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ferred to in section 598, *viz.* the Court whose decree is complained of. Then follow the remaining clauses of the section (608). They enable "the Court," *viz.* the Court "admitting the appeal," or in other words "the Court whose decree is complained of," to take steps to impose conditions and to give directions as to the execution of the decree sought to be appealed from, but they impose no limitation as to time upon the exercise by such Court of its powers. Nor is there any reason why they should. As to the power of impounding moveable property, it is plain that to be of avail it must be exercised at a very early stage. The same principle must be applied to all. This Court then being the Court admitting the appeal, and not being limited as to time in the exercise of its powers can, if it thinks fit, exercise its powers as to staying execution at the present time. We are, therefore, of opinion that we have jurisdiction now to hear the application, and that it is not premature, though the appeal has not been admitted.

Attorneys for appellant.—Messrs. *Roughton and Byrne.*

Attorneys for respondents:—Messrs. *Little, Smith Nicholson and Bowen.*

ORIGINAL CIVIL.

Before Mr Justice Candy.

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July 31.

GOKULDA'S MUCCANJI, PLAINTIFF, *v.* VASSANJI JAIRA'M AND OTHERS, DEFENDANTS.*

Deed—Creditors' trust deed—Assignment of all his property by debtor to trustees for payment of creditors—Suit by creditor who had signed as creditor and as trustee to recover his debt notwithstanding the deed.

On the 30th March, 1894, the plaintiff sued the defendant, who traded under the name of Vasanji Jairam, to recover Rs. 7,705 due on an adjusted account. On the 17th April following the suit was on the board for hearing, but by consent of parties was adjourned for three months. Later on the same day the defendant executed a deed whereby he assigned all his property to the plaintiff and three other persons as trustees in trust for the payment of his creditors. The deed was executed by the plaintiff and the other trustees both as trustees and as creditors. It contained no release and no agreement by the creditors to take less than the full amount of their debts. It conveyed all the defendant's property to the trustee, who was to collect the estate and divide it rateably among the creditors "without prejudice to the rights of the several creditors to recover" the balance (if any) which might

* Suit No. 129 of 1894.

remain due to them after receiving such rateable distribution, and it declared that the said agreement for the payment of the debts was accepted by the creditors, and that "upon payment to the said creditors, respectively, of the full or whole amount of their respective claims these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor, or the said firm of Vassanji Jairam, to the said creditors respectively, and may be pleaded in bar to any claim in respect of such debts; and each of them the said creditors for himself, his heirs, executors and administrators doth hereby covenant with the said debtor, his heirs, executors and administrators that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of Vassanji Jairam to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of Vassanji Jairam to the said creditors respectively." On the execution of this deed the trustees took possession of defendant's books of accounts, and proceeded to recover the defendant's estate.

The three months for which, as above mentioned, the suit was adjourned in April, 1894, having now expired, it came on for hearing. The defendant pleaded the deed, and contended that the plaintiff having accepted the trust, and signed the deed, was not entitled to continue the suit against him.

Held, that it would be inequitable that the defendant having handed over all his property to four of his creditors as trustees with a view to the payment of his debts in full should be harassed by one of those creditors who had accepted the trust. The conduct of the plaintiff had been such as to deprive him of the right to present payment of his debt except by the assignment made to him and the other trustees. There had been a concluded agreement which precluded him from proceeding with his suit, and to allow him to proceed would be a fraud on the creditors. Under the circumstances there was an implied condition that the creditors should not sue until their remedy under the assignment was exhausted. The creditors should get what they could under the assignment, and then proceed for the rest.

THE plaintiff sued the defendant to recover the sum of Rs. 7,705 due upon an adjusted account dated 9th November, 1893. The suit was filed in March, 1894, and now came on for hearing as a short cause.

The defendant pleaded that on the 17th April, 1894, he had made over all his property to the plaintiff and three other creditors as trustees for the rateable distribution thereof among all his creditors, and that the plaintiff had accepted the said trust and, with the other trustees, had signed the deed. He contended that under these circumstances the plaintiff was not entitled to continue the suit against him or to get a decree.

