H. & N. 227. (2) L. R. 3 Q. B. 160,

(3) 6 H. & N. 227.

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that for the execution of decrees in suits commenced before that date, and whether such decrees themselves be of a date prior or posterior to the same date, the parties can, after the said 1st October 1877, resort only to the provisions of the new Code, and that, for instance, under any warrant of arrest ordered to issue subsequently to that date, whether in execution of a decree prior or subsequent to the same date, the judgment-debtor cannot be imprisoned for a period longer than six months. But the present petitioners were on the 1st October 1877 already in custody under warrants issued by virtue of Act VIII. of 1859, by the terms of which they were to be imprisoned till satisfaction of the decrees against them. Their period of imprisonment was limited by the said Act to two years. No new proceeding has been taken, or is, in fact, necessary to be taken, to detain these persons in custody under the warrants already issued, and, in my opinion, the right which the execution-creditors had, under such warrants, to detain their debtors in custody till satisfaction of their decrees (but not exceeding the period of two years) was in no wise affected by the Code coming into operation. As to proceedings already had and taken in suits, the old Acts are not, in my opinion, repealed. The right of detaining creditors till satisfaction, is further, in my opinion, a right having relation to property, and tending at least (whether effectively and certainly or not, is not material) to secure payment to creditors of money due to them. It was a right, whether in fact valuable or not, vested in the creditor at the time the new Code came into force, and, as such vested right, is not to be taken away except by the clearly expressed will of the Legislature. Ample application is, in my opinion, to be found for sections 1, 3, 341 and 342 of the new Code without attributing to them any such effect, and in such case comes into operation the general principle that, unless absolutely imperative, statutes are not to be construed to take away or diminish existing rights. I think the case of *Williams* v. *Smith*,[1] which was cited in the argument, is very much in point. Though, no doubt, the statute in question there, namely, "The Mercantile Law Amendment Act, 1856," was not a statute generally concerned with procedure, yet the particular provision in question, which altered the effect of a writ of *fi., fa.*, was distinctly so.

(1) 4 H. & N. 559.

Though the words of the statute there in question were in themselves such as affected the operation of writs of *fi. fa.* already delivered to the sheriff, but not executed by actual seizure and attachment of goods, yet it was held that such words were not to have retrospective operation as to such writs, so as to deprive an execution-creditor of the right or advantage he had already gained when the statute came into operation, by the fact of the writ in the particular case having been already delivered to the sheriff at the time the statute came into force, though the seizure and attachment had not at that time taken place. For the above reasons I am of opinion that the application for the release from custody of the petitioners must be rejected.

WEST, J. :—The question for disposal in the present case being that of the proper scope of section 342 of the Code of Civil Procedure, Act X. of 1877, the argument for the applicants, Ratansi Kaliánji and others, is that their detention is a continued act of procedure in execution of the decrees against them, that procedure in execution, even as to past decrees and on past warrants of execution, is to be governed by the new Code, and that, therefore, section 342, as it relates to procedure in execution, properly applies to their cases. That section declares that "no person shall be imprisoned in execution of a decree for a longer period than six months :" the petitioners having already been imprisoned for more than six months, pray that an order may be made for their release. That the orders for their imprisonment were properly made under Act VIII. of 1859, is not questioned, nor is it disputed that, according to that Act, the imprisonment might extend to two years, while the petitioners have been imprisoned for a much shorter time ; but the original capacity of the orders to warrant an imprisonment of two years has, it is said, been cut down by the new law, so that it must now, after the lapse of more than six months, be regarded as exhausted.

The proposed construction is so far retrospective that it would give to the orders formerly made in the cases of the applicants an effect different and more limited than that attached to them by the law as it stood when the orders were pronounced. But Lord Westbury has laid down that there is a broad distinction

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between the rules which give a right of action and those which regulate the procedure of the Courts—*Attorney General* v. *Sillem*;[1] and laws of procedure, it is argued, are in the required sense ordinarily retrospective. Every hour's constraint being a renewed exercise of coercion, though in effect continuous with the force exercised before, is a fresh step in giving physical operation to the Court's order. It is, moreover, not to be regarded as the exercise of a right vested in the judgment-creditor, but merely as a process employed by the Court and its officers whereby the creditor may, if possible, attain his right, which is to have his decree satisfied by payment. Each new step, though the suit or the execution may have commenced before the new law was passed, is governed by it in the absence of an express provision to the contrary; and in the present instance the saving of the old procedure in the case of pending suits and appeals gives special significance to the omission of any like provision as to the proceedings in execution of decrees.

