1894.

MANCHUBHAI NAVALCHAND v. JOHN H. TOD.

prove a loss; if it fell, he could not, as he could without loss put himself in his original position by purchasing merchandize of the same quality. In the case of an intermediate article like pearls, unless there were a rise in the market, he could purchase similar pearls at the same rate. The damages would be the expenses of the sale and of the repurchase. In all cases alike, however, the principal must prove his damages; and if he can show none they can be no more than nominal. On this point the Court below has, in my opinion, come to a correct conclusion. If Mr. Tyabji's argument were adopted, his measure of damages must, I think, logically be applied to all classes of goods alike; and applied to ordinary merchandize, it would amount almost to an absurdity. In my judgment it cannot be applied to any.

Attorneys for plaintiff (appellant) :—Messrs. *Tyabji and Dayabhai.*

Attorneys for defendants (respondents) :—Messrs. *Brown and Moir.*

## ORIGINAL CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Strachey.*

1896. *February* 14, 27.

NAOROJI NUSSERWA'NJI THOONTHI, PLAINTIFF, *v.* KA'ZI SIDICK MIRZA, DEFENDANT.*

*Insolvent—Debt incurred before insolvency—Bond given after personal discharge in respect of—Private settlement with creditor, validity of—Absence of notice to Official Assignee and creditors—Position of insolvent with respect to property acquired after personal discharge—Agreement by creditor not to oppose final discharge—Validity of—Evidence—Untrue recital in bond—Contradiction by obligor allowed.*

An agreement, by which an insolvent who has obtained his personal but not his final discharge, without notice to the Official Assignee or his other creditors, settles the claim of one creditor, and by which that creditor agrees not to oppose his final discharge, is void as in fraud of the creditors and as inconsistent with the policy of the Insolvent Debtors' Act.

In a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors had been settled with, was untrue.

* Small Cause Court Reference, No. $\frac{256}{17772}$ of 1895.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

Though no creditor is bound to oppose the final discharge of an insolvent, yet a private agreement by a creditor with the insolvent, by which in consideration of a money payment the creditor binds himself not to oppose, is void as opposed to the policy of the Insolvent Debtors' Act and as in fraud of creditors.

CASE stated for the opinion of the High Court under section 60 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge. The case was stated as follows:—

"(1) This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 1,600 alleged to be due to him under a bond passed to him by the defendant and dated the 7th June, 1893.

"(2) The facts of the case, together with the reasons for my decision, are fully set out in my judgment.

"(3) A copy of the bond is annexed hereto.

"(4) The questions for their Lordships' consideration will be three in number:—

"(i) Whether a debt which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has, moreover, been included in the judgment entered up against him, in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt?

"(ii) Whether evidence was admissible to contradict the recital contained in the bond that all the creditors of the obligee (*sic*) (other than the plaintiff) have been settled with?

"(iii) Whether, if such evidence be admissible, and it is shown that all the creditors (other than the plaintiff) have not been settled with, the bond is not void as being passed in fraud of such creditors?

"For the reasons set out in my judgment, I dismissed the suit and certified Rs. 165 as the professional costs of the defendant. This amount, together with Rs. 50 to meet the costs of reference, has been deposited by the plaintiff."

The bond was in the following terms:—

"Know all men by these presents that I, Kázi Sidick Mirza Kázi Ahmed Mirza, of Bombay Mahomedan inhabitant, am held and firmly bound to Naoroji Nusserwánji Thoonthi, also of Bombay Pársi inhabitant, in the sum of Rs. 3,200 (three thousand and