In the 4th and 5th paragraphs of his written statement he further alleged that in respect of certain partnership transactions

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he had cross claims against the plaintiff which ought to be set off against the plaintiffs' claim in this suit.

The deed in question was made between the defendant Vassanji Jairám, called "the debtor," of the first part; the plaintiff and three other persons, called "the trustees," of the second part; and "the several persons and firms creditors of the firm of Vassanji Jairám, whose names are herewith affixed and hereinafter designated the said creditors, of the third part," and it contained *(inter alia)* the following recitals:—

"And whereas the said Vassanji Jairám being pressed has, as partner of the said firm of Vassanji Jairám, agreed to pay the said creditors the amount of their respective claims out of the assets of the said firm of Vassanji Jairám, so far as the said assets will extend, rateably in proportion to the respective claims of the said creditors and to secure such payment or composition by a grant and assignment of all the moveable and immoveable properties, estate and effects unto the said trustees, their executors, administrators and assigns upon the trusts hereinafter appearing for the realization of such estate and effects and the payment out of the proceeds thereof of the said rateable distribution or composition and by the covenant of the said trustees hereinafter contained to pay to the said creditors the said rateable distribution or composition; And whereas it has been agreed that the said arrangement shall be without prejudice to the rights of the said several creditors to recover from the said Vassanji Jairám and Gokuldás Meghji and their personal property the balance which may remain due to them after payment of the rateable distribution payable to them out of the assets of the said firm of Vassanji Jairám; And whereas the said creditors have agreed to the said proposal of the said debtor and to accept the said rateable distribution or composition and further payment of the balance of the said claims as is hereinbefore recited, and on payment thereof to give to the members of the said firm of Vassanji Jairám such release from the respective debts due to them the said creditors respectively as is hereinafter contained, &c."

The deed then "in pursuance of the said agreement" assigned to the trustees all the assets of the firm of Vassanji Jairám "and all other property of the said debtors" upon trust to recover and realise all the said assets and property and out of the same to pay the creditors rateably in proportion to the amount of their respective debts. It further contained *(inter alia)* the following clauses:—

"And the said trustees hereby for themselves and their heirs, executors and administrators covenant with each of the said creditors respectively and their respective executors, administrators and assigns that they the said trustees, their executors or administrators shall and will out of the net proceeds of the said sale, collection and conversion into money hereinbefore directed to be made, pay to each creditor the rateable distribution or composition payable to them on the amount

of their respective debts. And it is hereby agreed and declared that these presents are without prejudice to the rights of the said several creditors to recover the balance, if any, which may remain due to them (after receiving payment of the said rateable distribution or composition from the assets of the said firm of Vassanji Jairám) from the said debtor and the said Gokuldás Meghji personally, or from the personal estate and effects of the said Vassanji Jairám and Gokuldás Meghji. And the said debtor doth hereby for himself, his heirs, executors, and administrators, and for the said firm of Vassanji Jairam covenant with said trustees, their executors, administrators or assigns that he the said debtor now hath good right and power to assign the said premises in manner aforesaid. And this indenture also witnesseth that in consideration of the premises it is hereby agreed and declared that the said arrangement hereinbefore contained for payment of the debts due to the said creditors by the said debtor shall be and the same is hereby agreed to be accepted by the said creditors, and that upon payment to the said creditors respectively of the full or whole amount of their respective claims, these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor or the said firm of Vassanji Jairám to the said creditors respectively and may be pleaded in bar to any claim in respect of such debts. And each of them the said creditors for himself, his heirs, executors and administrators doth hereby covenant with the said debtor, his heirs, executors and administrators that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of Vassanji Jairám to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of Vassanji Jairám to the said creditors respectively."

The deed was duly signed by the plaintiff and the three other trustees as trustees, and was also signed by them as creditors.

At the hearing the material issues were whether, having regard to the provisions of the above deed, the plaintiff could maintain this suit, and whether, in case the alleged partnership transactions were proved, the defendant was in this suit entitled to have the accounts taken, and to set off any amount which might be found due to him.

