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abandon some part of their claim. It does not follow that, because from the statements in the plaint Rs. 1,000 appeared due, that amount was the actual amount claimed on which the fee was to be computed. It is clear that s. 54 (*b*) applies to cases where the relief is properly valued, but the plaint is written upon paper insufficiently stamped. Such is not the case here. The relief admittedly was properly valued, and the plaint sufficiently stamped, if the suit was one for an account. The plaint might be also sufficiently **[520]** stamped if the suit was one for money had and received, provided that the plaintiffs did not claim more than what the fees on the plaint covered. It is impossible, however, to determine whether the plaint is sufficiently or insufficiently stamped, unless and until the plaintiffs are called on to value the relief they seek, and they do value it. We must, therefore, reverse the decrees of the lower Courts, and remand the case for retrial by the Subordinate Judge. He should determine judicially whether the suit is one for an account. If it is, then the relief sought will be properly valued, and the stamp sufficient. If it is not, then the Subordinate Judge should call, on the plaintiffs to value precisely the relief they seek, that is the amount of money claimed, and he should proceed thereafter according to law. Costs to abide the result.

Decrees reversed, and case remanded.

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PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.

[*On appeal from the High Court at Bombay* (1).]

IN THE MATTER OF CANDAS NARRONDAS.
NAVIVAHU AND OTHERS (*Objectors*) AND C. A. TURNER, OFFICIAL ASSIGNEE (*Petitioner*). [6th and 12th April, 1889.]

Limitation to execution of judgment of Court for the relief of insolvent debtors entered up in the High Court under s. 86 of 11 and 12 Vic., cap. 21—Indian Limitation Act, XV of 1877, sch. II, art. 180—Starting point of limitation— Jurisdiction, "ordinary" and "extraordinary."

The Indian Limitation Act XV of 1877, sch. II, art. 180, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with s. 86 of the Stat. 11 and 12 Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. The latter expression in the charter of 28th December, 1865, being opposed to the "extraordinary" jurisdiction, which the High Court may assume at its discretion, upon special occasions and by special orders, includes all such **[521]** jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it.

When an order has been made, under s. 86 of the Stat. 11 and 12 Vic. cap. 21, that execution be taken out, a present right accrues to the Official Assignee to

(1) Reported at 11 B. 138.

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apply for it; and, therefore, art. 180 of sch. II assigning, in reference to judgments of High Courts exercising ordinary original jurisdiction, a starting point of time depending on the accrual of the right to enforce them, is the article applicable.

[R., 21 B. 405 (409) ; 27 B. 357 (361) ; 33 C. 560=9 C. W. N. 952; 22 M. 68=8 M.L.J. 231; 27 M. 602 (605)=14 M. L. J. 321; 32 M. 416 (420)=19 M. L. J. 388=6 M. L. T. 135=2 Ind. Cas. 802 ; 5 Bom. L. R. 203.]

APPEAL from an order (10th December, 1886), of the High Court, reversing an order (5th July, 1886) of a single Judge, who dismissed an application, as barred by time, for execution of a judgment entered up under 11 and 12 Vic , cap. 21, s. 86, in the High Court; and remanding the proceedings in execution.

The High Court's order, from which this appeal was preferred, declared that an application by the Official Assignee of the estate of an insolvent debtor, for the issue of execution upon a judgment entered up in the High Court under s. 86 of the Stat. 11 and 12 Vic., cap. 21, was not barred by time; and the question now raised was, whether execution was, or was not, barred under any, and, if any, which, of the articles in sch. II of the Indian Limitation Act XV of 1877, or whether the Act was inapplicable to such a judgment.

The material facts were that on the 19th August, 1868, a Court for the relief of insolvent debtors at Bombay, under the Stat. 11 and 12 Vic., cap. 21, ordered that judgment should be entered up against one Candas Narrondas, an adjudged insolvent, in the name of Henry Gamble, the then Official Assignee, and his successor or successors, for Rs. 1,64,08,276, being the amount of the debtor's scheduled debts.

On the 5th April, 1886, on the application of the succeeding Official Assignee, Mr. C. A. Turner, it was ordered that "execution to the extent of Rs. 49,43,952 be taken out, upon that judgment, against the moveable and immoveable properties mentioned in the indenture bearing date the 16th December, 1863, and made between the insolvent of the one part, and one Premchand Roychand and one Ardesir Bomanji Kaka of the other part, and which are now in the possession of Chotilal Jugulbhoy and Purshotam Mangaldas, as trustees."

