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WESTROPP, C.J.—We must decline to make the order. The poverty of the defendant is no ground for depriving him of his right to appeal.

Summons discharged.

Attorneys for plaintiff.—Messrs. *Hearn, Cleveland and Little.*

Attorneys for defendant.—Messrs. *Ardesir and Hormusji.*

ORIGINAL CIVIL.

(62)

Before Sir C. Sargent, Justice.

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 February
 21, 22, 25.

THE ORIENTAL BANK CORPORATION, THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND THE AGRA BANK (LIMITED), (PLAINTIFFS), v. JOHN FLEMING AND OTHERS (DEFENDANTS).*

*Deed—Cancellation of signature—Release—Composition deed—Misrepresentation
 Negligence—Contract Act (IX of 1872), Secs. 13, 18, 19.*

The firm of Nicol & Co. having suspended payment, a general meeting of creditors was convened, at which it was unanimously resolved that the business of the firm should be wound up by voluntary liquidation under the supervision of a committee; and that the winding up should be conducted by two trustees under the supervision and control of the said committee. At a subsequent meeting of the creditors the above resolutions were confirmed, and it was further resolved that a composition deed should be prepared in pursuance of the terms of the above resolutions. The adoption of this last resolution was strongly pressed upon the meeting by the solicitor for the insolvent firm on the ground that the mode of procedure therein proposed was proposed solely in the interests of the creditors. He entirely repudiated the idea that the members of the firm were to obtain any benefit by the proposed measure. No mention was made at either of the meetings of any release to be given to the parties.

The plaintiffs were creditors of Nicol & Co., and R., S. and B. were their respective agents in Bombay. R., S. and B. attended the said meetings on the plaintiffs' behalf, and were appointed members of the committee of supervision and control.

A few days after the last-mentioned meeting, M., one of the partners of the insolvent firm, called upon R., who at the time was deeply engaged in pressing and important business. M. produced a deed which had been prepared by the solicitors of the firm, and which contained a clause by which the creditors, in consideration of the assignment of the estate to trustees, released and discharged the members of the firm from all claims. M. was aware of the existence of the release in the deed. He asked R. to execute the deed, stating that it was "the trust deed." R. requested M. to leave the document, saying that he would go over it and return it in the course of the day. M. then earnestly pressed him to execute the document at once, stating that was of the utmost importance that no time

* Suit No. 563 of 1878.

should be lost, as the native creditors were coming to his office, and that it was necessary that all the members of the committee of supervision should sign first. R. objected to sign the document without reading it, and M. thereupon led him to suppose that the deed only carried out what was agreed to at the creditors' meeting. Upon the faith of that assurance, R. executed the deed on behalf of the first plaintiffs in the belief that it was nothing more than an assignment to trustees for the benefit of creditors. Subsequently, on the same day, M. took the deed to S., and asked him to sign. S. was also engaged in pressing business, and asked M. to leave the deed for perusal; but M. gave the same reason for not doing so that he had given to R., and further stated that R. had signed, and that he (M.) hoped that S. would also sign. S. glanced at the deed, and being assured by M. that it was in order, thereupon on the faith of that assurance, and believing that the deed was nothing more than an assignment of the estate to the trustees, executed the deed on behalf of the second plaintiffs without reading it. M. on the same day took the deed, with the signature of R. and S. attached thereto, to B. who was also engaged in pressing business, and asked him to sign it. After some conversation, B. said to M.: "The deed, then, is merely an assignment of the firms effect for the creditors," and M. replied in the affirmative. B. then on behalf of the third plaintiffs executed the deed without reading it, believing it to be merely an assignment of the estate to the trustees.

On the 15th October, R. and B. heard that the deed contained a release by the creditors to the debtors, and on the 16th October S. was also for the first time informed of it. On the 16th October, R. and S. wrote a letter to M., repudiating their signatures, and refusing to be bound by the deed; and on the 26th October, B. caused a similar letter to be written to M.'s solicitor. The plaintiffs sued to have the signatures of their said agents and managers severally cancelled, and to have it declared that the deed was not binding on the plaintiffs.

Held that, having regard to what passed at the meetings of creditors, the deed, so far as it operated as a release, was a different deed from that which R., S. and B. either intended to execute, or thought they were executing, when they affixed their signatures, and that not having read the deed, but having trusted to M. to inform them as to its contents, their signatures could not be held to be a consent to its contents, and that, therefore, so far as the deed operated as a release, their signatures were null.

Held, also, that under the special circumstances of the case it became the duty of M. to communicate to R., S., and B. the existence of the release, and that not having done so he committed a breach of duty such as is contemplated by clause 2 of section 18 of the contract Act (IX of 1872).

Held, also, that, under the circumstances, R., S. and B. had not the means of discovering the truth with ordinary diligence, and that the exception to section 19 of the Contract Act was not applicable.

In this suit the plaintiffs prayed that the signatures of their respective agents and managers to a certain deed might be can-

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called, on the ground that the said signatures had been procured by misrepresentation, and that it might be declared that the said deed was not binding on the plaintiffs.

The deed in question was a deed of assignment, by the first five defendants, of all the assets of their firm to trustees for distribution among creditors. It contained the following clause of release :—In consideration of the assignment hereinbefore contained, the creditors and the committee do, respectively, hereby release and discharge the debtors and each and every of them, and their and each and every of their estate and effects of and from all and singular the debts, bills, bonds, notes, accounts, costs, damages, expenses, judgments, executions, actions, suits, claims, and demands whatsoever which the creditors and the committee now have, or shall, or may, or otherwise could or might hereafter have or claim or demand of, from or against the debtors or any or either of them, their or any or either of their heirs, executors or administrators or any of them respectively, and of, and from any thing in any wise relating to the premises.”

The first five defendants were partners in the firm of Nicol & Co.; the sixth and seventh defendants were the trustees appointed to wind up the affairs of the said firm.

The firm of Nicol & Co., of Bombay, suspended payments on the 4th October 1878, and in the afternoon of that day a meeting of the creditors of the firm was held, at which it was unanimously resolved that the business of the said firm should be wound up by voluntary liquidation, under the supervision of a committee of five, two of whom should be natives. The three European members of the said committee were the agents and managers of the plaintiffs, respectively, viz.: P. W. Robertson, Agent in Bombay of the Oriental Bank; C. J. Sharp, Agent in Bombay of the Chartered Bank; and W. S. D. Blackhall, Manager in Bombay of the Agra Bank, Limited. It was also resolved at the said meeting that the winding up should be conducted by two trustees under the supervision and control of the said committee, and that the trustees should be the sixth and seventh defendants, viz.: W. M. Macaulay and T. H. Moore. P. W. Robertson, C. J. Sharp, and W. S. D.

Blackhall attended the meeting, and on behalf of the plaintiffs' banks voted in favour of the above resolution.