The general principle of the non-retroactivity of new laws need not be insisted on.[2] On the other hand, there is, in one sense, an element of retroactivity in all laws, since no law can operate except by changing or controlling what would else have been different capabilities, or a different sequence of acts and events having their roots and motives in the past. It would be more important for practical purposes to distinguish, if possible, the cases and the senses in which the loosely-expressed principle does and does not apply, and to ascertain the exceptions to which it is subject. That, as has occasionally been argued, there is something universally and essentially wrong and unjust in retrospective laws, is not to be admitted. The principle has, indeed, been accepted as a fundamental one in the written constitutions of some states, but it is properly rejected by Willes, J., in the case of *Phillips* v. *Eyre*,[3] and by Dr. Lushington in the "*Ironsides*."[4] For the legislator the question is always one of the higher as against the lower, or of the general against the particular interest. For the judge the question is simply as to the true intention of

(1) 10 H. L. 704; also see Savigny System v., 5 s., 204 ss.

(2) See Lord Coke on the St. of Gloster, 2 Inst. 292. Cic. in Verr, Act II., Lib. I., Cap. 42.

(3) L. R. 6 Q. B. at p. 23. (4) 29 L. J. Adm. at p. 131.

the Legislature (see *per* Trevor, C.J., in *Arthur* v. *Bokenham* [1]). In the case of the *Queen* v. *Vine* [2] the statute to be construed said nothing expressly as to existing holders of licenses, and the rule against retroactivity would have saved an interest already fully acquired and exercised; but the majority of the Court, looking to the obvious purpose of the Legislature, held that a past conviction caused the law to operate in destroying an existing interest in a public-house license, as well as in preventing the acquisition of such an interest in future.

This retroactive force, however, bearing usually on whole classes of the community, which has in particular instances to be ascribed to laws intended to abolish or profoundly change some legal institution, or to attain some great public end, even at the sacrifice of individual interests, has always to encounter a very strong presumption if it is sought to apply it to the extinguishment or the extension of particular rights once definitely constituted between individual subjects of the state.* These cannot be interfered with, except at the cost of a general distrust of the stability of the law and an unjust preference of one to the other of the two parties to transactions. Such transactions are, for the most part, purely voluntary, and the law will give effect to them because it has virtually promised to do so; though, as to the method and details, in the manner deemed most convenient. Hence in *Moon* v. *Durden* [3] the majority of the Court held that a right of action fully acquired before the passing of the Wagers' Act was not extinguished by the words "no action shall be brought or maintained" on a wager. The public interest was manifestly the motive of the law; yet, as between private parties, it was not allowed to affect the consequences of acts not, at the time they were entered on, forbidden, and capable in themselves at the time of generating a legal right and corresponding obligation. The cases of *Gilmore* v. *Executors of Shuter*,[4] of *ex parte Rashleigh*,[5] and many others, are to be referred to the same principle. Language wide enough in itself to embrace the results of past transactions has been restricted to transactions concluded after the enactment of

(1) 11 Mod. at p. 161. (2) L. R. 10 Q. B. 195.

* Mis. S. A. 38 of 1871.

(3) 2 Ex. R. 22. So *per* Jessel M. R. *In re Suche and Co.*, L. R. 1 C. D. at p. 50.

(4) 2 Mod. 310. (5) L. R. 20 Eq. Ca. 782.

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the law, in order to avert its preventing the full exercise and natural fruition of rights already fully acquired by one subject as against another before the new rule had become law.

That a legal relation, however, between the parties concerned is equally constituted by a judicial order as by their own agreement, needs no demonstration. It is only through the possibility of judicial enforcement that the agreement itself becomes practically binding. The judicial transaction, therefore, consisting in an inquiry and an order of a Court under a particular law, is a matter as to which that law, though repealed, still has full effect. The decision has ascertained or created a legal right[1] which must afterwards be guarded in the unfolding and outgrowth of all its regular consequences. If this were not so, indeed, the right and the relation must wholly fail with the statute under which they came into being, and prisoners confined even for a week under the late Code, for instance, might demand their release for want of authority for their detention. That Code, it seems, must have clothed the Court's orders with an abiding validity, the judgment creditors with an abiding right, or else with none at all.