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

two hundred) to be paid to the said Naoroji Nusserwánji Thoonthi or to his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators firmly by these presents. Whereas the above bounden Kázi Sidick Mirza Kázi Ahmed Mirza being unable to pay his debts filed a petition and schedule in the Court for the Relief of Insolvent Debtors holden at Bombay on the 7th day of June, 1893 (1), and by an order made by the said Court all the property and effects of the said Kázi Sidick Mirza Kázi Ahmed Mirza were vested in the Official Assignee, and whereas on the day of 189 the said Kázi Sidick Mirza Kázi Ahmed Mirza got his personal discharge from the said Court, in respect of the debts mentioned in the schedule, and judgment was entered in favour of the Official Assignee for the total amount of the debts due by the said Kázi Sidick Mirza Kázi Ahmed Mirza in the said schedule, and whereas subsequently the said Kázi Sidick Mirza Kázi Ahmed Mirza settled with all his creditors, except the said Naoroji Nusserwánji Thoonthi, and whereas the said Kázi Sidick Mirza Kázi Ahmed Mirza then proposed also to settle the claim of the said Naoroji Nusserwánji Thoonthi of Rs. 4,000, costs and interest, and the said Naoroji Nusserwánji Thoonthi has ultimately agreed to settle his said claim in the manner following :—That the said Kázi Sidick Mirza Kázi Ahmed Mirza should pay Rs. 800 (eight hundred) in cash and apply immediately after the execution of these presents to the Insolvent Debtors' Court at his own expense to get satisfaction entered of the judgment passed as aforesaid against the said Kázi Sidick Mirza Kázi Ahmed Mirza in favour of the Official Assignee and upon such satisfaction being entered the said Kázi Sidick Mirza Kázi Ahmed Mirza should execute in favour of the said Naoroji Nusserwánji Thoonthi a conveyance at the cost of the said Naoroji Nusserwánji Thoonthi of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the day of 189 made between the said Kázi Sidick Mirza Kazi Ahmed Mirza of the one part and one Mr. Pestonji Rustomji Kánga of the other part and to the payment of the principal amount and interest due at the foot of the said mortgage : Provided, however, that if Káramali Pirbhái and Meherali Khakhi to whom the said Kázi Sidick Mirza Kázi Ahmed Mirza has contracted to sell the said properties should insist on carrying out the said contract, and they are entitled by law to do so, the said Kazi Sidick Mirza Kázi Ahmed Mirza shall, in lieu of the conveyance hereinbefore mentioned, execute an assignment to the said Naoroji Nusserwánji Thoonthi at the cost of Naoroji Nusserwánji Thoonthi of the right, title and interest of the said Kázi Sidick Mirza Kázi Ahmed Mirza in the balance of the purchase-monies remaining to be paid by the said Karamali Pirbhái and Meherali to the said Kázi Sidick Mirza Kázi Ahmed Mirza, and that, in the event of the said Kázi Sidick Mirza Kázi Ahmed Mirza failing to execute the said conveyance or assignment as aforesaid, the said Kázi Sidick Mirza Kázi Ahmed Mirza should pay the said Naoroji Nusserwánji Thoonthi a further sum of Rs. 1,600 (sixteen hundred) in cash, and that he the said Kázi Sidick Mirza Kázi Ahmed Mirza should to secure payment of the same execute the above-written bond subject to the conditions hereafter appearing. Now the conditions of the above-written bond or obligation are such that if the said Kázi Sidick Mirza Kázi Ahmed Mirza shall forthwith apply at his own expense to the Insolvent Debtors' Court to enter and cause to be entered satisfaction of the judgment passed against the said Kázi Sidick Mirza Kázi Ahmed Mirza in favour

(1) This should be 12th December, 1890, the date 7th June, 1893, being the date of the bond (Reporter's note).

of the Official Assignee as aforesaid, and upon satisfaction being entered if the said Kázi Sidick Mirza Kázi Ahmed Mirza shall execute in favour of the said Naoroji Nusserwánji Thoonthi a conveyance at the cost of the said Naoroji Nusserwánji Thoonthi of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the day of 189 made between the said Kázi Sidick Mirza Kázi Ahmed Mirza of the one part and the said Pestonji Rustomji Kánga of the other part and to the payment of the principal amount and interest thereby secured: Provided, however, that in the event of Karamali Pirbhái and Meherali Khákhi, to whom the said Kázi Sidick Mirza Kázi Ahmed Mirza has contracted to sell the said properties, insisting on carrying out the said contract and their being entitled by law to do so if the said Kázi Sidick Mirza Kázi Ahmed Mirza shall, in lieu of the said conveyance hereinbefore mentioned, execute an assignment in favour of the said Naoroji Nusserwánji Thoonthi of the right, title and interest of the said Kázi Sidick Mirza Kázi Ahmed Mirza in the balance of the purchase-monies remaining to be paid by the said Karamali Pirbhái and Meherali to the said Kázi Sidick Mirza Kázi Ahmed Mirza, and in the event of the said Kázi Sidick Mirza Kázi Ahmed Mirza failing to apply to the Court and to execute the conveyance or assignment as aforesaid, if the said Kázi Sidick Mirza Kázi Ahmed Mirza shall pay the said Naoroji Nusserwánji Thoonthi Rs. 1,600 (sixteen hundred) in cash, then and in such event the above-written bond or obligation shall be void: otherwise the same shall remain in full force and virtue. In witness whereof, &c."

The following extract from the Chief Judge's judgment states the facts of the case:—

"There is no great difficulty in arriving at the true state of the facts of the case. On 12th December, 1890, the defendant filed his petition and schedule in the Insolvent Debtors' Court. In the schedule five creditors are mentioned: (1) the plaintiff in respect of a decree in High Court Suit No. 387 of 1890 against defendant and his mother Jinábái for Rs. 4,734-4-10, and the balance of a Small Cause Court decree Rs. 188-11-0; (2) a Márvádi for Rs. 1,000; (3) Pestonji Rustomji Kánga, in respect of a mortgage, dated 28th September, 1888, on land at Bhiwandi for Rs. 7,000 and also a promissory note on personal security for Rs. 500; (4) Jinábái, defendant's mother, in respect of two promissory notes for Rs. 1,000 and Rs. 2,000 respectively (of which Rs. 1,000 were paid off); and (5) another Márvádi for Rs. 200. The insolvency of defendant was proceeded with and his discharge was opposed by the plaintiff. He, however, obtained his personal discharge on the 11th April, 1892, and on the same day judgment was entered up against him in the name of the Official Assignee for Rs. 15,623-6-10, the amount of the debts stated in the schedule.