On the 8th October 1878 another meeting of the creditors of Nicol & Co. was held, and it was resolved that the resolutions passed at the previous meeting, held on the 4th October, should be confirmed, subject to one native member being added to the committee, and it was also unanimously resolved that "a composition deed should be prepared in pursuance of the terms of the above resolution, and to be upon for inspection and signatures at the office of Messrs. W. Nicol & Co., on and after Friday next, between the hours of 12 noon and 4 P. M."

In the course of the discussion preceeding the final adoption of the said resolutions, Mr. Conroy, the solicitor for Nicol & Co. made the following observations:—

"It seemed there was an impression, that by the measure now proposed to be taken, they (the partners) were to get some benefit. He wished those present to disabuse themselves of that impression at once. In order to carry out their resolution, this deed had been prepared, and would be submitted to them at once for their signatures. There had not been much time in which to prepare it, but it had been settled by counsel, and by it the whole of the effects of the firm of Nicol & Co. in Bombay and of Fleming & Co. in Kurrachee was made over absolutely to two trustees, Mr. Moore and Mr. Macaulay, who would realize the estate for the benefit of the creditors generally, without reserving a single pie for the benefit of Messrs. Nicol & Co. The members of the firm had voluntarily given up everything, and the object of this deed was entirely for the benefit of the creditors. If they went under that deed, the estate would be at once wound up by two practical business men, under the supervision of a very strong committee of five, three of them representing banks, who were the largest creditors of the estate. Under such a deed it would be clearly seen that the estate would realize the very best price. They would get the largest dividend they could expect; but if they did not adopt course at once, creditors at home would be pressing, suits instituted, and before they knew where they were, the property would be in the hands of the Official Assignee, from whom he did not know what they could get. By agreeing to a voluntary liquidation they saved enormous law expenses, and the estate would be handed over clear to the creditors, to be distributed *pro rata*. The fairness of the proposition was seen in Mr. Maxwell's statement, that he and his partner, Mr. Hall, divested themselves of everything; and although it was a mere drop in the ocean as much as it amounted to, it was there. If they adopted that deed they must do it at once, and, instead of asking useless questions, leave the matter to be adjusted by the committee. He impressed upon them that speed was the one thing. Either they took that deed or they did not take it. They were bound in their own interests to confirm the resolution; if they did not, his own belief was the thing would go through. It depended upon

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them whether they were going to act in their own interests now by confirming that proposition, or whether they were going directly against it by causing vexatious delays, which could produce a break-down of everything."

After some further discussion the resolution, that a composition deed be prepared in pursuance of the above resolution, was unanimously agreed to.

The following paragraphs of the plaint set forth fully the plaintiffs' case, and the circumstances which they relied upon as invalidating the signatures of their agents:--

"4. It is the fact that it was not suggested by any person present at the said meeting of the 8th October 1878 that a release or discharge from liability to the said debtors was, or was to be, a part or incident of the said scheme for voluntary liquidation, and the plaintiffs will contend that, on the contrary, the whole tenor of the discussion which took place at the said meeting, and specially the said address of Mr. Conroy, and the answer of the chairman to a question put to him by a creditor named Esmailjee Ebrahim, prove that such a release or discharge was no part of the arrangement embodied in the said resolutions.

"5. The plaintiffs say that they (by their agents and managers, respectively, as aforesaid) attended the said meetings with the object and intention of preventing, if possible, the estate of the said debtors from passing into the hands of the Official Assignee of this Honourable Court, and the plaintiffs say that they accepted and voted for the said scheme of private liquidation, in the belief that the same would be more beneficial to the creditors than a winding up by the said Official Assignee; and the plaintiffs expected and understood the only meaning of the said resolutions to be, that the said private liquidation would be carried out by a deed containing a simple assignment and grant by the said debtors of their moveable and immoveable estate to the sixth and seventh defendants as trustees, in order that the said trustees might realize and distribute the said estate rateably amongst all the creditors; and it never occurred to the plaintiffs, or any of them, as possible that it was intended by the said debtors, or by any one on their behalf, to insert in such deed a release to the said debtors until the fifteenth day of October 1878, and

after the plaintiffs, by their said agents, respectively, had executed the same under the circumstances hereinafter mentioned. It appears from the said report hereto annexed, and marked B, that the deed proposed to be prepared by the last-mentioned resolution was in such resolution described as 'composition deed.' The plaintiffs are unable to say, from recollection or otherwise, whether the deed was so described at the said meeting by the mover of the said resolution in moving the same, and the plaintiffs are also unable to say whether the said word 'composition' occurs in the original of the said resolution, inasmuch as the said Messrs. Rimington, Hore, and Conroy (the defendants' solicitors), in whose possession the plaintiffs believe the original of the said resolution to be, refuse to permit the plaintiffs to inspect the same. The plaintiffs, however, say that if the said deed was described at the said meeting of the 8th October as a 'composition deed,' and if the same is so described in the said resolution, these facts in no way altered or affected the plaintiffs' belief, that the said deed would be an assignment, by the said debtors, of their estate to the said trustees for the benefit of the creditors of the said debtors, and nothing more.

" 6. On the fourteenth day of October 1878 the defendant Hamilton Maxwell (being one of the said debtors) took a document to the said Peter Walker Robertson at the office, in Bombay, of the plaintiffs, the Oriental Bank Corporation, and asked the said Peter Walker Robertson to execute the said document, stating that it was 'the trust deed.' The said Peter Walker Robertson was at the time deeply engaged with English-mail business (the said 14th day of October having been English-mail day), and asked the said Hamilton Maxwell to leave the document, and said that he (the said Peter Walker Robertson) would go over it and return it in the course of the day. The said Hamilton Maxwell then pressed the said Peter Walker Robertson to execute the said document, at once, saying it was important that no time should be lost, as the native creditors were coming to his office that day, and it was necessary to have all the committee members' signatures attached first. The said Peter Walker Robertson then objected to signing the document without reading it, and the said Hamilton

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Maxwell thereupon assured the said Peter Walker Robertson that *the deed was in the usual form and contained nothing beyond what was agreed to at the creditors' meeting.* Upon the faith of such assurance the said Peter Walker Robertson then executed the said deed, first, as a member of the said committee, and then, on behalf of the Oriental Bank Corporation, without reading the same and in the belief that the same was nothing more than an assignment to trustees for the benefit of creditors.

"7. Afterwards, on the same 14th day of October 1878, the said Hamilton Maxwell took the said deed, with the signature of the said Peter Walker Robertson attached thereto, to the said Charles John Sharp at the office, in Bombay, of the plaintiffs, the Chartered Bank of India, Australia and China. The said Charles John Sharp was engaged with English-mail business, and asked the said Hamilton Maxwell to leave the deed for perusal; but the said Hamilton Maxwell gave the same reasons for not doing so as he had given to the said Peter Walker Robertson, and further said that the said Peter Walker Robertson had signed, and he (the said Hamilton Maxwell) hoped that the said Charles John Sharp would also sign. The said Hamilton Maxwell did not inform the said Charles John Sharp that the said Peter Walker Robertson had signed the deed without reading it. The said Charles John Sharp again objected to signing the deed without reading it, and the said Hamilton Maxwell thereupon assured the said Charles John Sharp *that the deed contained nothing but what was agreed to at the creditors' meeting,* and the said Charles John Sharp, in consequence of and upon the faith of such assurance, executed the deed on behalf of the plaintiffs, the Chartered Bank of India, Australia and China, and also as a member of the said committee having only cursorily glanced at the contents of the same during his said conversation with the said Hamilton Maxwell, and in the belief that the same was nothing more than an assignment, by the said debtors, of their estate to trustees for the benefit of their creditors.