In the present case it is urged for the judgment-creditor that he has acquired a right of this kind. Before the passing of the new Code, it is said, he had a right arising from a specific order to enforce payment of the debt due to him by keeping his judgment-debtor, if necessary, for two years in gaol. The detention of the debtor, resting in the option of the creditor, was a matter of substantial right, though of right to be exercised only in the appointed way; and the presumption, it is contended, is strong against any intention to deprive him of this right: he is not to be deprived of it by a mere inference from the omission to provide for this particular case, without words expressly applicable to it. In the case of *Williams* v. *Smith*[2] the delivery of a writ of *fi. fa.* to the sheriff was held to bind the goods of a judgment-debtor after the passing of the Mercantile Law Amendment Act, it having been delivered before the Act came into force, which made actual prior seizure necessary to produce this effect as against a purchaser in good faith for valuable consideration.

(1) See per Lord Selborne in *Lockyer* v. *Ferriman*, L. R. 2 App. at p. 519.
(2) 28 L. J. Ex. 286.

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The case just referred to was analogous to the one before us, in that a right acquired in relation to a judgment-debtor's property was held not to have been impaired by a law which, if the right had to be newly acquired, would have prevented that result from arising. If the creditor's right, (for some right he clearly has,) against his judgment-debtor's person is of a like legal character to that which he acquires against his property by a proceeding which binds it, the new law which modifies the right ought to be applied only to instances arising after its own creation in the one case as in the other. The cases certainly resemble one another in this, that in *Williams* v. *Smith*[1] a right had been acquired by the judgment-creditor to which full effect was to be given by a merely ministerial activity, just as the imprisonment of the applicants here is to be carried out without further order of the Court by the sheriff.

The coercion exercised in depriving a man of his property and keeping him out of possession of it, seems, from this point of view, quite akin to that used in confining his person. The extension and the restriction of the natural personal capacity involve in each case the creation of a right regulated in each case by special rules for its exercise.[2] That some further result is expected or intended to be realized, is no special attribute of the particular right consisting in creditor's power in execution; but such as it is it belongs equally to either mode of coercion. If, too, the one is a continuous act of procedure so it appears must be the other. Under the new Code the wages of domestic servants are not liable to attachment (section 266). If wages were attached on the 30th September 1877, did the attachment fail or become illegal on the 1st October? There would be a continuous procedure in the sense intended, so that, if that sense be admitted, the new Code would dissolve the attachment; but *Williams* v. *Smith*[3] shows that in spite of this the creditor's right fully acquired would not be annulled. It appears, then, that the ministerial officer is to act on the order of the Court according to its original purport, and the jurisdiction under which

(1) 28 L. J. Ex. 286.
(2) Ortolan Elem. de Dr: Pen: S. 12. Goudsmidt Pand. S. 17.
(3) 28 L. J. Ex. 286.

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it was issued; that the order itself, in the absence of an express provision to the contrary, retains its validity until it is withdrawn or varied, and that the new procedure, therefore, does not apply, except perhaps in matters of mere administration, (1) or provisional arrangement, (2) whether as touching person or property. It cannot, at any rate, apply so as to annul an order properly made, a relation legally constituted, and thus deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. In the words of Coleridge, J., in *Reg.* v. *Denton*, (3) "what has been perfected is not to be disturbed," though, "if we require the Act for any further step, it must be in force at the time." Any change in the relations of the parties can be made only in accordance with the later and existing law; but their previously subsisting relations continue to subsist as before.

But even if that were otherwise, it does not, judging by the generally received standards of judicial construction, seem likely that the Legislature intended the limiting provision of section 342 of the new Code to be applied to cases of imprisonment other than those arising under the Code itself. Sections 254, 259, 260 of the Code empower the Court to direct the imprisonment of a defaulting judgment-debtor. If section 342 were annexed immediately to any of these sections, no reasonable doubt could exist that it was intended as a proviso or limitation operating along with the affirmative enactment, and on those cases only to which the empowering enactment was to be applied. As a simply negative provision, it would by itself have no effect; this forces us to look for some affirmative provisions with which it may be read; and these we find within the same chapter of the Code. The sections giving authority could, of course, be applied only to cases arising after the Act had come into force; and thus the limiting provision would itself be limited. Then, as to the form of expression, "No person shall be imprisoned" appears more properly to mean "No one shall be put into prison and kept there" than "No one being now in gaol shall be kept there." The latter, as an additional or complementary sense, would naturally have been conveyed by say-