[522] On the 13th April, 1886, the Official Assignee applied to the Prothonotary of the High Court for execution against the representatives of the insolvent, and against the trustees above mentioned.

This application was dismissed by the order of Mr. Justice Scott, who, after referring to the judgment of the High Court in *In re Bhagwandas Hurjivan* (1), to the effect that a judgment entered up under s. 86 of the Stat. 11 and 12 Vic., cap. 21, is a judgment of the High Court, and must be executed under the Civil Procedure Code, held s. 227 of that Code to be applicable to the judgment, as a judgment belonging to the original civil jurisdiction ; but raised the question of limitation as follows :—

"Eighteen years have elapsed between the judgment entered up and the order for execution. But twelve years is the period fixed within which a judgment may be enforced, if it is a judgment within the meaning of s. 180 of the 2nd schedule of the present Limitation Act, and by s. 179 three years is fixed for the execution of a decree of any Civil Court not provided for by s. 180. This same period was given by the Act for the limitation of suits in force at the time this judgment was entered up in the Supreme Court. (See Limitation Act XIV of 1859,

(1) 8 B. 511.

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ss. 19, 20). It may also be added that the principle of limitation was fully recognized before any Act of limitation was passed in India. The Privy Council has held that the English law of limitation applied in India—*The East India Company* v. *Oditchurn Paul* (1) ; and in a subsequent case, about the same time—*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund* (2)—their Lordships extended the application of that law to Hindus and Mahomedans as well as to Europeans in civil actions in the Supreme Court.

" We may take it, therefore, that the general policy of limitation was applicable in India at the date of the Insolvency Act. But it was argued that all limitation of time was expressly excluded by the terms of s. 86 of the Insolvency Act. The [523] words relied upon are, ' and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvent Court.' These words, in my opinion, were intended to give a special value to the special publicity of the entering up by the order of the Court, but were not intended to exclude the vested right of every debtor to the privileges of limitation. The fair interpretation of the passage of the section relied upon, in my opinion, is as follows : the words ' no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time,' only dispense with the formalities in the nature of a writ of *scire facias* ordinarily required as a preliminary to the execution of a judgment not executed within a year of its date. The other words relied upon, *viz.*, ' execution shall at all times issue,' must, in the absence of any specific exclusion of the general law of limitation, be read subject to the operation of that general law. It is a well-known principle that Acts must be construed so as not to affect any vested rights unless those rights are excluded in express terms ; or, to put the same principle in other words, the Legislature must not be taken to intend any alteration in the law beyond what it explicitly declares in express terms, or by unmistakeable implication. General words, such as these in question, must, if possible, be read as bearing on the immediate object of the Act, and not as altering the general policy of the law. The scope and object of this section was to keep alive the ordinary legal liability of the debtor to his previously accrued debts, not to deprive him of any vested right, such as that of limitation, or to cast upon him any extraordinary or new liability such as that of perpetual liability. To hold otherwise would be to repeal by a side wind, so to speak, a general principle of law. I must, therefore, hold that s. 86 of the Insolvent Act does not exclude the operation of the law of limitation."

From this order the Official Assignee appealed to the High Court, which reversed it, remanding the case to the Court below. For this reversal the Judges differed in their reasons. The judgment of Mr. Justice West was as follows :—

[524] " As the decision in *In re Bhagwandas Hurjivan* (3) has determined that a judgment entered up under an order of the Insolvent Court ranks as a judgment or decree of the High Court, we must so regard the judgment in the present instance. The Court, in the case referred to, held that the judgment must be executed, like one passed by

(1) 5 M.I.A. 43. (2) 5 M.I.A. 234. (3) 8 B. 511.