"Before his insolvency the defendant had contracted to sell the Bhiwandi property to Pirbhái Khákibhái and others for Rs. 11,000 subject to the mortgage of Pestonji Rustomji Kánga. It was referred to Mr. Bháishankar Nánábhái, the mortgagee's solicitor, to take the account of what was due on the mortgage, and he ascertained the amount to be Rs. 11,037-3-6. Pirbhái Khákibhái and his brothers had agreed to be bound by the finding, and it was accordingly on the 6th February, 1894, made an order of the Court that they should pay the amount to the mortgagee, and that he should reconvey the property to them.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

"In the meanwhile, in 1893, the plaintiff had taken from the defendant the bond in this case. That bond is dated 7th June, 1893, and provides for the payment of Rs. 800 in cash by defendant, which was paid. The bond contains a recital that all the creditors of the defendant have been settled with, except the plaintiff, and it contains the conditions to the effect that defendant shall forthwith apply to have satisfaction of the judgment in favour of the Official Assignee entered up, and that defendant should then execute to plaintiff a conveyance of the Bhiwandi property, subject to the mortgage in favour of Pestonji Rustonji Kánga, and the amount thereby secured, or in case Pirbhái Khákibhái and his brothers should insist on carrying out the sale, then that defendant should execute in favour of plaintiff an assignment of his (defendant's) right, title and interest in the balance of the purchase-money, and in the event of defendant's failing to apply to the Court or execute such conveyance or assignment, then that if defendant should pay the plaintiff Rs. 1,600 the bond should be void: otherwise it should continue in full force and effect. On this state of things, three questions arise for determination: (1) Was there any consideration for this bond? (2) Is the bond a fraud on creditors? (3) Have the conditions been fulfilled to enable plaintiff to recover?"

*Inverarity* for the plaintiff:—Is the agreement void? There is no authority for holding it to be an undue preference. There can be no undue preference after the date of the insolvency.

We say a person who has obtained his discharge can make any arrangement he likes; his after-acquired property does not belong to the Official Assignee, and till the Official Assignee intervenes he can do what he likes with it—*Cohen* v. *Mitchell*[1]. The Chief Judge is wrong in saying that it ought to go to the Official Assignee. The object of entering into the bond was to get rid of the insolvency by getting satisfaction entered up on the judgment. If an insolvent has many creditors, he must, to effect this, go to them, and settle with them, one by one. There is no undue preference in this, unless the Official Assignee is entitled to the after-acquired property directly it is acquired.

There is ample consideration in our giving up a great part of our debt. We could not, after this, claim any dividend from the Official Assignee. Also by this arrangement we agree not to oppose the debtor's final discharge.

As to the evidence given to contradict the recital in the bond, we say the defendant is bound by the recital and estopped from saying it is untrue.

(1) 25 Q. B. D., 262.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

*Scott* for defendant:—There is no consideration. The debt existed before the insolvency and is no consideration after insolvency. Therefore, in this country at all events, the agreement is void. In India the exception to the rule that agreements without consideration are void under section 25 of the Contract Act (IX of 1872) only saves agreements barred by limitation. In England the rule was different. See *Heather* v. *Webb*(1).

Giving up part of an old debt is not a new consideration. The remedy of the judgment-creditor, moreover, is not gone, but only transferred to the Official Assignee.

There is no consent of the plaintiff in the bond to have satisfaction entered up. If he had so consented, he could have withdrawn the consent—*Foakes* v. *Beer*(2).

Had the Official Assignee after the execution of this document proceeded under the decree to recover the full amount, we should have been bound to pay—*Peakman* v. *Harrison*(3).

*Cohen* v. *Mitchell* only applies as between the Official Assignee and third parties.

Evidence can be given to show that the recital in the bond is untrue.

*Inverarity* in reply:—Section 63, Contract Act, is contrary to *Foakes* v. *Beer*. See *Manohar Koyal* v. *Thákur Dás*(4).