It appeared that this suit had been on the board for hearing on the morning of the day the above deed was signed, but that by consent of the parties it was postponed for three months, and later on that day the deed was executed.

The plaintiff gave evidence and stated that he had not agreed to abandon this suit, but merely to postpone the hearing. Evidence was also given that on execution of the deed the trustees had taken possession of the defendants' books and had

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filed suits to recover the defendants' outstandings. Only a sum of Rs. 348 had been as yet recovered, and other suits would be necessary.

Inverarity for plaintiff:—The plaintiff is entitled to get a decree. This suit was filed before the execution of the deed, and the plaintiff never agreed to abandon it. The deed is not a composition deed. It contains no release, and no covenant to take less than the full debt. The Court cannot stay the suit, though perhaps it may stay the execution of the decree. He commented on the terms of the deed, and cited the *Ipstones Iron Ore Co.* v. *Pattinson*(1); *Clarke* v. *Williams*(2); *Eyre* v. *Archer*(3); Civil Procedure Code (XIV of 1882), section 243. No set-off could be permitted in this suit—Civil Procedure Code, section 111.

Kirkpatrick for defendant:—It would be inequitable to pass a decree when the defendant has given over all his property to the trustees for distribution. The trustees themselves are empowered by the deed to recover his property, and are actually doing so—Robson on Bankruptcy (6th Ed.), pp. 254, 780, 794; *Norman* v. *Thompson*(4); *Kheta Mal* v. *Chuni Lál*(5). As to set-off, he cited *Niaz Gul Khán* v. *Durga Prasad*(6); *G. Chisolm* v. *Gopál Chunder Surma*(7).

CANDY, J.:—This is a suit filed on the 30th March, 1894, by Gokuldás Muccanji against Vassanji Jairám and Gokuldás Meghji trading under the name and firm of Vassanji Jairám, on an account signed by the defendant on 9th November, 1893, when the amount of Rs. 7,705-10-3 was found due.

The written statement of the defendants filed on 30th July, 1894, the day before the hearing of this suit, raised two defences, *viz.*, (*a*) first, that by a deed made on 17th April, 1894, the plaintiff and three other creditors of the defendants were appointed trustees of the estate and effects of the defendants, with power to realise the same and to pay the creditors of the defendants the amount of their claims, it being provided by the said deed that until such estate and effects were collected, no suit should be

(1) 2 H. and C., 828, at p. 833.
(2) 3 H. and C., 508.
(3) 16 C. B. (N. S.) 638.
(4) 4 Ex., 755.
(5) I. L. R., 2 All., 173.
(6) I. L. R., 15 All., 9.
(7) I. L. R., 16 Calc., 711.

maintained or instituted against the defendants. (*b*) Second, that plaintiff and defendants were partners in any business in cotton which either plaintiff or defendants should do, and that on an account being taken of their partnership transactions it would be found that a large sum was due to defendants from plaintiff; and this the defendants claimed to set off.

This second plea was also used as an argument by the Advocate General for transferring the case to the long-cause list. But I disallowed the plea, it being admitted by the Advocate General that the alleged partnership transactions were distinct from the signed and adjusted account which forms the subject-matter of the present suit. No "ascertained sum of money" was claimed, no particulars of the debt sought to be set off tendered: so section 111 of the Civil Procedure Code (XIV of 1882) was not applicable. Nor was this an equitable set-off independently of the provisions of that section, for the cross-demands do not arise out of one and the same transaction, nor are they so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit.

For the same reason, when the case came on for hearing, I intimated that it was not open to defendants in the present suit to prove the allegations in the 4th or 5th paras. of the written statement, because the alleged partnership had no connection with the two specific accounts which were adjusted by the settlement of 9th November, 1893. This disposes of the second and third issues.

There remains the first and the most important issue, whether, having regard to the deed above mentioned, this suit is maintainable,—that is, whether the deed can be pleaded in bar to the present action.