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the Court itself, according to the provisions the Code of Civil Procedure: and whether the judgment is to be deemed one sent to the Court from another Court under the provisions of s. 227 of the Code or not, makes no practical difference. In either case the order of the Court for the Relief of Insolvent Debtors would be good for its own purpose; in either case it would not justify the Court in disregarding a bar by limitation coming into existence and operating against execution of the decree subsequently to the High Court becoming seized of it. It is urged that such a bar has come into existence; that the decree cannot be other than a decree of the High Court, and is subject, as such, to limitation. Under the English law in force when the Indian Insolvency Act (Stat. 11 and 12, Vic. cap. 21), was passed, and from which that statute was largely copied, the insolvent, as a condition of obtaining his discharge, had to execute a warrant of attorney to confess judgment in favour of the assignee. This, when duly recorded, became a speciality against which limitation did not run under the Act of James I. Execution could, therefore, be had after any time. The need for a '*scire facias*' was removed by the insolvency statutes; but, at the same time, a discretion was accorded to the Commissioners in Insolvency of granting, refusing, or limiting the execution sought at any time against the after-acquired property of the insolvent. Subject to this qualification, the confession of judgment would come into operation whenever property worth seizing came into the insolvent's possession, until the whole amount of the scheduled debts was discharged. The English Stat. 1 and 2 Vic., cap. 110, s. 88, further provided that the insolvent might be forced to transfer stock which the assignee could not get at under the judgment entered up, and it was under this provision that the case of *Ex parte Pain* (1) arose. The general principle was that all property that should **[525]** become the insolvent's should be available for the satisfaction of his creditors, and this was carried out in the case of *Barton* v. *Tattersall* (2), and those which followed it, to the extent of allowing a creditor who was also assignee, to obtain satisfaction in an administration suit without seeking execution of the judgment. The Indian Act replaces the process of a confession of judgment by a direct order of the Insolvency Court. It enables the same Court to order that execution be taken out of the judgment entered up in the Supreme Court, and 'against the property of the insolvent, whether the same may or may not be by law vested in his assignee.' This last provision is meant apparently as a substitute for the one in the English statute under which the case of *Ex parte Pain* (1) was disposed of.

"The perpetual responsibility of an insolvent debtor ceased in time to be part of the policy of English legislation. By the Stat. 32 and 33 Vic., cap. 83, bankruptcy was substituted for insolvency, and all pending cases of insolvency were to be closed within prescribed periods. The meaning of this last provision is discussed in *In re Clagett's Estate*; *Fordham* v. *Clagett* (3). Effect was in this case given to a rather ambiguous provision by construing it in the light of the obvious policy of the Act, and declaring that, after the given time, the insolvent was free from all responsibility under the proceedings in insolvency, and consequently that after his death his estate was free also. The lien on an insolvent debtor's whole future property has thus disappeared from the English law; but the Legislature expressed, as well as it could, in direct terms, its purpose of making a radical change.

(1) L.R. 3 Ch. Ap. 639. (2) 1 Russ. & Myl. 237. (3) L.R. 20 Ch. Div. 637.

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"In India it would seem as if the Insolvency Act had almost escaped the notice of the Legislature in dealing with cognate subjects. The judgment of the older law is replaced by the judgment and decree of the Code of Civil Procedure. The execution of a decree has ceased to be a merely ministerial act and a matter of course; a Judge must be applied to, and be satisfied that execution is rightly sought. As, then, the judgment entered up by order of the Insolvent Court is to be deemed a decree of the High Court itself, it is plain that the former state of things [526] with regard to it has necessarily changed. This is recognized when, on the order of the Insolvent Court to take out execution, the assignee applies to a Judge as for execution of a decree under the Code of Civil Procedure. It seems, then, that the decree must be subject to the same rules generally as other decrees of the High Court in the absence of any special exception. There was much perhaps to be said for a distinction between the judgments entered up under the order of the Insolvent Court and ordinary decrees under the Code; but, once included in the same category, they must needs be subject to the same rules. Article 180 of sch. II of the Limitation Act XV of 1877, therefore, is, I think, applicable to the judgment in the present case. The Insolvency Act did not contemplate its being entered up otherwise than as a judgment of the Supreme Court. It ranked then as a judgment of a Court established by Royal Charter in the execution of its ordinary original civil jurisdiction. The same description may be applied to it now, and hence the execution is limited, as in the case of other judgments and decrees of the High Court. The principle of perpetual liability to execution can no longer be deemed a principle. The English law has discarded it, as we have seen; the Indian law has made all judgments, subject to limitation, and amongst them those of the Insolvent Court. Mr. Inverarity sought to make out that the endless responsibility was a proper price paid for protection from imprisonment. It was rather an inducement to give up property. The moral obligation to satisfy an ordinary decree is the same as in the case of one that combines many claims; and there is no reason why the policy of applying limitation to the one should not extend to the other. An insolvency law for the District Courts is provided within the Civil Procedure Code itself; but he who profits by it is not, therefore, deprived of the benefit of the limitation against decrees."

The judgment then referred to art. 180 of sch. II of Act XV of 1877, the Judge being of opinion that no present right to enforce the judgment accrued to any person, in such a case as the present, until the making of the order by the Insolvency Court that execution be issued. The Commissioner exercised a discretion in allowing execution or not. The right to execution [527] which arose on the date of the order of 5th April, 1886, could not have been affected by art. 180, a few days afterwards. He, therefore, held that the application was not barred by limitation, and that the order of the Court below must be reversed.