STRACHEY, J.:—This is a case stated for the opinion of the High Court by the Chief Judge of the Court of Small Causes at Bombay. The facts are fully stated in the reference. The suit was for the recovery of Rs. 1,600 under a bond executed by the defendant in favour of the plaintiff on the 7th June, 1893. At the date of the execution of the bond the defendant was an insolvent who had obtained his personal discharge under section 47, but not his final discharge under section 59 or section 60 of the Indian Insolvent Act, 11 and 12 Vict., c. 21, and against whom judgment had been entered up in the name of the Official Assignee under section 86. The plaintiff was one of the scheduled creditors, his debt being for more than Rs. 4,000,

(1) 2 C. P. D. at p. 5.
(2) 9 Ap. Ca., 605.
(3) L. R., 14 Eq., 484, at p. 491.
(4) I. L. R., 15 Cal., 319, at p. 326.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

and he had opposed the insolvent's discharge. The bond recites the insolvency proceedings, and states that subsequently to the entering up of judgment the insolvent had settled with all his creditors except the plaintiff. That statement is found by the Chief Judge to be untrue. The bond then sets forth that the plaintiff had agreed to a proposal made by the insolvent to settle the claim for Rs. 4,000 odd in the manner following, namely, that the insolvent should pay Rs. 800 in cash; that he should immediately apply to the Insolvent Court to have satisfaction entered up on the judgment; that upon this being done, he should execute in favour of the plaintiff a conveyance of certain property subject to a mortgage; that if, owing to certain persons who had previously contracted to purchase the property insisting on carrying out their contract, this could not be done, he should execute an assignment to the plaintiff of his right, title and interest in the balance of the purchase-money; and that, in the event of his failing to apply to the Court and to execute the conveyance or assignment, he should pay to the plaintiff a further sum of Rs. 1,600 in cash. The Chief Judge dismissed the suit, subject to the opinion of this Court upon three questions which he has stated.

The first question is "whether a debt which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has, moreover, been included in the judgment entered up against him in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt." If it were necessary to decide that question, I should have great difficulty in answering it in the affirmative. In England it is settled that a promise to pay a debt barred by bankruptcy is a mere *nudum pactum*, as there is no consideration for it—*Jones* v. *Phelps*[1]; *Heather* v. *Webb*[2]—though it is binding if there is new consideration—*Jakeman* v. *Cook*[3]. In India the same principle would apply to a promise by an insolvent without new consideration to pay a debt from which he had obtained his final discharge, the Contract Act containing no exception in favour of such promises, such as section 25 (3), in

(1) 20 W. R., 92. (2) 2 C. P. D., 1.
(3) 4 Ex. D., 26.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

favour of promises to pay debts barred by limitation. How far the principle would apply to a promise without new consideration to pay a debt in respect of which the insolvent has obtained only his personal and not his final discharge, which is included in the judgment entered up against him in favour of the Official Assignee, and as to which the creditor's remedy, though not, strictly speaking, barred, is transferred to the Official Assignee, who alone can recover the debt in the manner and subject to the conditions provided by the statute, is a question which we need not consider, because it has not really been argued before us. What the learned counsel for the plaintiff contended was that there was ample new consideration for the bond in suit. He argued that, in the first place, the plaintiff gave up a considerable part of the debt and impliedly assented to satisfaction being entered up on the judgment so far as concerned him, and that, secondly, he impliedly gave up his right to oppose the insolvent's final discharge. Whether this argument is sound, depends chiefly upon the construction to be placed upon the bond. Having regard to the document as a whole, and in particular to the recital that the insolvent had proposed to "settle the claim" of the plaintiff in the manner following, I think that the bond must be regarded as a compromise by which the plaintiff, in satisfaction of his claim for Rs. 4,000, agreed to accept from the defendant a present cash payment of Rs. 800, and either the execution of a conveyance or assignment or the payment of a further Rs. 1,600 in cash. I think that he impliedly gave up, in consideration of the bond, his right to share in any future rateable distribution under section 86 of the Act. If, after the execution of the bond, any sum were obtained by the Official Assignee for the purpose of such distribution, it would under section 86 be distributed according to the mode directed in the case of a dividend, and under section 40 the plaintiff would have to prove his claim to share in the distribution in the same manner and subject to the like deductions, conditions and provisions as in the English Bankruptcy Acts for the time being in force. Under the rules contained in the second schedule of the Bankruptcy Act, 1883, he would have to verify it by an affidavit showing its parti-

1896.

NAOROJI N. THOONTHI v. KÁZI SIDICK MIRZA.