"8. The said Hamilton Maxwell afterwards, on the same 14th day of October 1878, took the said deed to the said William Scott Donald Blackhall at the office, in Bombay, of the plaintiffs, the Agra

Bank, Limited, with the signatures of the said Peter Walker Robertson and Charles John Sharp attached thereto, and requested the said William Scott Donald Blackhall to sign the same. After some conversation as to the committee being necessary parties to the deed and as to the printing copies of the deed, the said William Scott Donald Blackhall said to the said Hamilton Maxwell: '*the deed, then, is merely an assignment of the firm's effects for the creditors,*' and the said Hamilton Maxwell replied that such was the case. The said Hamilton Maxwell further told the said William Scott Donald Blackhall that the said Peter Walker Robertson had signed the said deed without reading the same, but that the said Charles John Sharp had carefully perused the same before signing. The said William Scott Donald Blackhall then executed the said deed as manager, in Bombay, of the plaintiffs, the Agra Bank, Limited, and as a member of the said committee, without reading the same, and in the belief that the same was, as stated by the said Hamilton Maxwell, nothing more than an assignment, by the said debtors, of their estate to trustees for the benefit to creditors.

" 9. On the morning of the 15th day of October 1878 the said William Scott Donald Blackhall heard that the deed so executed by them as aforesaid contained a release to the said debtors by all the creditors executing the same, and in the evening of the same day the said Peter Walker Robertson and William Scott Donald Blackhall had, for the first time, an opportunity of persuing the said deed, and the said William Scott Donald Blackhall then pointed out to the said Peter Walker Robertson that the deed contained the said release. The said Charles John Sharp, on the 16th day of October, heard from Mr. Mowat, a partner in the firm of Messrs. Ritchie, Steuart & Co., merchants of Bombay, who are also creditors of the said William Nicol & Co., that the deed contained a release to the said debtors, and on the evening of the same 16th day of October the said Charles John Sharp saw the said Peter William Robertson, who also informed that the deed contained the said release.

" 10. The plaintiffs say that they would not have executed the said deed (by their said agents and managers as aforesaid) if they

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had known that the same contained a release as in the last preceding paragraph mentioned.

“ 11. The said Peter Walker Robertson on the 16th day of October 1878 orally informed the defendant, Hamilton Maxwell, that on behalf of the plaintiffs, the Oriental Bank Corporation, he, the said Peter, Walker Robertson, declined, under the circumstances, to be bound by his signature to the said deed, as aforesaid, and on the same 16th day of October 1878 the said Peter Walker Robertson wrote and sent a letter to the same effect to the defendant Hamilton Maxwell.

“ 12. On the 17th day of October 1878 the said Charles John Sharp, on behalf of the plaintiffs, the Chartered Bank of India, Australia and China, wrote and sent a letter to the said debtors in regard to his execution of the said deed, and repudiating the same as not-binding on him.

“ 13. No answer was received to either of the said two letters in the last two preceding paragraphs mentioned.

“ 14. On the 26th day of October 1878 the said William Scott Donald Blackhall, through Messrs. Fletcher and Smith, solicitors of Bombay, wrote and sent a letter to the said Messrs Rimington, Hore and Conroy, as solicitors of the said debtors, in regard to the execution of the said deed by the said William Scott Donald Blackhall, and repudiating such execution as not binding on him.

“ 16. The plaintiffs charge that the execution as aforesaid of the said deed on their behalf by their said agents and managers, respectively, ought, under the circumstances aforesaid, to be declared to be not binding upon them, and that the signatures to the said deed of the said Peter Walker Robertson, Charles John Shary and William Scott Donald Blackhall, as agents and managers, on behalf of the plaintiffs, respectively, ought to be cancelled for the following reasons :—

“(a) Because the plaintiffs' said agents *were induced to sign the said deed by the misrepresentation to them, respectively, on the part of the defendant Hamilton Maxwell, that the said deed contained nothing more than was agreed to at the said meetings of creditors of the said debtors on the fourth and eighth October 1878*

whereas, in fact, the said deed contained a release to the said debtors which was not so agreed upon, and the existence of which release in the said deed the defendant Hamilton Maxwell was bound to bring to the notice of the plaintiffs' said agents before they signed the said deed at his request as aforesaid.

“(b) Because, even if this Honourable Court should be of opinion that such a release as aforesaid was properly inserted in the said deed, the legal result would (having regard to the plaintiff's agents and managers' understanding of the proceedings at the said meetings and of the resolutions passed thereat) be that *the plaintiffs and the Defendants did not agree to the same thing in the same sense, and that, consequently, there is no binding agreement between them in regard to the said scheme for voluntary liquidation of the state of the said debtors*”

The plaintiffs prayed that the signatures to the said deed of their said agents and managers might be severally cancelled, and that it might be declared that the said deed was not binding on the plaintiffs or any or either of them.

The defendants severed in their defence. The first three defendants, being resident in English, had no personal knowledge of the transaction out of which the suit arose. In their written statement they consented to a decree being passed for the plaintiffs in terms of the prayer of the plaint.

The fourth and the fifth defendants filed a written statement denying the plaintiffs' right to relief, and alleging that P. W. Robertson, C. J. Sharp and W. S. D. Blackhall had signed the composition deed voluntarily, and not in consequence of any pressure or representation by the defendant Hamilton Maxwell. The following are the material portions of their written statement:—

“4. With regard to the fourth and fifth paragraphs of the plaint, it is the fact, that the deed, the preparation of which was directed by a resolution passed at the said meeting, was at the said meeting and in the said resolution described as a ‘composition deed.’ Such resolution was seconded by Mr. Charles John Sharp, the agent of the plaintiffs, the Chartered Bank of India

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Australia and China. The defendants say that a release by creditors to debtors is an ordinary incident of the voluntary liquidation of the affairs of such debtors, and is a customary and proper provision to introduce into the composition deed, under which such a liquidation is to be effected. The enabling the debtors to commence their business again, was actually one of the reasons in favour of passing the resolution for such voluntary liquidation of the affairs of the debtors addressed to the said meeting by Esmailji Embrahim, the creditor in the forth paragraph of the plaint mentioned."

"10. The defendants deny that the plaintiffs' agents were induced to sign the said composition deed by the misrepresentation of the defendant Hamilton Maxwell, or that the defendant Hamilton Maxwell made any misrepresentation whatsoever to the plaintiffs' said agents, or any of them. The defendants further submit that the said composition deed properly carried into effect the resolution for the voluntary liquidation of the debtors' affairs, to which the plaintiffs, by their said agents, had agreed.