The Chief Justice, Sir C. Sargent, was of opinion that limitation under Act XV of 1877 was not applicable. He said:—"The Indian Insolvent Act was framed on the same lines as the English Insolvency Acts, beginning with 53 Geo. III, caps. 1 and 2, down to the passing of the Bankruptcy Act of 1861, which abolished the distinction between insolvency and bankruptcy; and the principle of those Acts, though varying the modes of giving effect to it, has always been held to be that the future property of the insolvent should be liable for his debts."

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He quoted the judgment in *Barton* v. *Tattersall* (1) and that in *Ex-parte Pain* (2), in the latter of which cases, Lord Hatherley, discussing the effect of ss. 87 and 88 of the Stat. 1 and 2 Vic., cap. 110, the former of which is similar in its practical effect to s. 86 of the Indian Act by providing that the insolvent before his discharge must give a warrant of attorney to enable the provisional assignee to obtain execution against his future property for the benefit of his creditors, says: "The insolvent cannot obtain his discharge except upon the condition of his making over all his future property of every kind for the benefit of his creditors." The judgment continued thus:—"Such being the policy of the Indian Insolvent Act, it is plain that it would be to a great extent defeated if judgment entered up by the order of the Insolvent Court under s. 86—the machinery provided for effecting that object—could only be executed within a limited time The spirit, therefore, of the well-established rule of construction of Acts, that *generalia specialibus non derogant*, requires that the Limitation Acts should not be deemed applicable to judgments entered up under s. 86, unless their language clearly requires it.

"Such is not the case, in my opinion, with the language of the two clauses of the Act of 1877 which have been relied on as constituting a bar to the judgment in question. Article 180 [528] relates to an application to enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction. Now a judgment entered up under s. 86 is doubtless a judgment of a Court established by Royal Charter, but it is not a judgment entered up in the exercise of its ordinary civil jurisdiction, but under s. 86 of the Insolvent Act, the jurisdiction under which formed no part of the ordinary civil jurisdiction. Again, the period of limitation fixed for such judgments, namely twelve years from the time a present right to enforce the judgment accrues to some person capable of releasing the right, is quite inapplicable to judgments which could only be enforced by order of the Insolvent Court and could not be released by any person, which must clearly mean lawfully released. As to s. 178, it is to be remarked that a fresh right to execute the judgment is constantly accruing under s. 86, whenever the Insolvent Court orders it."

"I am of opinion, therefore, that the judgment in question was not barred, and that the order of the Court below should be discharged, and that execution should issue on the judgment."

On this appeal,

Mr. *J. Rigby*, Q. C., and Mr. *J. D. Mayne*, for the appellants, argued that there was error in both the judgments given in the appellate Court below. The Chief Justice had incorrectly held that the Indian law of limitation was inapplicable to a judgment entered up under s. 86 of the Stat. 11 and 12 Vic., cap. 21. The judgment of Mr. Justice West, though correct as to the general application of Act XV of 1877, was wrong in not concluding that execution in this instance was barred under art. 179. It was submitted that, under art. 179, execution of the judgment of 1868 was barred; that article, and art. 180, exhausting all cases of application to a Civil Court for execution. But here art. 180 was inapplicable, the present not being "an application to enforce a judgment of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction." It was not in its "ordinary" jurisdiction that the High Court entered up

(1) 1 Russ. & Myl. 237. (2) L. R., 3 Ch. Ap. 639.

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a judgment of the Insolvent Debtors' Court; but such entry up was one of those matters that were provided for [529] by special enactments, and not belonging to the ordinary procedure. Therefore this application did not fall under art. 180. Article 179, however, operated, by cl. 5, to bar it.

Reference was made to s. 19 of Act XIV of 1859; also to *In re Bhagwandas Hurjivan* (1).