culars, and under Form 72 of the forms in the Appendix of the Bankruptcy Rules, 1886, made under section 127 of the Act, the affidavit must state that the debt still remains due and unsatisfied, and that neither the claimant nor any person by his order has received any manner of satisfaction or security except as specified. If Rs. 800 or any other sum had been received on account of the scheduled debt, that would have to be stated in the affidavit, and the Official Assignee in making a rateable distribution under section 86 would take such payment into account. If, upon any such claim being made, it were brought to the knowledge of the Official Assignee that the claim had been fully satisfied by payment or the acceptance of a bond or otherwise, he would disallow it. I understand that this represents the practice of the Official Assignee of the Insolvent Court at Bombay. Whether the Official Assignee, in addition to disallowing the claim, would or could take steps to recover, for the benefit of the creditors generally, so much of the money paid to the claimant as exceeded the sum to which he would be entitled on a rateable distribution, is another question. At all events, the plaintiff could not, in disregard of a settlement of this kind, still claim for the whole debt under section 86, and that being so, I think that he does give up a part of his claim. It was contended for the defendant that the plaintiff would not be bound by any undertaking to give up part of the claim, and in support of this contention the case of *Foakes* v. *Beer*[1] was cited. That case, however, which was decided by the House of Lords with great reluctance, Lord Blackburn almost dissenting, does not represent the law of British India: see Dr. Whitley Stokes's note to section 63 of the Contract Act; Pollock on Contracts (6th Ed.), p. 177, note (*d*); and *Manohar Koyal* v. *Thákurdás Naskar*[2]. If this view is correct, if the plaintiff by accepting the bond impliedly gives up his right as a scheduled creditor under section 86, I think it follows, as contended by Mr. Inverarity, that he also impliedly gives up the right, which is accessory to it, of opposing the final discharge of the insolvent. Whether a consideration of that kind is lawful, whether an agreement by a scheduled creditor not to oppose the discharge, in consideration of a promise by the insolvent to pay part of the debt, is in

(1) 9 App. Ca., 605. (2) I. L. R., 15 Cal., at p. 326.

accordance with public policy, is a point which I shall discuss in connection with the third question referred to us by the Chief Judge. So far as the first question is concerned, I think, for the reasons which I have given, that there is consideration for the bond in suit.

The second question is "whether evidence was admissible to contradict the recital contained in the bond that all the creditors of the obligor (other than the plaintiff) had been settled with." Upon this question I agree with the learned Chief Judge. The fact that the other creditors had not been settled with, is material upon the question whether the object of the bond was to give the plaintiff an unfair advantage over the other creditors, and whether the bond was for that reason void as a fraud upon them and as opposed to public policy. Evidence of such a fact, in contradiction of the terms of the bond, was admissible under the first proviso to section 92 of the Evidence Act, and in accordance with the authorities cited in the notes to *Collins* v. *Blantern*[1] and paragraph 93 of Taylor on Evidence (9th Ed.). In such a case there is no estoppel. Apart from the principle that a party is not estopped from proving that the instrument was executed for an unlawful purpose, there is nothing to bring the facts of the present case within section 115 of the Evidence Act. I am, therefore, of opinion that the second question must be answered in the affirmative.

The third question is "whether if such evidence be admissible, and it is shown that all the creditors other than the plaintiff have not been settled with, the bond is not void as being passed in fraud of creditors." To decide this it is necessary to look at the provisions of the Insolvent Act and to consider their policy. By the vesting order under section 7 the insolvent's after-acquired as well as his existing property vests in the Official Assignee who has full powers for its recovery, and who holds it as a trustee for all the creditors admitted on the schedule—*In re Dewcurn Jewraj*[2]. By sections 59 and 60 a final order of discharge can only be made after notice to the creditors, any of whom is at liberty to oppose it; and its effect is to discharge the insolvent personally and also his after-acquired property, in the case of a

(1) 1 Sm. L. Cas. (9th Ed.), 398. (2) I. L. R., 12 Bom., 342.

1896.

NAOROJI N. THOONTHI v. KÁZI SIDICK MIRZA.

trader, from all demands with certain specified exceptions, and in the case of a non-trader from the demands of all the creditors named in the order *nisi*. By section 86, the Court may, before making an order of final discharge, direct judgment to be entered up against the insolvent in the High Court in the name of the Official Assignee for the amount of the debts stated in the schedule and established, the judgment may under certain conditions be executed against any after-acquired property of the insolvent, and the proceeds of the execution must be distributed rateably among the creditors as in the case of a dividend. When the debts have been satisfied, the Court may under section 87 direct satisfaction to be entered up on the judgment, and then, if any property of the insolvent remains with the Official Assignee, the Court may order that it shall be vested in and delivered up to the insolvent. It is only by such an order or by dismissal of the petition or the revocation of the adjudication that the original vesting order ceases to have effect. From these and other provisions it is obvious that the policy of the Act is to make the relief of the insolvent conditional upon the whole of his property, after-acquired as well as existing, being given up to the Official Assignee and made available for rateable distribution among all creditors whose claims are established, without preference of any of them, and upon all being free to oppose the discharge. A bargain made by the insolvent before discharge, behind the backs of the Official Assignee and the creditors generally, which might have the effect of giving a particular creditor more than he would be entitled to receive on a rateable distribution, and by which the creditor in return agrees not to oppose the discharge, is, in my opinion, inconsistent with that policy. It appears to me that this is a substantially correct description of the bond in suit. It is an agreement by the insolvent in certain events to transfer certain property or to pay Rs. 1,600 to the plaintiff in settlement of his claim. If the other creditors had been paid, or if the agreement were to pay the plaintiff in the event of their being paid in full, or of satisfaction being entered up on the judgment, it might not be open to objection. But, in the first place, the recital that the other creditors have been settled with, is found to be untrue, and in the