"11. The defendants submit that the plaintiffs are not entitled to have the signatures of their agents and managers to the said composition deed cancelled, or to have it declared that the said composition deed is not binding on the plaintiffs, more especially as many other creditors of the debtors have abstained from taking proceedings against the debtors, and have signed the said composition deed on the faith of the said composition deed having been executed by and on behalf of the plaintiffs. The defendants submit that, on the allegations in the plaint contained, the plaintiffs' remedy (if any) would be simply to have the release to the debtors in the said composition deed contained cancelled, so far as the plaintiffs are concerned."

Macpherson and *Inverarity* for the plaintiffs and for the first three defendants.

The *Advocate General* and *Latham* for the forth, fifth, sixth and seventh defendants.

A preliminary question arose as to whether the other creditors of Nicol & Co. should not be made parties to the suit.

Macpherson.—The others creditors need not be parties. The deed remains, although the plaintiffs' signature be removed, and the

property will remain vested in the trustees. He referred to sections 32 and 437 of the Civil Procedure Code of 1877. [SARGENT, J.—Is not this deed of assignment, by the defendant of all their property an act of insolvency? If so, the plaintiffs after getting their name removed, might proceed to have the defendants adjudicated insolvents. Then the other creditors would be interested in sustaining the deed, and preventing the estate from going to the Official Assignee. Does not that seem to show that the other creditors should be parties to this suit that they may uphold the deed?] In England, no doubt, the deed would be an act of insolvency, but not so in India. (Cites sections 24 and 54 of the Indian Insolvent Act (11 and 12 Vic., c. 21) and section 9, which states what are acts of insolvency.) The deed cannot be set aside unless proceedings for that purpose are taken within two months. This deed was not executed “with intent to defeat creditors;” it is for the benefit of creditors. Any creditor who has not signed this deed could throw the estate into insolvency. The mere fact of the plaintiffs’ signatures to it being cancelled, cannot alter the case. Counsel referred to *In re Dhanjibhai Kharsetji*(1) and the English Bankruptcy Act, 1869, sec. 6.

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SARGENT, J.—I think the other creditors need not be made parties. The object of the suit is not to impeach the deed so far as other creditors are concerned. The property will remain with the trustees for their benefit.

Macpherson continued on the main questions in the case as stated in the plaint.—We repudiated the deed as soon as we became aware that it contained a clause of release. We repudiated on the ground that we never intended to give such a release. Maxwell induced us to sign by saying that the deed simply carried out the resolutions which had been passed at the creditors’ meeting. The question, therefore, is what was the effect of the resolutions? There is no allusion to a release of the debtors in the resolution, nor was a release suggested at the meeting which passed the resolutions. The only question before the meeting was whether the estate should go into the Insolvent Court or not. The point

(1) 10 Bom. H. C. Rep. 327.

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discussed was, what was best for the creditors, not whether the debtors should be released. We do not say that Maxwell's representation as to the tenor of the deed was fraudulent. That is not necessary (Contract Act (IX of 1872), sec. 18, clause 3).

There was no agreement to the same thing in the same sense. The agreement is voidable at our option (Contract Act, secs. 13 and 19; Specific Relief Act (I of 1877), sec. 39).

At the creditors' meetings the subject of a release to the debtors was not even mentioned. It is true that a composition deed was then agreed upon. But such a deed does not necessarily imply a release. A composition deed is merely an instrument under which the obligation to pay the original debt is suspended; but it revives again in case of default in carrying out the new agreement. Under this deed, however, the deed debt is extinguished, and the debtors are released; and in return the creditors have nothing except a conveyance of the debtors' estate to trustees, without any security that the provisions of the deed will be carried out. If an ordinary composition deed does not imply a release, *a fortiori*, a deed of assignment, like this, cannot imply a release. An examination of the cases in England shows that a release has never been considered as necessary part of a composition deed, or a deed of assignment to trustees, or even an ordinary incident of such deeds. The schedule to the Bankruptcy Act of 1861 (24 & 25 Vic., c. 134) gives a form of assignment to trust to operate as a release: *Ipstones Park Iron Ore Company v. Pattinson*.⁽¹⁾ That was a case of a deed drawn under section 192 of the Act. Schedule D to the same statute gives another form of deed drawn under section 200. In two reported cases it was held that such a deed did not operate as a release: *Eyre v. Archer*,⁽²⁾ *Clarke v. Williams*.⁽³⁾ We contend that if the resolutions passed at the meetings of creditors had been carried out, the deed in the present case would have been similar to the deeds set up in the cases I have cited: Davidson on conveyancing, Vol. V, Part II, p. 929 (2nd ed., 1865); and Story's Equity Jurisprudence, sec. 378. Section 126 of the English Bankruptcy Act 1869 (32

(1) 2 H. & C. 828.

(2) 16 C. B. N. S. 638; 33 L. J. C. P. 296.

(3) 3 H. & C. 508; 34 L. J. Ex. 60.

& 33 Vic., c. 71) and Rule 281 of the General Rules under that Act(1) prescribe regulations for proceedings such as were adopted here, and the cases cited under section 126 in Lee on Bankruptcy, p. 469 *et seq.*, show the meaning of the word 'composition' and the operation of a composition deed. It is a suspension, not an extinguishment, of the debtors' liability : *Edwards v. Combe*,(2) *In re Hatton*,(3) *Edwards v. Hancher*,(4) *Ex parte Gilbey*.(5)

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Further, we say that our signatures were obtained by misrepresentation. We were told by Maxwell that the deed contained nothing except what was agreed on at the creditors' meeting ; and a release was never mentioned at that meeting. It was his duty to tell us of the clause of release : Contract Act (IX of 1872), sec. 18 ; Pollock on Contracts (1876), p. 444 ; *Earl Beauchamp v. Winn* ;(6) *Cooper v. Phibbs*.(7)

Again; there was no consent on the part of the plaintiffs as it is defined in section 13 of the Contract Act. The plaintiffs believed they were signing a deed for the benefit of the creditors ; while, in fact, they signed a deed for the benefit of the debtors. This deed was not the plaintiffs' agreement at all : Leake on Contracts (1878), p. 311 ; Pollock on Contracts, p. 372 ; *Foster v. Mackinnon*.(8) The plaintiffs did not intend to execute a releases ; they did not know they were doing so ; therefore, in contemplation of law they did not execute a release. Where parties do not know what they are doing, they are entitled to relief : *Simons v. Great Western Railway Company* ;(9) Pollock on Contracts, p. 537.

At the close of counsel's address, P. W. Robertson, C. J. Sharp, and W. [S.D. Blackhall were called as witnesses, and substantiated in evidence the statements contained in the 6th, 7th and 8th paras. of the plaint with regard to the circumstances under which their signatures to the deed were obtained.

Counsel for the defendants did not address the Court. The defendant Maxwell was examined. The points upon which his

(1) Lee on Bankruptcy, p. 600.