Mr. *A. Cohen*, Q. C., and Mr. *J. Macpherson*, for the respondents, argued that the execution was not barred by limitation, and that the order of the High Court was correct in remanding the decree for execution. The Code of Civil Procedure did not apply to the Insolvency Court, (s. 638 of Act XIV of 1882); and the application to the Insolvency Court to have the judgment entered up in the High Court was made under Rule 42 of the Rules relating to the former Court (2). The Insolvency Court acted in the matter under the Stat. 11 and 12 Vic., cap. 21. Referring, then, to the decision of the High Court in *Bai Manekbai* v. *Manekji Kavasji* (3) that art. 178 of sch. II of Act XV of 1877 was applicable to applications made under the Code, and no others, art. 178 was excluded here. It was submitted that the latter Act did not apply to, or affect, applications to execute judgments entered up under s. 86 of 11 and 12 Vic., cap. 21. Analogy was to be found in the law under the Stat. 1 and 2 Vic., cap. 110, s. 87, as applied in *Sturgis* v. *Joy* (4), which decided that a judgment entered up in one of the superior Courts at Westminister, in the name of the assignee of an insolvent debtor, on a warrant, pursuant to s. 87 of the above Act, was not a record over which such superior Court exercised control; but that the Insolvency Court alone could decide when satisfaction was to be entered. If, however, it should be held that the Indian law of limitation was applicable, then the only applicable article, would be found to be art. 180, and this because such a judgment as the one entered up under s. 86 was [530] within the language of the article. Upon the question under what category of jurisdiction this judgment fell, all the High Court's proceedings, as an original Court, that were not extraordinary were ordinary; and this judgment was entered up in the exercise of ordinary original jurisdiction. The High Court entered up the judgment of the Insolvent Court of 19th August, 1868, not under the 18th clause of the Amended Letters Patent, butunder the 9th section of 24 and 25 Vic., cap. 104, relating to the jurisdiction and powers of the High Courts.

The result of the argument for the respondent was that, first, it had not been made out that the Indian law of limitation was applicable here; secondly, that assuming Act XV of 1877 to be applicable, the only applicable article of sch. II was art. 180. In this, the period of limitation, not commencing to run from a fixed date, but being dependent for its starting point on the date when the right accrued to the Official Assignee to apply for execution, had only commenced when the application was made; and it was consequently not barred by time.

Mr. *J. Rigby*, Q. C. replied.

Cur. adv. vult.

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(1) 8 B. 511.

(2) Rule 42.—"The Prothonotary of the High Court shall, upon the production of an order made by the Court pursuant to 86th section of the Act 11 Vict. cap. 21, forthwith enter up judgment for the amount against the Insolvent therein named, that the Court may be enabled at any future time, if it shall see fit, to issue execution on the same against the future assets of the Insolvent."

(3) 7 B. 213.

(4) 2 E. & B. 739.

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JUDGMENT.

Their Lordships' judgment was delivered on 12th April, 1889, by

LORD HOBHOUSE.—On the 19th August, 1868, the Insolvency Court of Bombay ordered that a judgment should be entered up in the name of the Official Assignee against the insolvent Candas Narrondas for a sum exceeding sixteen millions of rupees. That judgment was accordingly entered up in the High Court.

It does not appear whether anything was done under the judgment till the 5th April, 1886, when the Insolvency Court ordered execution for a sum of nearly five millions to be taken out against certain properties described in the order.

The representatives of the Insolvent, being summoned to show cause why the judgment should not be executed, assigned as cause that under the operation of the Indian Limitation Act, 1877, the right to have execution was barred by lapse of time. It will be convenient to state here the effect of the articles in the [531] schedule of the Act of 1877 which have been put forward as applicable to the case, taking them in reverse order. The amendments of this Act by Acts XII of 1879 and XIV of 1882 do not affect the present question.

By art. 180 an application to enforce a judgment of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction is barred unless made within twelve years from the time when a present right to enforce the judgment accrues to some person capable of releasing the right. By art. 179 an application for the execution of a decree or order of any Civil Court, not provided for by art. 180 or by the Code of Civil Procedure, s. 230, is barred, unless made within three years from various points of time ;—it may be taken, for the purpose of the present case, that the starting point of time would be in the year 1868. By art. 178 an application, for which no period is provided elsewhere in the schedule to the Act or by the Code of Civil Procedure, s. 230, is barred unless made within three years from the time when the right to apply accrues.

This case was heard before Mr. Justice Scott, who held that the application was barred by time. From his judgment it is to be gathered that he thought the case was governed by either art. 179 or art. 180, but it does not appear which. There is a great difference between the two; for art. 179 assigns a fixed starting point of time, whereas art. 180 assigns one that is dependent on the right to enforce the judgment.

On the appeal of the Official Assignee the case was heard before Chief Justice Sargent and Mr. Justice West, who reversed the order of the Court below, and directed that execution should issue. West, J., held that the case fell under art. 180, and that no present right accrued till the order of the Insolvency Court made on the 5th April, 1886. Sargent, C.J., held that the case is not provided for by the Limitation Act at all. From this order of the High Court the present appeal is brought. And the first question is, whether the judgment of 1868 was entered up in exercise of the ordinary original civil jurisdiction of the Supreme Court.