second place, it is not in the event of satisfaction being entered up, but in the event of the insolvent failing to apply for its being entered up and to do certain other things, that the Rs. 1,600 is to be paid. It is not alleged that satisfaction has been entered up, the Chief Judge finds that the insolvent has not applied to have it entered up, and so long as any creditors remained unsatisfied, no application for that purpose could be entertained. The Rs. 800 which under the bond has already been paid to the plaintiff, and the Rs. 1,600 which the insolvent binds himself to pay, and to recover which the suit is brought, are not the property of the insolvent, but that of the Official Assignee in trust for all the creditors, and every creditor and not only the plaintiff is entitled to share in it. The bargain is carried out behind the backs of the Official Assignee and the other creditors, who are not shown to have had notice of it or to have assented to it. To hold that such an agreement should be given effect as between the insolvent and the plaintiff so long as the Official Assignee does not interfere, but that the Official Assignee if he thinks fit can step in and protect the other creditors by claiming the money, would be to put a premium on secret dealings between the insolvents and particular creditors whom they may be induced to favour. Such a result is inconsistent with the provisions of the statute securing to the creditors a rateable distribution of all the insolvent's property, and implying that the insolvent is to deal with them openly and impartially, and to assist in the appropriation of the property for their benefit. In cases where the Official Assignee became aware of a disposition of moveable property by the insolvent in favour of a particular creditor, he might be hindered or delayed in recovering it from the creditor or from any transferee from the creditor. If, as was contended, the doctrine of *Cohen* v. *Mitchell*[1] applied to such a case, the further consequence would follow that when once the money had been paid over, or other property had passed from the insolvent under the agreement, whether by voluntary act or in execution of decree, it would be too late for the Official Assignee to intervene, and, the creditor acquiring a complete title, the property

(1) 25 Q. B. D., 262.

1896.

AOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

would be irrevocably lost to the other creditors. In that view the Rs. 800 already paid to the plaintiff could not be recovered. Again, if the insolvent could make a bargain of this kind with one of his creditors, he could do so with others. If he had ten creditors he might secretly agree with five to pay them the greater part of their claims, leaving the others wholly unpaid, and thus effect a distribution of assets altogether inconsistent with that contemplated by the statute. It is, of course, conceivable that a compromise by which a particular creditor gave up his right to future dividends in consideration of a present part payment, might ultimately turn out advantageous to the other creditors. Whether it would do so or not, it would be impossible, at the time of the compromise, to determine. It would depend upon whether, subsequently to the payment, the insolvent acquired property of such value as to realize for each of the other creditors a larger dividend than he would have been entitled to if no compromise had been made and if the creditor settled with had not been excluded from the subsequent distribution. If, subsequent to the payment, the insolvent acquired no property at all, each of the other creditors would necessarily lose the dividend to which he was entitled out of the money paid. Again, accepting the contention that part of the consideration for the bond is an implied agreement by the plaintiff not to oppose the final discharge of the insolvent, is such an agreement in accordance with public policy and with the spirit of the statute? I am of opinion that it is not. The right to oppose the final discharge is given to a creditor not only for his own benefit, but for the benefit of all the creditors and of the whole community, which is interested in the bringing to light of anything in the conduct of the insolvent which disentitles him to recommence business free from past liabilities. In considering whether the discharge should be granted, the Court has to consider the insolvent's entire conduct, and not merely his conduct with reference to the opposing creditor. That principle was laid down by Mr. Justice Gibbs in *In re Pestanjee Shápurjee Káka*[1]. If it is correct, then although a creditor is not bound to oppose the final discharge, it cannot be in accordance with public policy that, by a private agreement with the insolvent and

(1) 8 Bom. H. C. Rep., 39.

in consideration of a money payment, he should bind himself not to oppose it.

In England there are many cases in which such agreements have been held to be void as opposed to the policy of the Insolvency and Bankruptcy Acts and as in fraud of creditors. In *Jackson* v. *Davison*(1), a case of 1821 decided under 1 Geo. IV, c. 119, an insolvent, in order to induce a creditor to withdraw opposition to his discharge, agreed to execute a warrant of attorney for the debt, and, in pursuance of the agreement, the insolvent was discharged, the warrant of attorney executed, and judgment entered up thereon by the creditor. A rule *nisi* having been obtained to set aside the warrant of attorney and the judgment, the Court set both aside on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the Legislature intended to be distributed among all the creditors, and defeated the effect of the judgment entered up by order of the Insolvent Court. In *Murray* v. *Reeves*(2), the debt due to the opposing creditor was a judgment debt of £ 2,686. In consideration of the creditor withdrawing his opposition to the discharge, the attorney of the insolvent undertook that he should be the sole assignee of the estate and should receive £ 100 out of it within three weeks from his appointment. It was held that this agreement was contrary to the policy of the Insolvent Act and, therefore, void. That decision was followed in *Hall* v. *Dyson*(3), a case decided under the 1 and 2 Vict., c. 110. There the opposing creditor's claim was for £ 400. It was held that an agreement by the insolvent to pay him £ 50 in consideration of his withdrawing his opposition was void, being contrary to the policy of the Insolvent Debtors' Act and a fraud upon the creditors. In his judgment Lord Campbell, C.J., said: "There is no doubt that the plaintiff might have withdrawn his opposition if he chose, but he had no right to do so in consideration of a money payment." In *Hills* v. *Mitson*(4), decided under the same statute, the Court consisting of Pollock, C. B., and

