That section will not apply in this case, because the decree-holder in the suit in which execution was asked for is not a party to these proceedings, and it is only when questions arise between the parties to the suit in which the decree was passed, or their representatives, that those questions must be determined by the Court executing the decree, and not by a separate suit. Here the decree-holder was not a party nor the representative of a party. The judgment-debtor deposited the money with the Collector or the Mamlatdar, and then proceeded to ask the Collector to set aside the sale. The only questions which arose were purely between himself and the auction-purchaser who was an outsider to the original suit, and was neither a party nor a representative of any of the parties. Therefore the decree of the lower appellate Court was perfectly correct and the appeal must be dismissed with costs.

HEATON, J. :—I concur.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Pratt.

MURADALLY SHAMJI (PLAINTIFF) *v.* B. N. LANG (DEFENDANT)[°]

1919. *July 7.*

Presidency Towns Insolvency Act (III of 1909), sections 38 (b), 52 (2) (a) —Adjudicated insolvent—Order suspending discharge but providing that the insolvent be discharged at the end of the suspension period—Order under section (38) (b) and in form prescribed by the High Court Rules operates as a discharge under the Act—Practice of the High Court requiring appearance of the insolvent to obtain a final order of discharge, illegal—The English Bankruptcy Act, 1842 (5 & 6 Vict. c. 122)*—Civil Procedure Code (Act V of 1908), section 80—Suit against Official Assignee for injunction to restrain threatened and imminent injury to property—Notice not necessary.*

[°] O. C. J. Suit No. 339 of 1918.

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The plaintiff was adjudicated insolvent on the 26th of September 1911 when an order was made vesting his estate in the Official Assignee. The plaintiff having subsequently applied for his discharge an order was made on the 2nd of October 1912 in the following terms:—"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913." In 1916 and 1917 the plaintiff acquired property in the nature of a business. No final order of discharge having been made, the Official Assignee on the 22nd of January 1918 took possession of the plaintiff's stock-in-trade and then restored possession to the plaintiff on condition of his making payments for the benefit of his scheduled creditors. On the 7th of March 1918, the Official Assignee threatened to re-take possession and on the following day the plaintiff filed the suit (1) to recover the sums paid to the Official Assignee together with damages for the trespass already committed, and (2) to restrain the Official Assignee by an injunction from committing the threatened trespass. The defendant contended, *inter alia*, that the suit was not maintainable as the plaintiff had not given notice as required by section 80 of the Civil Procedure Code and further, that until a final order of discharge was made at the expiration of the period mentioned in the order suspending discharge the property acquired by the plaintiff became divisible amongst the plaintiff's creditors under section 52 (2) (*a*) of the Presidency Towns Insolvency Act. In support of the latter contention the defendant relied upon the practice of the High Court to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension. At the trial, the plaintiff abandoned his claim on the first cause of action and elected to proceed only on the injunction in respect of the second cause of action :

Held, (1) that the suit was maintainable in respect of the injunction to restrain the threatened and imminent injury to the plaintiff's property in spite of the fact that no notice was given under section 80 of the Civil Procedure Code.

(2) that the order of 2nd October 1912 though suspending discharge for one year expressly provided that the plaintiff "be discharged as from the 2nd day of October 1913," and that the said order having operated as a discharge under the Act from the 2nd of October 1913 the Official Assignee could not proceed against the property of the plaintiff acquired by him after that date.

(3) that the practice of the High Court to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension being in contravention of the law was unlawful and ought not to be given effect to.

Naginlal Chunilal v. *The Official Assignee, Bombay*[1], followed though doubted.

In re Dove[2], referred to.

PER CURIAM :—The words of section 38 (*b*) of the Presidency Towns Insolvency Act (III of 1909) imply that the discharge is granted though its operation is suspended. It is not the making of the order that is suspended but the operation of the order made. The Act makes no further proceedings necessary after an order of suspension under section 38 has been passed.

SUIT for injunction.

The plaintiff, Muradally Shamji, a Khoja Mahomedan presented a petition to the Insolvent Debtors' Court on 26th September 1911 when an order was made vesting his estate and effects in the Official Assignee of Bombay. The total liability of the plaintiff at the date of the said petition amounted to Rs. 834-0-6 only. On 6th October 1911, an order was made by the said Court directing that the estate of the plaintiff be administered in a summary manner.

The plaintiff subsequently applied for his discharge and on 2nd October 1912 an order was made by the Court in the following terms :—

"Whereas it has not been proved that the insolvent has committed any of the offences under the Act or under sections 421 to 424 of the Indian Penal Code, it is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913."