(1) See *Reg.* v. *Mount*, L. R. 6, P. C. 283.
(2) See *Ex parte Anderson*, L. R. 5 Ch. Ap. 473.
(3) 21 L. J. M. C. at p. 208.

ing: "No one shall be imprisoned or retained in imprisonment," and the omission of an obviously appropriate expression may, according to the argument for the applicants, signify most strongly that the thought was absent too. Still, however, standing, as it does, apart from the affirmative provisions, section 342 may allowably suggest, if looked at singly, the notion of a general prohibition of all imprisonment in civil cases beyond a term of six months, though more properly referrible to imprisonment begun, continued, and ended in future; but then it is a cardinal rule, in the interpretation of statutes, that every part is to be construed by reference to every other. Section 342 is not only in the same statute, but in the same chapter as the several sections empowering the civil Courts to order imprisonment; and though there are many intervening sections, they all have reference to the same subject; the same course of thought is pursued throughout them. The section which restricts imprisonment belongs essentially in sense to the sections which authorize it, and a reason for their severance in place is apparent in the economy of using a single formula of restriction instead of several times repeating it, and in the desire to group the provision fixing the extreme limit of imprisonment along with the provisions in section 341 for the release of the judgment-debtor after a shorter time under the various circumstances there specified.

In the English Statute (32 and 33 Vic., cap. 62,) for abolishing imprisonment for debt, except in cases of fraud and contumacy, an express provision was thought necessary, in order to make it applicable to the case of persons already in confinement. This was an interference with the rights of judgment-creditors as they had already been constituted by a completed juridical transaction which it was felt the Courts would not ground, as to past commitments, on any mere inference from the general abolition of imprisonment. In the present case, if the Procedure Code, while making other provisions for the enforcement of decrees, had enacted that imprisonment for debt should cease, though the application of the law to pending cases would not conform to the rule, laid down by Lord Westbury in *Attorney General* v. *Sillem*, (1)

(1) 10 H. L. C. at p. 727.

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of its applying "equally and impartially to both sides," yet such an abolition of a whole legal institution would perhaps have justified the conclusion that the rights of creditors already acquired over the person of the debtor were meant to be extinguished as well as their future creation prevented. So, if, in the sphere of criminal law, solitary confinement as a punishment were wholly abolished, a reference to the policy or motives of the Legislature would justify without express words a construction against the infliction of solitary confinement for particular crimes committed before the passing of the prohibiting Act. But an Act abolishing whipping as a punishment for petty theft would not make illegal the infliction, after it had passed, of a sentence of whipping pronounced before it. Here the institution of imprisonment for debt, or for failure to satisfy a Court's decree, is by no means abolished; it is only the term to which the imprisonment may extend that is abridged. This is not a fundamental change indicating a completely new view and purpose of the Legislature; it is a mere change of degree, though no doubt a considerable one, within the limits of the institution itself. No special excursive rule of construction, therefore, is to be applied to it; and while it must govern all orders for imprisonment on applications made subsequently to the Code's coming into force, and the execution of those orders, it does not apply to orders made under the former Code.

Had the change in the maximum of imprisonment been from six months to two years, it would hardly have been contended by any one that debtors already in gaol might be detained there under the new Code for eighteen months longer than the old one allowed. Had any creditor been hardy enough to urge such an argument, it would have been answered that his right against his debtor's person had become definitely fixed by his proceeding under the former Code, and that the debtor's position was not to be prejudiced by the operation, not expressly directed, of an *ex post facto* law. That the close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, is evident from *Mount* v. *Taylor* [1] and *Butcher* v. *Henderson*. [2] In the one case the change of

[1] L. R. 3 C. P. 645. [2] L. R. 3 Q. B. 335.

the law operated favourably, in the other adversely, to the defendant as to the plaintiff's recovery of costs; and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The latter is no more to be deprived of a right of confinement of his defaulting debtor than the latter of the limitation, subject to which the right came into existence, and was first exercised. Our sensibilities are apt to influence our judgment in a matter of this kind, but the question is really one simply of defined civil rights as affected by subsequent legislation. Even a milder penal law, however, is never held to relieve against sentences already passed under the severer provisions of its predecessor, and in the French and German codes it has been thought necessary to provide expressly that offences committed under the more rigorous law shall, if tried after a more lenient one has passed, be punished according to the milder standard. Mere construction would not have given the new laws any such reflexive effect, though in England and in India the result has been held to follow from a change of the law that a criminal is not liable to punishment at all.