(1) 4 B. and Ald., 691.
(2) 8 B. and C., 421.
(3) 17 Q. B., 785.
8 Exch., 751.

1896.

NAOROJI N. THOONTHI v. KA'ZI SIDICK MIRZA.

Parke, Alderson and Martin, BB., applied the principle *Hall* v. *Dyson* to an action upon a promissory note executed in favour of a particular creditor, not by the insolvent but by a third person, in consideration of the creditor ceasing to oppose, and undertaking not in future to oppose the insolvent's discharge. It was attempted, but without success, to distinguish *Jackson* v. *Davison* and similar cases on the ground that in them the agreement, being made with the insolvent himself, had the effect of giving to a particular creditor property which ought to be distributed among all the creditors. On the other hand, it was pointed out that "it is not the opposing creditor alone who is interested in the opposition, but that it enures to the benefit of the other creditors," and that if such an agreement were allowed, the insolvent might arrange with a particular creditor, whose opposition he feared, by means of a third person, at the same time undertaking to pay the latter after his discharge. In *Humphreys* v. *Welling*(1) decided in 1862 under the 7 and 8 Vict., c. 96, an agreement was entered into between an opposing creditor and the insolvent that the latter should give the former a promissory note as a security for the debt, and that the creditor in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made. It was held that "the Court had no authority to sanction such an arrangement; that it was illegal notwithstanding such sanction, and that no action could be maintained upon the note." That case is important not only because there the agreement had actually been sanctioned by the Commissioner of the Insolvent Court, but because it was argued that from the absence in the 7 and 8 Vict., c. 96, of any provision such as section 61 of the 7 Geo. IV, c. 57, or section 91 of the 1 and 2 Vict., c. 110, preventing a creditor from suing upon any new contract or security for payment of a debt from which the insolvent had obtained his discharge, it should be inferred that the Legislature

(1) 1 H. and C., 7.

did not intend that such actions should be prohibited; and the Court nevertheless decided against the agreement upon general grounds of public policy. It follows that no inference in favour of such an agreement can be drawn from the absence of any provision in the Indian Insolvent Act, and that *Hall* v. *Dyson* and other cases decided under the 1 and 2 Vict., c. 110, cannot be distinguished on that ground, but are based, as indeed the reports show, upon the general policy of the statute. If that view of the decisions is correct, they have an obvious application to cases under the Indian Insolvent Act, which, as pointed out by Mr. Justice West in *In the matter of Cándás Núrrondas*[1], was largely copied from the English law then in force and the 1 and 2 Vict., c. 110, in particular.

The case of *Peakman* v. *Harrison*[2], cited by the learned Chief Judge in his reference and decided in 1872, was in some respects different from those which I have mentioned. There the insolvent had obtained his discharge and given a warrant of attorney as required by the insolvency statutes. He gave a scheduled creditor, whose claim was for £ 200, a bill of sale on his effects to cover the prior debt and further advances. The creditor having seized under the bill of sale and sold the effects, the debtor was adjudicated a bankrupt under the Bankruptcy Acts, and the creditor's assignee filed a bill praying that the revival of the debt of £ 200 might be declared illegal, that accounts might be taken of the proceeds of the sale and of the sum justly due to the defendant, and that the defendant might be ordered to pay to the plaintiff what on taking such accounts might be found due. The Court held that the old debt could not be revived. The judgment certainly appears to have been based, in part, on the view that the bill of sale, so far as it related to the old debt, was an evasion of section 91 of the 1 and 2 Vict., c. 110 (which re-enacted the provisions of section 61 of the 7 Geo. IV, c. 57); but it also proceeded upon the broader ground of public policy taken in the other cases to which I have referred. Thus, the Vice-Chancellor said: "If an insolvent were at liberty to pledge after-acquired property, the consequence would be that it would give undue preference to one creditor over another, and the law is clear that in such a

(1) I. L. R., 11 Bom., at p. 150. (2) L. R. 14 Eq., 484.

1896.

NAOROJI N. THOONTHI v. KÁZI SIDICK MIRZA.

case the security is void. . . . The distinction between bankruptcy and insolvency is clear. The insolvent only gets a discharge for his person; his after-acquired property remains liable, after satisfying the demands of subsequent creditors, to be seized under the insolvency, and applied for the equal benefit of all creditors under the insolvency. If, therefore, a creditor under the insolvency were to be allowed to take after-acquired property to secure a scheduled debt, he would defeat the object of the insolvency statutes by taking to himself alone what those statutes say shall be applied for the benefit of all. This is a fraud upon the Act of Parliament."