(5) L. R. 8 Ch. Div. 248.

(2) L. R. 7 C. P. 519.

(6) L. R. 6 Eng. & Ir. Ap. 223.

(3) L. R. 7 Ch. Ap. 723.

(7) L. R. 2 Eng. & Ir. Ap. 19.

(4) L. R. 1 C. P. D. 111.

(8) L. R. 4 C. P. 704.

(9) 2 C. B. N. S. 620.

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evidence differed from that given for the plaintiffs are noticed in the judgment of the Court.

March 13.—SARGENT, J.—The plaintiffs in this suit are the Oriental Bank Corporation, the Chartered Bank of India, Australia and China, and the Agra Bank, and they seek by their plaint to have it declared that a certain deed made on the 14th October 1878 between John Fleming, Robert McIlwraith, William Nicol, Hamilton Maxwell and William Gilmore Hall, carrying on business as merchants in Bombay under the style of William Nicol & Co., and in Kurrachee under the style of Fleming & Co., of the first part, and the creditors of the said firm on the second part, and certain persons, therein described as the Committee, of the third part, and the trustees under the said deed, Thomas H. Moore and William Macaulay, of the fourth part, and which deed was executed by their respective managers in Bombay on the said 14th October 1879, is not binding, and that their signatures of the same may be cancelled by and under the direction of this Court. The circumstances which have led to the institution of the suit are as follows:—The firm of Nicol & Co. suspended payment on the morning of the 4th October 1878, and immediately issued a circular to their creditors, calling a meeting in the afternoon. At that meeting, Mr. Douglas, of the firm of Messrs. Ritchie, Steuart & Co., presided as chairman, and a proposition was made to the creditors by Mr. Douglas, on behalf of Nicol & Co., that instead of the business being thrown into insolvency it should be wound up by voluntary liquidation. A resolution to that effect was put to the meeting and carried unanimously, and the meeting was adjourned to the following Tuesday for the purpose of having that resolution confirmed. On Tuesday, the 8th October, there was another meeting. On that occasion the same resolution which was carried at the former meeting was again laid before the creditors and enforced by the arguments of Mr. Douglas, and especially of Mr. Conroy, the solicitor for Nicol & Co. At the same time a statement was made by Mr. Maxwell as to the assets and liabilities. It is sufficient to say that that meeting ultimately confirmed the resolution which had been passed at the previous meeting, with some slight alteration as to the constitution of the committee; and the meeting

further passed a resolution proposed by Mr. Balfour, the manager of the Bank of Bombay, to the effect that "a composition deed should be prepared in pursuance of the terms of the resolution just passed, and be open for inspection and signature at the office of Nicol & Co. on and after Friday next, between the hours of 12 noon and 4 p. m." Nothing of importance seems to have transpired between that meeting and the 14th October (Monday). On that day Mr. Maxwell proceeded with the deed, which had been prepared by the solicitors of Nicol & Co. to carry out the arrangement come to at the meetings, to the offices of the three banks who are the plaintiffs in this suit. This deed consisted of two distinct operative parts, viz. an assignment of the property of the firm to trustees expressed to be made in pursuance of the resolutions passed by the creditors, and a release of the claims of the creditors expressed to be made in consideration of the above assignments. Mr. Maxwell went first to the Oriental Bank, where he had an interview with Mr. Robertson, who was admittedly on that occasion busily engaged with mail letters. Mr. Robertson expressed himself as unwilling to look at the deed at that time, being occupied with other matters, and demurred—naturally demurred—to signing it without being able to read it. A conversation then took place between them, as to which it is sufficient for me at present to say that it resulted in Mr. Robertson signing the deed. The deed was then carried by Mr. Maxwell to the Chartered Bank of India, Australia and China, where he had a similar interview with Mr. Sharp, the manager. The evidence is somewhat conflicting as to what occurred on that occasion, but it resulted in Mr. Sharp signing the deed. From thence Mr. Maxwell proceeded to the Agra Bank, Limited, and had an interview with Mr. Blackhall, the manager there. Mr. Blackhall also signed the deed without having read it, after having had a conversation with Mr. Maxwell as to its contents. The next day, Mr. Robertson, Mr. Sharp and Mr. Blackhall, as the managers of the three banks and also as gentleman who had been named by the creditors to set on the committee of supervision and control, were invited by Messrs. Nicol & Co. to attend at their office, it being stated that certain difficulties had arisen with the native creditors as to matters connected with the trust deed, viz. with regard to the remuneration to

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be paid to the trustees and to the members of the firm themselves. On their going there the deed was called for in order to settle the difficulty that had arisen, and it was produced and read by Mr. Blackhall. It was then discovered that it contained an immediate release by all the creditors of their claims, and Mr. Blackhall at once called the attention of Mr. Robertson to that fact. It being late (half-past 5 o'clock), nothing further was done that day. Mr. Blackhall and Mr. Robertson walked home together towards Malabar Hill, and, according to their evidence, on that occasion Mr. Robertson expressed his astonishment and anxiety at finding that this deed contained a release, and mentioned that it was entirely contrary to the rules and practice of their office for the manager of the bank to sign a release without communicating with the directors at home. Early next morning Mr. Robertson called on Mr. Craigie, his solicitor, communicated the fact of the release being contained in the deed, and asked for his advice. On going to his office that morning he (Mr. Robertson) wrote to Mr. Maxwell to this effect :—

"Bombay, 16th October 1878.

"My dear Maxwell,

"With reference to my conversation with you this morning on the subject of your trust deed, I think it is advisable to place on record the purport of what I verbally communicated to you. That is to say, that when I signed the trust deed on Monday, I was not aware that it contained a clause granting the members of your firm a release. You will recollect that when you came to me to obtain my signature, I was immersed in mail business, and I signed the deed at your earnest request, under the impression that it contained merely an assignment of all your estate to the trustees." I have no authority from my directors to sign a deed containing such a release as, I now learn, is contained in this deed ; and had I been aware of the clause in question, I should have had no alternative but to refuse to sign.

"So soon as my solicitors shall have received the copy of the deed which you have promised to send them, I will consult them on the matter, and afterwards obtain instructions from my directors in London ; but, in the meantime, you must, please, under-

stand that my signature to the deed must be considered as absolutely cancelled.

Your very truly,
(Signed) P. W. ROBERTSON."

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On the 17th October Mr. Sharp also wrote as follows :—

"Bombay 17th October 1878.

"Messrs. W. Nicol & Co.,
Bombay.

"Dear Sirs,

"When I signed your trust deed the other day, I did so entirely on your assurance that the same was in order, and trusting to your solicitors having prepared the document strictly in accordance with the resolution passed at the meeting of creditors. If such is not the case, I hereby withdraw my signature from the same, and you must consider it null and void.

"Meantime, I will be obliged by your sending me the deed in question for perusal.

I am, &c.,
(Signed) C. J. SHARP,
Agent."