The provisions in juxtaposition to which section 342 is placed, like the other provisions of the chapter of the Code on execution, seem to point only to future steps taken under future orders of the civil Courts. Looking at the chapter as a whole, it seems plain that the provisions empowering the Courts to order imprisonment being necessarily intended for the future, the limiting provision which in sense accompanies them is intended to apply, like the several ancillary and modal provisions which intervene, to future cases also, and to those cases only. Such a construction will give full effect to every word in the section, and it is surely very unlikely that the proposed extension of its meaning should in so elaborate an Act have been left to a mere questionable implication when the addition of three words would have made the more comprehensive intention clear. It seems safest to ascribe to our Legislature an excess rather than a defect of system and of technical reserve; and this leads directly to some considerations which, in my opinion, are quite decisive of the case before us.

Section 6 of Act I. of 1868 says that "The repeal of any..... Act ..... shall not affect ..... any proceedings commenced

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before the repealing Act shall have come into operation." If there were no provision at all in the new Code as to any matters still pending, this provision would, in my opinion, prevent the imprisonment of the applicant, as a "proceeding commenced," from being affected by its rules; and I do not think the mere omission of procedure in execution from the enumeration in section 3 of matters not to be governed by the Code affords a safe basis on which to ground an exception from the operation of the General Clauses Act. The provisions of that Act we must suppose are ever present to the memories of our law-makers, and the omission of any provision which that Act supplies, is an exact fulfilment of its purpose. It may well be that the clause, directing that the whole procedure prior to decree in pending suits is to be governed by the former law, was introduced into the Code on account of a possible distinction arising on the words "proceedings commenced," and with a view to secure the harmony of a single system amongst the several steps of the same suit; while as to execution, it was thought that only "proceedings commenced," some definite application for the enforcement of a decree, or some particular prayer against the attachment of property, and the steps consequent on it, required a substantial identity of procedure. This as to anything initiated before the 1st October 1877 was sufficiently provided for by the General Clauses Act; matters originated afterwards were left to the operation of the Code. In the cases before us it is certain that the "proceedings commenced" before the 1st October. What is urged, is that they ought to have ended on that day; but if the General Clauses Act operates at all, it causes the former and not the present Code to govern the enforcement or attempt to enforce the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment. Under the former Code the applicants are not entitled to be released, and their application should be rejected. The application itself may, indeed, from one point of view, be regarded as a "proceeding commenced" since the new law came into operation, and the new law would thus govern the procedure under which it was to be heard and disposed of; but if it is a new proceeding in this sense, and with these consequences, that circumstance excludes it from being integral

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with the previous proceedings in execution. The fact, therefore, that it must be dealt with under the new law, has no influence on them as regards the law to which they are subject. If, on the other hand, it is to be regarded as integral with the previous applications and orders, forming with them a single and essentially connected series, then it must necessarily be part of a "proceeding commenced" before the new Act came into force, and not governed, therefore, by its provisions. In neither case can it bring within those provisions orders deriving their validity and effect from another law.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

MANOHAR GANESH (ORIGINAL PLAINTIFF), APPELLANT *v.* BA'WA' RA'MCHARANDA'S AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* August 22.

Court fees—Act VII. of 1870*—Declaratory decree—Consequential relief—Valuation of suit—Jurisdiction—Appeal.*

Held, following *Nárávan Madhavráv* v. *Collector of Thánd* (I. L. R. 2 Bom. 145), that the decision of the Court of first instance rejecting a plaint for insufficiency of the valuation and stamp for the purposes of the Court Fees' Act (VII. of 1870), not being to the detriment of the revenue, is final, and no appeal lies from it.

A suit praying merely for a declaration that the plaintiff is entitled to require the defendants to account to him, and to permit him to inspect their books, is simply a suit for a declaratory decree without consequential relief, and falls within art. 17, cl. iii. of sched. II. of Act VII. of 1870.

A suit praying for such a declaration as the above, and also for a positive order in the nature of a mandatory injunction for the production of the defendants' books and property in their hands, or a suit praying for such declaration as the above, and also for a positive decree for an account to be taken by the Court, and for the production of the books and property, would range under sec. 7, cl. IV., art. (c) of Act VII. of 1870, as being a suit "to obtain a declaratory decree or order where consequential relief is prayed," and also within art. (*d*) of the same section, as being a suit "to obtain an injunction," and a suit of the third species described above would fall under art. (*f*) of the same clause, as being a suit "for accounts."

* Regular Appeal No. 31 of 1876.