In *McKewan* v. *Sanderson*(1) Malins, V. C., cited *Hall* v. *Dyson* as applying the principle that "whenever there are proceedings in bankruptcy and insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor who obtains this advantage will be set aside by this Court."

The case of *Kearley* v. *Thomson*(2) was decided by the Court of Appeal in 1890 when the Bankruptcy Act, 1883, was in force. Neither that Act nor the Act of 1869 contains any provision similar to section 91 of the 1 and 2 Vict., c. 110, or to section 167 of the Act of 1861 (re-enacting the substance of section 202 of the Bankruptcy Law Consolidation Act, 1849, and repealed by the Bankruptcy Repeal Act, 1869) which made void all contracts or securities made or given as a consideration or with intent to persuade a creditor to forbear opposing the allowance of a certificate. The Court of Appeal held, on the authority of *Hall* v. *Dyson*, that an agreement, the consideration for which was an undertaking by a creditor not to appear at the public examination of the bankrupt and not to oppose the order of dis-

(1) L. R., 15 Eq., 229; 20 Eq., 65. (2) 24 Q. B. D., 742.

charge, was illegal, as obviously tending to pervert the course of justice. "Although," said Lord Justice Fry, "the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing."

In *In re Barham*[1], a case of 1893, Mr. Justice Vaughan Williams held that a payment by a bankrupt to one of his creditors, made before the receiving order but after the petition and consequently after the time to which the trustee's title related back, with the view of giving that creditor a preference over the others, though not within the section relating to fraudulent preference, was a disposal of money which *primâ facie* belonged to the trustee, and should be set aside as contrary to the policy of the bankruptcy laws.

It was, however, contended that the doctrine laid down by the Court of Appeal in *Cohen* v. *Mitchell*[2] was applicable to the case; that according to that doctrine the after-acquired property of an insolvent who has not obtained his final discharge does not vest in the Official Assignee until the latter intervenes; and that, consequently, an agreement, such as the bond in suit, is valid and should be enforced subject to his right to intervene and claim the money. When that decision is read with the later cases which explain and limit the general language which it uses, it will not be found to justify that conclusion. It was pointed out in *In re Rogers, ex parte Woodthorpe*[3], *In re New Land Development Association and Grey*[4], *In re Clark, ex parte Beardmore*[5] and *In re Rogers, ex parte Collins*[6] that the rule in *Cohen* v. *Mitchell* was only applied for the purpose of protecting persons who had been trading with an undischarged bankrupt, and dealing with him *bonâ fide* for value without interference by the trustee, who had given him credit and been paid with money acquired by carrying on such business, and who on that ground were held to have a good title as against the trustee. Again, in *Kerakoose* v. *Brooks*[7],

(1) 69 L. T., 356.
(2) 25 Q. B. D., 262.
(3) 8 Morrell, 236.
(4) (1892) 2 Ch. at p. 147.
(5) (1894) 2 Q. B., 393.
(6) (1894) 1 Q. B., 425.
(7) 8 Moo. I. A., 339.

1895.

NAOROJI N. THOONTHI v. KÁZI SIDICK MIRZA.

the Privy Council held that the only qualification of the Official Assignee's title to after-acquired property (apart from a qualification not material to the present case) was "that if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject, in equity, to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency." There is nothing in *Cohen* v. *Mitchell* which applies to an agreement by which a scheduled creditor accepts a present cash payment and a promise of a further payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business, and without the assent or knowledge of the Official Assignee. For these reasons I think that section 23 of the Contract Act applies to the case, and that the third question must be answered in the affirmative. Costs will be costs in the case.

Mr. Justice Parsons authorizes me to say that he concurs in this judgment.

Attorneys for the plaintiff:—Messrs. *Frámji, Moos and Mehta.*

Attorneys for the defendant:—Messrs. *Dikshit and Dhunjishaw.*

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.*

1895. *March* 12.

SORA'BJI JAMSETJI, APPELLANT, *v.* ISHWARDA'S JUGJIWANDA'S STORE AND ANOTHER, RESPONDENTS.*

*Company—Indian Companies' Act (VI of* 1882), *Secs.* 61, 126, 144, *Cl. g—Contributory—Liability of the heirs of a deceased contributory—Calls—Calls made before the winding up—Limitation—Official liquidators not bound to take out letters of administration to the estate of a deceased contributory before settling the list of contributories—Shares duly issued, cancellation of—Reduction of capital.*

Section 61, Indian Companies' Act (VI of 1882) (corresponding with section 38 of the English Companies' Act of 1862) creates a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not.

* Appeal, No. 112 of 1894.