On 8th November 1916, the plaintiff's father Shamji Hirji who was till then carrying on business in saddlery in the name of "Shamji Hirji and Sons" admitted the plaintiff and his brother Hassanbhai as partners in the said business which was thereafter continued in the same name of Shamji Hirji and Sons.

The partnership was dissolved in November 1917. On 30th November 1917 the plaintiff, his father and his brother Hassanbhai executed a Deed of Dissolution

(1) (1912) 37 Bom. 243

(2) (1884) 27 Ch. D. 687.

whereby in consideration of Rs. 2,607-10-7 paid by the plaintiff to his father and of Rs. 2,607-10-7 paid to his brother, the plaintiff's father and brother transferred all the stock-in-trade and outstandings of the firm and all their interest therein to the plaintiff. Subsequently the plaintiff continued the business in his own name of Muradally Shamji.

On the 22nd of January 1918, the Official Assignee considering that no final order of discharge was obtained by the plaintiff after 2nd October 1913 took possession of the plaintiff's stock-in-trade and then restored possession and allowed the plaintiff to continue his business on his agreeing to pay to the Official Assignee the daily cash balance and the amount of the debt specified in the plaintiff's schedule in insolvency. The plaintiff alleged that he had no alternative but to submit to terms imposed upon him under coercion, the result being that up to the 27th of February 1918 the plaintiff was forced to make a total payment of Rs. 331 to the Official Assignee.

On the 7th of March 1918, the Official Assignee again wrote to the plaintiff stating that unless the full amount of his liabilities with interest was paid on 8th March 1918 the plaintiff's shop would be closed on 9th March 1918 at 12 noon.

On the 8th of March 1918, the plaintiff filed the present suit alleging that the order dated 2nd of October 1912 operated as his discharge as from 2nd October 1913 and that he was from that date released from all the debts provable in insolvency, the contention of the defendant to the contrary being unlawful. The plaintiff submitted that in view of the threatened and imminent injury to his property held out by the defendant no notice was necessary under section 80 of the Civil Procedure Code.

The plaintiff therefore prayed (*a*) that it may be declared that the order dated 2nd October 1912 operated as a discharge of the plaintiff from all debts provable in insolvency as from 2nd October 1913, (*b*) that the defendant may be restrained by an order and injunction of the Court from closing the plaintiff's shop and from otherwise interfering with the plaintiff's business, (*c*) that the defendant may be ordered to pay to the plaintiff the sum of Rs. 331 with interest thereon at the rate of 9 per cent. per annum from the date of payment, and (*d*) that the defendant may be ordered to pay to the plaintiff Rs. 10,000 as damages or such other sum as the Court may think just.

The defendant contended, *inter alia*, that the suit was not maintainable inasmuch as the plaintiff had not given notice which is made imperative under section 80 of the Civil Procedure Code, and that the order of 2nd October 1912 did not by itself operate as a discharge of the plaintiff in law. The main defence was however set forth in paragraph 7 of the written statement which ran as follows :—

7......The defendant says that under the practice of this Honourable Court until a final order of discharge is made at the expiration of the period mentioned in the order suspending discharge, the plaintiff could not obtain his discharge under the provisions of the Presidency Towns Insolvency Act.

Ghaswalla, with *Kanga*, for the plaintiff.

Desai, with *R. D. N. Wadia*, for the defendant.

PRATT, J. :—On the 26th of September 1911 the plaintiff in this suit was adjudicated insolvent and an order was made vesting his estate in the Official Assignee. The plaintiff thereafter applied for his discharge and on the 2nd of October 1912 an order was made in the following terms :—" It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day

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of October 1913". In 1916 and 1917 the plaintiff acquired a saddlery business. On the 22nd day of January 1918 the Official Assignee considering that no final order of discharge had been made took possession of the plaintiff's stock-in-trade and then restored possession and allowed the plaintiff to continue his business on condition of his making payments for the benefit of his scheduled creditors. On the 7th of March 1918 the Official Assignee threatened to retake possession and on the 8th of March the plaintiff filed this suit to recover the sums which he had paid to the Official Assignee as he says under coercion, for damages for the alleged trespass and for an injunction to restrain the threatened trespass.

A preliminary objection has been taken that the suit is not maintainable as the plaintiff has not given notice as required by section 80 of the Code of Civil Procedure.