[532] By s. 86 of the Indian Insolvency Act, it is provided that the Insolvency Court may direct a judgment to be entered up in the Supreme Court; that the production of the order of the Insolvency Court shall be sufficient authority to the officer of the Supreme Court for entering up the judgment; that if at any time it shall appear to the satisfaction of the Insolvency Court that the insolvent is of ability, or has left

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assets, to pay debts, that Court may order execution to be taken out upon the judgment; that such further proceedings may be had upon the judgment as the Insolvency Court may from time to time order, until the debts are fully paid; and that no *scire facias* shall be necessary to revive or to execute the judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvency Court from time to time.

By the High Court Act of 1861 Her Majesty received power to erect High Courts, and s. 11 enacts that all provisions applicable to the Supreme Courts and to their Judges shall be taken as applicable to such High Courts and to their Judges respectively.

The Royal Charter which regulates the Bombay High Court, under the provisions of the High Court Act, is dated the 28th December, 1865. Sections 11 to 18 are a group of clauses headed "Civil Jurisdiction of the High Court." Sections 11 and 12 describe the local limits of the ordinary original civil jurisdiction, which is said to extend to all kinds of suits within those limits except small cause suits. Section 13 gives to the High Court power to remove, and to try as a Court of extraordinary original jurisdiction, any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 16 confer appellate jurisdiction. Section 17 confers authority over infants, idiots and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India.

[533] From this brief statement of the material statutes and charters it appears that though the Insolvency Court determines the substance of the questions relating to the insolvent's estates, such as the amount of the judgment to be entered up against him, and the propriety of issuing execution upon it, the proceedings in execution are the proceedings of the High Court, and the judgment itself is the judgment of the High Court. And it is clearly entered up in the exercise of civil jurisdiction, and of original jurisdiction.

But it was strongly contended at the bar that this jurisdiction though civil and original, was not ordinary; and Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes—ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders. They are confirmed in this view by observing that, in the next group of clauses which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate. The judgment of 1868 was entered up by the High Court, not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with. It was, therefore, entered up in exercise of the ordinary original civil jurisdiction of the High Court; and no present right accrued

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to the Official Assignee to move for execution until the order of 5th April, 1886, was made.

The order of the High Court, which is appealed from, is dated the 10th December, 1886. After the appeal was presented, and on the 2nd March, 1888, the High Court amended the order, by remanding the case to the Court below, with a declaration that [534] the application for execution was not barred, instead of directing execution at once. Strictly speaking such an alteration of the order appealed from was beyond the competence of the Court, but their Lordships accept the alteration as indicating the opinion of the High Court as to the best form of order. The present order, therefore, should be that of 1886, as varied by the High Court itself in 1888. Subject to this variation the appeal must be dismissed, and with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants.—Messrs. *Macfarlane and Lefroy.*

Solicitors for the respondents.—Messrs. *Payne and Lattey.*

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13 B. 534.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

AHMEDBHOY HUBIBBHOY (*Defendant and Appellant*) *v.* CASSUMBHOY AHMEDBHOY (*Plaintiff and Respondent*) AND RAHIMBHOY ALLADINBHOY (*Defendant and Respondent*).*

[21st June, 1889.]

Khoja Mohomedans—Law applicable to—Partition—Right of a son to claim partition of ancestral property in his father's lifetime—Custom, proof of—Ancestral property—Wealth amassed in trade—Evidence—Burden of proof.

The rule that Hindu law as administered in this presidency, in the absence of proof of custom to the contrary, is the law applicable to Khoja Mahomedans is not to be understood in its widest sense, but as confined to simple questions of inheritance and succession.

The right of a son to partition in the lifetime of his father, more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there is no presumption in favour of its inclusion in the Hindu law, which, in the absence of proof of custom to the contrary, is applicable to Khoja Mahomedans. The *onus* is on the party alleging such a right, in the case of Khoja Mahomedans, to prove it.

Held, on the evidence, that it was not established that amongst Khojas in Bombay there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired.

[535] *Held*, also on the evidence that there was no sufficient proof of the property, of which the plaintiff sought partition being ancestral property in the hands of his father.

Where wealth amassed in trade by an individual is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shown that the property inherited contributed in a material degree to the wealth so amassed.

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* Suit No. 382 of 1884; Appeal No. 602.