Mr. Inverarity for plaintiff contended that the deed did not apply to a suit filed before the deed was executed, and that the first defendant had failed to fulfil his covenant according to the deed: further, that the deed contained no release, and that it was worthless, because the first defendant denied the deed, while the second defendant was wrongly omitted therefrom. Counsel

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quoted *Ipstones Park Iron Ore Co.* v. *Pattinson*[1], *Clarke* v. *Williams*[2], and *Eyre* v. *Archer*[3].

Mr. Kirkpatrick, in support of the plea of the defendant, referred to Robson on Bankruptcy (6th Ed.), pp. 254, 780, 794, and quoted *Norman* v. *Thompson*[4] and *Kheta Mal* v. *Chuni Lál*[5].

In the last noted case the debtor and some of his creditors, including the plaintiff, agreed to an award made by arbitrators, by which the debtor was expressly released from certain debts. The plaintiff received certain payments under that award. It was held that if creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award, and fall back on their old debts in satisfaction of which the debtor had assigned all his property for the benefit of his creditors. The acceptance by one or more of the creditors of the assignment by the debtor of all his estate deprived them of all further relief against the debtor. Plaintiff being one of the creditors who accepted that mode of settlement was bound by it, and could not recover any balance that might remain over after the event of the award in the arbitration proceedings.

So here it is contended that if the plaintiff has accepted the settlement evidenced by the deed in question, and if that deed releases defendants so as to bar any present recovery of the debt due to plaintiff except by the settlement, then this suit cannot now be maintained. Thus the important question will be, what are the exact terms of that settlement?

In *Norman* v. *Thompson* the question was one of pleading, *viz.*, whether there was a variance between the plea and the facts found in the special verdict; but Mr. Kirkpatrick quoted the case as an authority for the proposition that an agreement by two or more of the creditors to enter into a composition is perfectly good and binding as to such parties, whether the others do so or not. In the present case it is not contended that the deed is invalid because all the creditors have not yet signed it. Plaintiff has signed it, and (it is said) has acted under it. It may be remarked

(1) 2 H. and C., 328 at p. 333.
(2) 3 H. and C., 508.
(3) 16 C. B. (N. S.), 638.
(4) Ex., 755.
(5) I. L. R., 2 All., 173.

that in *Norman* v. *Thompson*[1] the composition was to accept from the debtor, in certain instalments, the sum of 10*s.* in the pound in full satisfaction and discharge of the creditors' respective debts and demands, and the defendant pleaded that he was ready and willing to pay the instalments at the time and place so appointed for the payment thereof. Such an agreement, no doubt, may be pleaded by the debtor by way of accord and satisfaction as a defence to an action by one of the compounding creditors for the original debt. So, too, where a creditor undertook to accept a composition and to sign a composition deed with a clause of release, and where everything on the debtor's part was done, it was held that there was both accord and satisfaction which could be pleaded in bar of an action for the original debt—*Bradley* v. *Gregory* [2].

The cases quoted by the learned counsel for the plaintiff have special reference to the English Bankruptcy Act of 1861. Thus in the *Ipstones Park Iron Ore Co.* v. *Pattinson*[3] it was held that a deed under the 192nd section of that Act does not operate as a statutable release of the debtor, pleadable in bar of an action by a creditor, and the debtor can only avail himself of it by application to the Court of Bankruptcy to stay the proceedings, or after certificate by application to the Court, in which judgment has been obtained, to stay execution. I did not understand Mr. Inverarity to contend that the only way in which defendants in the present suit could avail themselves of the deed was by application to the Court of Insolvency in Bombay to stay proceedings, or, after certificate obtained in that Court by application to this Court, to stay execution. On the contrary he contended that the only way in which stay of execution could be obtained was under section 243 of the Civil Procedure Code (XIV of 1882), and that that section was not applicable in the present case.

The point to be noticed in the case just quoted is that the question was whether the deed could be pleaded as a *statutable* release. As the deed did not contain any provisions by which the creditors, in addition to a covenant not to sue, had agreed that,

(1) 4 Ex., 755. (2) 2 Camp., 383.