Mr. Blackball seems to have repudiated his signature somewhat later by a letter on the 26th October. I may say, also, that all three gentlemen joined in a letter of the 24th October, in which they asserted that they had been led to suppose that the deed, which they executed, was one in which there was no such release, and distinctly repudiated their signatures. Some few days after this repudiation there were meetings of creditors, held apparently on both sides, with a view to inducing the other creditors to have nothing to do with the deed. A very bad feeling sprang up at once between the managers of the banks on the one side and Messrs. Maxwell and Hall on the other side, and, as I have said, there were attempts made to prevent this deed receiving any further signatures. Ultimately, on the 22nd November 1878, the plaintiffs filed the present suit. They state in paragraph 5 of their plaint that "they accepted and voted for the said scheme of private liquidation in the belief that the same would be more beneficial to the creditors than a winding up by the said

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Official Assignee ; and the plaintiffs expected and understood the only meaning of the said resolutions to be, that the said private liquidation would be carried out by a deed containing a simple assignment and grant, by the said debtors, of their moveable and immoveable estates to the sixth and seventh defendants as trustees, in order that the said trustees might realize and distribute the said estate rateably amongst all the creditors, and it never occurred to the plaintiffs, or any of them, as possible that it was intended by the said debtors, or by any one on their behalf, to insert in such deed a release to the said debtors until the 15th day of October 1878, and after the plaintiffs by their said agents respectively had executed the same under the circumstances hereinafter mentioned." The account of what occurred at the various meetings is given in the plaint as follows:—"On the 14th day of October 1878, the defendant Hamilton Maxwell (being one of the said debtors) took a document to the said Peter Walker Robertson at the office, in Bombay, of the plaintiffs, the Oriental Bank Corporation, and asked the said Peter Walker Robertson to execute the said document, stating that it was 'the trust deed.' The said Peter Walker Robertson was at the time deeply engaged with English-mail business (the said 14th day of October having been English-mail day), asked the said Hamilton Maxwell to leave the document, and said that he (the said Peter Walker Robertson) would go over it and return it in the course of the day. The said Hamilton Maxwell then pressed the said Peter Walker Robertson to execute the said document at once, saying it was important that no time should be lost, as the native creditors were coming to his office that day, and it was necessary to have all the committee men's signatures attached first ; the said Peter Walker Robertson then objected to signing the document without reading it, and the said Hamilton Maxwell thereupon assured the said Peter Walker Robertson that the deed was in the usual form, and contained nothing beyond what was agreed to at the creditors' meeting. Upon the faith of such assurance the said Peter Walker Robertson then executed the said deed, first as a member of the said committee and then on behalf of the Oriental Bank Corporation, without reading the same, and in the belief that the same was nothing more than an assignment

to trustees for the benefit of creditors: that the deed was next carried to Mr. Sharp, as the manager of the Chartered Bank of India, Australia and China, and that he also executed the deed on the assurance that it was nothing more than an assignment, by the debtors, of their estate to trustees for the benefit of their creditors, and in ignorance that it contained a release to the debtors, and, lastly, that the deed was carried by Mr. Maxwell to Mr. Blackhall, who, they say, signed the deed upon the assurance that it was merely an assignment of the firm's effect for the creditors." Upon these grounds they claim to have the signatures of their managers to this deed cancelled, and a declaration made that the deed is not binding upon the plaintiffs, or any of them. The defendants, who are the several members of the firm of Nicol & Co., have severed in their defence. Three of the defendants, who are members of the firm who lives in London, say they know nothing about the particulars under which this deed was executed, and that they are willing that a decree should be made as asked for by the plaintiffs. The other two defendants, members of the firm who reside in Bombay, Mr. Hamilton Maxwell and Mr. Hall, put in a statement in which they deny the allegations contained in the plaint, claim to have the deed upheld, and say the plaintiffs are not entitled to the relief prayed for. At the same time, ~~they did not~~ they themselves ready to consent to the banks being relieved from the effect of the release. That expression of their consent did not satisfy the plaintiffs, who considered that a mere consent decree might lead to other questions, and, therefore, insisted on the case being gone into by the Court and decided upon its merits.

Now, it is to be remarked at the outset that the plaint does not charge Mr. Maxwell with any fraudulent intention in making the statements which the several bank managers assign to him, and Mr. Macpherson repudiated any intention of making such a charge. The case presented to the Court was that the bank managers were misled into signing a deed of a substantially different nature from that contemplated by the resolution, or intended to be executed by them. It was argued that, under the circumstances under which the deed was executed, it could not be regarded as the deed of the plaintiffs, or that, at any rate, it was

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voidable on the ground of misrepresentation as defined by section 18 of the Indian Contract Act. As to what occurred at the meetings of creditors on the 4th and 8th October, the parties are agreed that the reports in the *Bombay Gazette* and *Times of India* are substantially correct. (Having given a *resume* of the report of the proceedings at the two meetings, his Lordship continued).

—Upon this statement of what occurred at the meeting, it is contended for the plaintiffs, and I think successfully, that the introduction into the deed of an immediate release from the creditors essentially alters the character of the arrangement contemplated by the resolution, or intended to be acceded to by the creditors. It cannot admit of a doubt that the proposal as put before the creditors by the firm of Nicol & Co through their solicitor, Mr. Conroy, assisted by Mr. Douglas, at a meeting called by themselves, was one simply for substituting winding up of the affairs of the firm by voluntary liquidation in lieu of and to obviate the necessity of the ordinary course being adopted, by the firm of Nicol & Co., of filing their petition in insolvency and their estate being liquidated by the Official Assignee. That was the burden of the speeches made by both these gentlemen whom I have named and at both meetings. Again, it cannot be questioned that the proposal for winding up the estate by voluntary liquidation was presented to the creditors as one made entirely in their interest. Mr. Conroy begs the creditors in the most earnest manner to disabuse their minds of the idea that the members of the firm would derive any benefit from the proposed measure, or, in other words, from the draft deed which Mr. Conroy at the same time pointed to as “this deed,” admittedly in his hands or lying on the table, and which he said would be presented to them for their signature. Further, it is to be remarked that from the commencement of the first meeting down to the termination of the second meeting no communication of any kind took place between the creditors and the members of the firm in Bombay or their solicitor, with a view to the firm obtaining a release from their creditors. It is admitted by Mr. Maxwell that the subject was not mentioned before the first meeting, or in the interval between the two meetings; and the report of what took place at the meetings, shows that it was not hinted