(3) 2 H. and C. 828.

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if they did sue, the deed might be pleaded as a release, the only question was whether the statute, under which the deed purported to have been executed, made the deed operate as a bar to an action. The Court said—no; the relief indicated by the Legislature is by application to the Court of Bankruptcy, and so forth.

In the present case, the deed is not put forward as a *statutable* bar to the action. It is unnecessary, therefore, to further consider the above case, or that of *Clarke* v. *Williams* (1), in which the judgment of the Court was simply based on the cases of *Eyre* v. *Archer* and the *Ipstones Park Iron Ore Co.* v. *Pattinson*; and as was subsequently pointed out in *Garrod* v. *Simpson*(2) "in *Eyre* v. *Archer*, the deed was in the form of Schedule D of the Bankruptcy Act, 1861, and was, therefore, a mere assignment and not a composition deed. In the deed in the *Ipstones Park Iron Ore Co.* v. *Pattinson* there was an agreement by the creditors to accept a particular composition, as well as an assignment by the debtor; but there was no allegation of tender. The question argued and decided was, whether the plea was good as a statutable release, and not whether, if it had averred a tender, it would have been good."

It may be remarked that the judgment in *Clarke* v. *Williams* (referred to above) was subsequently affirmed in the Exchequer Chamber(3), on the ground that the deed which operates under the Bankruptcy Act, 1861, is no bar to an action unless the statute makes it so. During the course of the argument Willes, J., remarked: "Suppose an assignment by a debtor of all his estate and effects to trustees to pay his creditors rateably, would there be an implied condition that they should not sue the debtor?" And Crompton, J., in his judgment said: "At common law this deed would not have afforded a defence to the action. Where a debtor assigns all his property to trustees for the benefit of his creditors, any creditor has a right to get what he can under the assignment and proceed for the rest. In deeds under the Bankruptcy Act, 1861, the requisite majority in number and value of creditors binds the rest: but they are only bound according to the terms

(1) 3 H. and C., 508. (2) 34 L. J. Ex., 70.
(3) 3 H. and C., 1001.

of the deed. This deed contains no release Neither does it come within the principles of the decision in *Clapham* v. *Atkinson*[1] and other cases in which a composition deed has been held a bar to an action. Nor is it within that class of cases in which a composition deed is pleadable by way of accord and satisfaction."

Thus the question in the present case is, whether, apart from any statute, the defendants can plead that the effect of the deed is to bar the plaintiff's action?

The deed is to the following effect:—It recites that it is between the present defendants on the one part, four trustees of the second part (whose names are given, plaintiff being one of them), and the creditors of the defendant's firm of the third part ("whose names and seals are hereunto set and affixed"): that whereas Gokuldâs (second defendant) retired from the firm and Vassanji (first defendant) is the only remaining partner; and he has agreed to pay the creditors the amount of their respective claims rateably out of the assets of the firm, without prejudice to the right of the creditors to recover the balances due to them after the rateable distribution, and the creditors have agreed on payment of such rateable distribution or composition and further payment to give a release to the members of the firm; in pursuance of the said agreement Vassanji conveys to the trustees the property described in the schedule, as also the personal or moveable estate and property of the firm and all other property of Vassanji, in trust to collect the estate and divide it rateably amongst the creditors of the firm, without prejudice to the rights of the creditors to recover the balances (if any due to them) from Vassanji and Gokuldâs; and it is agreed that the said agreement for payment of the debts is accepted by the creditors, and upon payment to them of the full or whole of their respective claims, these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due, and may be pleaded in bar to any claim in respect of such debts; and the creditors covenant that if the debtor shall pay the full amount of the debts, they will not bring any action, suit or proceeding in respect of the debts.

(1) 4 B. and S., 722.

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This deed was signed and sealed by Vassanji and the four trustees one of whom is the plaintiff. There is a schedule describing certain property, and there is a list with columns to show "names of creditors," "amount due to each creditor," "signature of creditors," "witnesses." In the third column the four trustees have signed as creditors. No other creditor has signed, and there is no entry in the other columns.

It is admitted that the managing trustee is in possession of defendants' accounts; that the trustees have filed one suit to recover a debt due to defendants; that they will have to file other suits, and that they have collected Rs. 348 as part of the estate of the firm.

On these facts as between the present plaintiff and defendants, I hold that it is not open to plaintiff to contend that the deed is inoperative because the defendants have contested the present suit, or because the second defendant has not signed the deed. Defendants have not denied the signed and adjusted account, and the second defendant has joined in admitting in the present suit the validity of the deed. Defendants have done all that is in their power to do, and they can plead the deed if it is really in their favour. But the question is whether the terms of the deed are such that it can be pleaded as a bar to the action.

Now it must be noticed that the present action was filed before the deed was executed. The suit was called on for hearing on the 17th April, 1894, the very day on which the deed was executed, and was adjourned by consent for three months; and there is not any record of any application being made for adjournment on the ground that the parties were intending to execute a deed of assignment, the effect of which would be that this action could not proceed further. On the contrary, it is clear, from the solicitor's letter and plaintiff's deposition, that all that was intended was a settlement out of Court,—that is, a payment of the whole or part of the debt.

Further, it is clear that the only mention of any covenant not to sue is to be found in the concluding portion of the deed, which recites that upon payment of the whole of the respective claims of the creditors these presents may be pleaded in bar to any claim.

in respect of such debts, and the creditors covenant that they will not, if the said debtor, his heirs, executors and administrators shall pay the said full amount of the debts due by him or the said firm to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm to the said creditors respectively.

It is fairly argued that if the deed was intended to operate as a bar to any action, clear language to that effect would have been used; that by covenanting not to sue *after* full payment, the right to sue *before* full payment was clearly not taken away; that this is not a composition deed by which the creditors agreed to accept a certain composition in full satisfaction of their claim, but simply an assignment deed by which the debtor conveyed all his property to four of his creditors as trustees to pay his debts rateably out of the assets, leaving the creditors free to sue for the balance (if any) of such debts, and only debarring them from suing when payment had been made in full.

On the other hand, it may be argued that the covenant not to sue on full payment was surplusage. If the debt is paid, that is a bar, the debt being extinguished. So, too, if it is released. But it is quite possible that here, though the debt has not been paid or released, the creditor's right to sue may be suspended. In the *Ipstones Park Iron Ore Co.* v. *Pattinson* (*supra*) the judgment of Pollock, C. B., was "although a debtor, who has effected an arrangement with his creditors, is entitled to protection," it was clear with reference to the language of the Bankruptcy Act under which the arrangement was made, and by analogy to proceedings under former Bankruptcy Acts, that protection can only be given in a particular way, and not by pleading the deed of arrangement in bar of an action filed by a creditor. Pigott, B., in his judgment, said: "No doubt there is a seeming anomaly in leaving a debtor to be harassed with actions after he has assigned all his property to trustees for the benefit of his creditors. But I suppose the Legislature thought that such actions would not be brought without good reason." This is illustrated by a remark of Channell, B., that such a deed under the Bankruptcy Act "has the beneficial effect of deterring creditors from harassing the

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debtor with actions; for the object of a creditor in suing is not merely to obtain judgment, but to get the fruit of it, and he knows that if the proceedings under a deed of this kind are carried out, and the debtor obtains a certificate, the judgment is inoperative."

But here the deed is not under any statute, which provides a remedy or protection for the debtor in a particular way. The seeming anomaly still exists. The learned counsel for plaintiff did not pretend that he would be contented with a bare judgment, or that he could be prevented from getting the fruits of it.