at when the proposition confirmed was under consideration. Lastly, we find the firm of Ritchie, Steuart & Co., of which Mr. Douglas, the chairman of the meetings, is senior partner, refusing to sign the deed on the ground that it did contain the release. The irresistible conclusion from these considerations is, in my opinion, that the question as to the release, by the creditors, of the firm was never brought to their notice in any shape whatever, that it never was presented to their minds for consideration, and that the deed contemplated by the second resolution could not, with any reasonable regard to what took place at the meetings, have been intended by the creditors to contain an immediate release. A resolution to wind up the affairs of a firm in lieu of proceeding in insolvency, and still more so having regard to the circumstances and manner in which it was proposed to the creditors in this case—whatever the members of the firm and their solicitors might have had in their minds—can only be construed in the ordinary sense, namely, as a resolution to apply the assets of the firm in liquidation to meet the claims of the creditors. The winding up is closed when that has been done, as appears section 131 and the proceeding sections of the English Bankruptcy Act of 1869. In clause 9 of section 135 the close of the winding up and the discharge of the debtor are treated as perfectly distinct. It may be said that the parties must have contemplated the firm obtaining a discharge from their debts under the arrangement at some time, as it was an arrangement intended to be in substitution of the insolvency process, and the last resolution speaks of a “composition deed” being prepared. As a fact, the question of the discharge of the firm from their debts was not expressly before the meetings in any shape; but it may be admitted that the proposed arrangement must have been regarded by the creditors as one ultimately to result in the firm obtaining its discharge. In that respect only could the term “composition deed” with any proper regard to what had taken place at the meeting have been used. If such be the correct conclusion from the evidence, can it be contended that the insertion in the deed of an *immediate* release did not essentially alter the character of the arrangement which had been proposed to, and accepted by, the creditors? The consequence which under certain circumstances might result to the

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creditors from such a release, whether in carrying out the deed itself or in taking proceedings against third parties who might be liable in conjunction with the firm, are perfectly obvious.

Passing now to what occurred at the interviews between Mr. Maxwell and the three bank managers—Mr. Robertson, Mr. Sharp and Mr. Blackhall—on the 14th October, we find much conflicting evidence as to what took place, more particularly as to the precise words used by either on those occasions. (His Lordship read Mr. Robertson's, Mr. Sharp's and Mr. Blackhall's and also Mr. Maxwell's evidence on these points.) In giving his evidence Mr. Robertson refreshed his memory from memorandum which he said he made on the 17th October. It may, therefore, be remarked that this memorandum was made undoubtedly after the existence of the release had been discovered on the 15th and after the day (the 16th) on which he had consulted his solicitor, Mr. Craigie, on the subject of the release, and after he had received a telegram from the Head Office in London instructing him not to sign a release without reference home, and also after he had repudiated his signature, which he had done on the 16th. No doubt, therefore, it was a memorandum drawn up at a time when naturally under a strong bias to represent what occurred as favourably as possible to himself. Mr. Sharp's account tallies with a memorandum which he drew up on the 23rd October, and which is open to the same remark. On the following Monday it appears that Mr. Maxwell wrote a letter to Mr. Harding, the Official Assignee of the estate of Smith, Fleming & Co. in London. As to this letter, I will only remark that it could not have been written with the intention of giving an accurate account of what had occurred. It is written very briefly, and gives a very imperfect description of the state of affairs, besides omitting altogether to mention what took place with Mr. Blackhall. It is a very short and summary account. In the view I take of this case I am, to a great extent, relieved from the painful necessity of determining accurately what were precise words used on each occasion. Accasion Mr. Maxwell's statement that, in reply to Mr. Robertson and Mr. Sharp, he said that the deed was "all right" or was 'in order,' that statement, under the circumstances under which it was made, could only mean that the deed carried

out the resolution of the creditors, as it was admitted that nothing had passed between the bank managers and Mr. Maxwell or Mr. Hall since the passing of that resolution—in other words, that it was the deed, the preparation of which was contemplated by the last resolution come to at the meeting held on the 8th October. I think, therefore, it is immaterial whether Mr. Maxwell said the deed was “all right” and ‘in order,’ or whether he said, as Mr. Robertson and Mr. Sharp stated he did, that it ‘carried out only the resolution come to at the meeting. Mr. Maxwell, in answer to the question ‘is it in order?’ says that he replied: “I believe so; it has been prepared by Mr. Conroy and settled by Mr. Latham”—words which are not to be found in the account of the interviews given by the bank managers. But I am unable to believe that Mr. Maxwell did use the words “I believe so,” as it was admitted that the bank managers were reluctant to sign the deed without reading it, and he was extremely anxious that they should sign it; and it was, therefore, most unlikely that he would use any words casting upon it.

The important question, therefore, arises, whether the banks can, under these circumstances, claim to be relieved from the deed, or, at any rate, from that part of it which consists of a release of their claims.

In *Thoroughgood's case*(1) the defendant was sued in trespass, and pleaded a release given by the plaintiff, who replied admitting the execution of the release, but alleging that he was an ignorant man, that the deed was not read to him, and that he had been induced to sign it upon a false representation being made to him of its nature and effect. The Court held that it was not the plaintiff's deed, and it was resolved that “it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing.”

In *Foster v. Mackinnon*, (2) *Thoroughgood's case* was commented on and explained in the judgment of the Court delivered by Byles, J. That learned Judge says: “It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears

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(1) 2 Coke's Rep. 9 b.

(2) L. R. 4 C, P. 704, at p. 711.

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to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards sign; then, at least, if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law never did sign, the contract to which his name is appended." The case of *Kennedy v. Green* (1) and *Vorley v. Cooke* (2) were also decided upon the principle enforced in *Foster v. Mackinnon*.

The principle to be gathered from these authorities is, I think, correctly stated in Mr. Pollock's treatise on Contracts (p. 376) as being "that an instrument executed by a man who meant not to execute any such instrument, but something of a different kind, is in itself a mere nullity, though the person so executing it may perhaps be estopped from disputing it if there be negligence on his part." It is plain, however, that it would lead to most mischievous result if a person could be relieved from his execution of a deed or other solemn instrument upon any but the most unequivocal evidence bringing the case within the above rule. *Hunter v. Walters* (3) is a case which shows the reluctance with which a Court of Equity will permit a man to escape from the consequence of his act by pleading that he was ignorant of the effect of the instrument to which he has deliberately signed his name. In that case it was alleged that the person who had executed a deed of sale, and signed a receipt for the purchase money, and who had since died, had been induced to do so by being told that it was a raere form. Lord Hatherley remarked that that was quite consistent with the deed being exactly what he intended to execute; and Lord Justice James scouted the idea as ludicrous that a man executing a deed and signing a receipt as a matter of form should be able to say that it was a nullity.

How, then, does the evidence stand in the present case? It satisfactorily establishes, in my opinion, that Mr. Robetson was

(3) 1 M. & K. 699.

(2) 1 Giff. 230.