Is it equitable that the defendants, having handed over all their property to four of their creditors as trustees with a view to a payment of their debts in full, should be harassed with an action by one of those creditors who has accepted the trust? '*Tatlock* v. *Smith*(1) is a strong case in support of this argument in favour of defendants. In that case by an agreement between the defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estate. The trustees carried on defendants' business and paid the creditors 10*s.* in the pound. Tindal, C.J., said: "This agreement seems, by its terms, to contemplate a suspension of the right of action on the part of the creditors, and in our judgment that suspension still continues." Then after reciting the terms of the deed he says: "This of itself implies, that the trustees are to take the defendants' tangible property for the payment of their debts. They have taken it and they have made payments to the extent of 10*s.* in the pound. Is it reasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors? Their situation itself seems to preclude the possibility of any such intendment." Parke, J., said: "On the face of this agreement certain things are to be done which plainly imply a suspension of the creditors' right to sue, and there is no evidence of anything having occurred to remit them to their rights."

(1) 6 Bing., 339.

So, too, in *Good* v. *Cheesman*[1] it was held that an agreement by creditors to accept payment by the debtor agreeing to pay to a trustee one-third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof, amounted to a consent to forbear enforcing their demands. During the argument, reference was made to *Heathcote* v. *Crookshanks*[2] and Littledale, J., remarked: "It was observed by Buller, J., there that no fund was appropriated for the payment of the debt; and that if the debtor had assigned over all his effects to a trustee for distribution among the creditors, that would have been a good consideration for a promise of forbearance;" and Parke, J., said: "It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did."

Again in *Garrard* v. *Woolner*[3], where the plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants upon their property being assigned to trustees for the payment of the creditors, and where the defendants and their trustees refused to allow the plaintiff to come in as a creditor under the deed, it was held that he might sue defendants notwithstanding the execution of the resolutions. Tindal, J., said: "The defendants contend that a party who concurs in resolutions for the distribution of the property of his debtor brings himself within the operation of a subsequent deed by which the debtor's property is assigned for the benefit of the creditors at large, and that his separate right is thereby suspended till the creditors are satisfied, or at least placed in the situation in which they originally stood. *As a general proposition this is true.*" So here, though there is no composition or release, and no covenant not to sue, except when full payment has been made of the debts, it would be a fraud on the other creditors if the plaintiff was permitted to go on with the present suit. A century ago Lord Kenyon enunciated the principle upon which such an action could not be maintained. In *Butler* v. *Rhodes*[4] the debtor had proposed to pay his creditors a composition, and for that purpose to execute an assignment of all his effects to trustees for their benefit. Plaintiff and one of the

(1) 2 B. and Ad., 328.
(2) 2 T. R., 24.
(3) 8 Bing., 258.
(4) 1 Esp., 235.

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creditors assented, but subsequently refused to sign the deed and brought an action to recover the whole of his demand. Lord Kenyon ruled that the evidence was a complete answer to the plaintiff's answer. He said:—

"The principle upon which the action could not be maintained was, that in consequence of this act of the plaintiff's, the defendant had parted with all his property, and the other creditors had been induced to execute the deed: that this was putting the defendant into a very aukward situation, as by assigning all his property he was committing an act of bankruptcy: that it, therefore, never should be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition, by a refusal to execute the deed which had been prepared with his consent."

So in the present case, admitting that defendant's plea, that the deed expressly provided that until the estate was collected no suit by a creditor should be maintained, is incorrect, and admitting that it is doubtful whether the debtors at first had any clear idea on the point, and possibly thought that they were bound to meet the plaintiff's action by at once paying the debt; admitting that the present suit was filed before the deed was executed, still in my opinion the defendants are entitled to set up any equitable defence which they may have to the action. If the conduct of the creditor has been such as to deprive him of the right to the present payment of the debt except by the assignment made to him and the other trustees, then the suit must be dismissed. There has been a concluded agreement—not a mere preliminary step—which precludes the plaintiff from proceeding with this action. To allow him to proceed would amount to a fraud on the other creditors. With reference to the remarks, above noted, of Willes and Crompton, JJ., in *Clarke* v. *Williams*, I would say that under circumstances such as are found in the present case, there is an implied condition that the creditors shall not sue the debtor till their remedy under the assignment is exhausted. The creditors must get what they can under the assignment and then proceed for the rest. For these reasons I find on the first issue in favour of the defendants, and dismiss the suit with costs.

Suit dismissed.

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