(3) 1 L. R. 7 Ch. Ap. 75.

unwilling to sign the deed without reading it; that he was earnestly pressed to sign it at once by Mr. Maxwell; that Mr. Maxwell strongly urged his doing so on account of its being of the utmost importance to him that the deed should be signed by the members of the committee before the arrival of the native creditors who were expected in the afternoon at Nicol & Co.'s office; that Mr. Robertson ultimately did sign on Mr. Maxwell's statement, either expressly or in equivalent terms, "that it carried out only the terms agreed to at the meeting." It is also established that Mr. Robertson would not have signed the deed had he known that it contained a release. Further, it shows that the deed in question, containing as it does an immediate release by the creditors of their claims in consideration of the assignment of the property of the firm, cannot, when read by the light of what occurred at the meetings of creditors, be regarded as a deed made in pursuance of the resolutions passed at those meetings, but that the deed in its present form is essentially a different deed from that which Mr. Robertson either intended to execute or thought he was executing when he affixed his signature to the deed and delivered it to Mr. Maxwell. Under these circumstances, and both parties being willing that the deed should have effect given to it as an assignment, I must hold that the signature of Mr. Robertson, so far as the deed operated as a release, must be treated as a nullity.

There is, I think, another ground on which the Oriental Bank is entitled to relief, if it should be thought that the circumstances above mentioned are not sufficient to make the signature a mere nullity. The circumstances under which the deed was executed bring the case, in my opinion, within section 18 of the Contract Act. That section defines the misrepresentation, which by section 19 is made a ground for having a contract declared void at the suit of the party whose consent was caused by such misrepresentation. The second clause of section 18 is probably intended to meet all those cases which are called in the Court of Equity, perhaps unfortunately so, cases "of constructive fraud," in which there is no intention to deceive, but where the circumstances are such as to make the party, who derives a benefit from the transaction, equally answerable in effect as if he had been actuated by motives

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of fraud or deceit. Now, it is doubtless clear that when Mr. Maxwell entered Mr. Robertson's room to ask him to sign the deed, he was under no obligation, legally or morally, to communicate the contents of the deed; but the circumstances were quite changed by what took place between Mr. Maxwell and Mr. Robertson. Mr. Robertson says he is too busily engaged to read the deed, and at the same time expresses his disinclination to sign the deed without doing so; he is urgently pressed by Mr. Maxwell to sign it without further delay, upon which he asks Mr. Maxwell, as that gentleman himself admits, "whether it is all right" or (if we accept Mr. Robertson's account) "whether it carried out the resolutions passed at the meetings," and he is answered in the affirmative, and thereupon he signs. In other words, he placed confidence in Mr. Maxwell, and Mr. Maxwell accepted that confidence—which he need not have done if he had not liked—by answering the question and purporting to tell him what was the nature of the deed. It thus became the duty of Mr. Maxwell to state fully, without concealment, all that was essential to a knowledge of the contents of the document. And if this be so, can it be doubted that, under the circumstances which I have described, it was the duty of Mr. Maxwell to have communicated the existence of this release. He might have been ignorant of the fact, and in that case his not communicating it could not be said to be a breach of duty; but Mr. Maxwell, as he admits, knew perfectly well that this release did exist, and he admits that a release had never been mentioned at any time during the meetings, or between the meetings, or before the meetings, or after the meetings; that, in fact, the matter had never been brought to the notice of the creditors. Any professional man, and probably most unprofessional men, would have recognized its importance. Mr. Maxwell certainly did, for on seeing it he expressed his surprise to Mr. Conroy. It may be, as Mr. Maxwell says, that he was guided by Mr. Conroy's statement that a release was usual clause of a trust deed; but, whatever Mr. Conroy's opinion might have been on that subject, that cannot assist Mr. Maxwell, who knew that a release formed no part of the arrangement with the creditors of the firm, and who as a man of business was perfectly aware of its importance. It appears to me, therefore, that, under those special cir-

cumstances, Mr. Maxwell was bound to communicate to Mr. Robertson the fact of the existence of this release ; and not having done so, and Mr. Robertson having been thus led to execute a release to the prejudice of the bank, the bank is now entitled to be relieved. No doubt, under section 19 of the Contract Act, if the person who has been misled might have ascertained the facts by the exercise of ordinary diligence, he would not be entitled to be relieved ; but can it be said that there was negligence on Mr. Robertson's part when Mr. Maxwell had himself induced him to sign the deed at once without reading it ? I am, therefore, of opinion that the bank is entitled to have the release declared void under this section.

In the cases of the Chartered Bank and the Agra Bank I am unable to discover any circumstances making a material difference. No doubt, Mr. Maxwell says that Mr. Sharp went through the deed from beginning to end. Mr. Sharp admits that he cursorily glanced over the deed ; he has distinctly sworn that he did not read the deed, and that he was not aware of the existence of the release, and it is admitted by Mr. Maxwell that he afterwards asked if the deed was in order. It is clear to my mind that, although Mr. Sharp may have cursorily looked at the deed, he knew nothing about the release, and that he really did virtually rely on the same statement as Mr. Robertson. Nor does his conduct afterwards cast any doubt upon the inference derived from the evidence. As to Mr. Blackhall, the case stands even stronger in his favour. It is admitted by Mr. Maxwell that he never looked at the deed, and that he asked him if it contained only an assignment of the property to the creditors, and was answered in the affirmative. Mr. Maxwell in his evidence leaves out the word "only," but under the circumstances that was obviously what Mr. Blackhall meant, and what Mr. Maxwell must have understood him to mean. In both cases the managers were induced to sign at once without reading the deed by Mr. Maxwell's earnest entreaties, and by his leading them to suppose that the deed only carried out the resolutions which had been passed by the creditors, and by his silence as to the release. Under these circumstances

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and for the reasons I have already indicated, I think this deed must be declared to be void as against the plaintiffs, so far as it purports to operate as a release.

Note.—The following was the form of the decree:—

This Court doth declare that the said deed, dated the 14th October 1873, in the pleadings mentioned, is not the deed of the plaintiffs so far as it purports to operate as a release by the plaintiffs to the defendants John Fleming, Robert McIlwraith, William Nicol the younger, Hamilton Maxwell and William Gilmour Hall; and that the same is void *ab initio* so far as it purports to operate as aforesaid; and this Court doth decree that the first five defendants above named be and they are hereby perpetually restrained from pleading the said deed as a release or as a bar to any action or suit brought against them by the plaintiffs or any of them.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the defendants.—Messrs. *Rimington, Hore and Conroy.*

INSOLVENCY.

(63)

Before Sir C. Sargent, Justice, and Mr. Justice Melvill.

IN THE MATTER OF THE PETITION OF NURSEY KESTOWJI,
 AN INSOLVENT.

Practice—Indian Insolvent Act (11th & 12th Vic., c. 21), Section 36—Right of witness summoned under Section 36 to appear by counsel.

A witness summoned for examination under section 36 of the Indian Insolvent Act is not entitled, as of right, to be represented by counsel. The attendance of counsel, on his behalf, is a matter of practice to be settled by the Judge at his discretion.

On the 15th February 1879 the Official Assignee obtained an order, under section 36 of the Indian Insolvent Act (11th & 12th Vic., c. 21), for the examination of Kessowji Náik (the father of the insolvent), and for the production, by him, of all books and documents relating to the business carried on by the said insolvent in the *Samvat* year 1934.

In pursuance of this order, Kessowji Náik presented himself on the 3rd March, for examination as a witness in the case.

Lang stated that he appeared as counsel for the witness.