There is no question but that the Official Assignee is a "public officer" entitled to such a notice: *Joosub Haji* v. *N. W. Kemp*[1]. It is sought, however, to take this out of the operation of the section as one of the reliefs claimed is for an injunction to restrain a future act of trespass.

Section 80 is as follows :—

"No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing, &c."

It is said that the words "act purporting to be done by such public officer in his official capacity" refer to past and not to future acts. If the matter were *res integra* I should have found no difficulty in deciding that they do refer to future acts. If the words were limited to past acts it would have been easy to express

(1) (1902) 26 Bom. 809.

that limitation by such words as "purporting to have been done" as for instance in section 167 of the Bombay District Municipalities Act, 1901. I think it quite clear that the clause "purporting to be done by such public officer in his official capacity" is merely an adjectival clause qualifying the substantive word "act". The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future; but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty.

In *Flower* v. *Local Board of Low Leyton*[1], a similar provision in the Public Health Act (38 & 39 Vic. c. 55) was held to be inapplicable to suits for an injunction. The judgment proceeded on the ground that a Court of Chancery would not have held that its jurisdiction to grant equitable relief was limited by the section; for otherwise irreparable injury might be done before the Court could intervene. The fallacy of this argument has been exposed in *Colls* v. *Home and Colonial Stores, Limited*[2]. The Court of Chancery in its concurrent jurisdiction enforced legal rights by equitable remedies. But by inadvertence equitable doctrines were sometimes applied to the right instead of to the remedy. This process was stopped by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*[2]. The Chancery Court had granted an injunction to restrain a building which would deprive plaintiff of some of the light he had been enjoying, but yet would not interfere with his common law right to such light as was necessary to make his house habitable. The Court of Chancery had thus inadvertently enlarged the plaintiff's common law right. The House of Lords overruled

(1) (1877) 5 Ch. D. 347.

(2) [1904] A. C. 179 at p. 188.

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multitude of decisions of Chancery Judges and held that the equitable remedy must be limited to the legal right. Lord Macnaughten said :

"Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions."

Now, in *Flower* v. *Local Board of Low Leyton*[1] an injunction was granted where plaintiff had under the Statute no right of action and thus the equitable jurisdiction of the remedy was inadvertently used to enlarge the legal right on which the remedy was claimed. This is the very abuse condemned in the judgment of the House of Lords.

Flower v. *Local Board of Low Leyton*[1] is, therefore, no longer good law ; and it is perhaps unnecessary to add that the Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Acts of the Indian Legislature.

However, *Flower's case*[1] was followed by this Court in *Secretary of State* v. *Gajanan Krishnarao*,[2] and *Naginlal Chunilal* v. *The Official Assignee, Bombay*[3]. In the former case it was stated that if the future act was so imminent that it was practically impossible for the plaintiff to give notice and serious injury was threatened, the Court would not be debarred from entertaining the suit. This was an *obiter dictum*, as the suit was held to be barred. But it was followed in the second case where the suit was filed to restrain a threatened sale by Official Assignee and was held maintainable in spite of the fact that no notice had been given. Though I respectfully differ from this case I am bound by it.

(1) (1877) 5 Ch. D. 347. (2) (1911) 35 Bom. 362.
(3) (1912) 37 Bom. 243.

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In this suit there are two distinct causes of action: a tort already committed and a threatened trespass on the plaintiff's property. Damages are claimed for the first, and an injunction to restrain the second. The suit under the first cause of action is not maintainable. But the injunction is a substantive relief claimed under the second cause of action. The threat of trespass was made on the 7th of March. Danger was indeed so imminent that the suit was filed on the 8th of March, and the trespass was restrained by an *interim* injunction granted on the same day. Mr. Ghaswalla drops his claim on the first cause of action and elects to proceed only on the injunction in respect of the second cause of action, and under *Naginlal's case*[1] I think he is entitled to do so.

The finding on the second issue will be: Plaintiff having dropped the claim for damages and for recovering the money payable under coercion, suit is maintainable in respect of the injunction to restrain the threatened trespass.

The case was further argued and the following judgment was delivered on the 25th July 1909.

PRATT, J.:—In view of the judgment on the 2nd issue, the only issue that survives is the first as to whether the plaintiff is entitled to an injunction.

There is a suggestion in paragraph 2 of the written statement that the property which the Official Assignee claims is not the property of the insolvent acquired after his discharge. If this were so, it might be contended that this property was vested in the Official Assignee and that the effect of the order of discharge was not to revest this property in the insolvent: *In re Thomas Pereira*[2]. The point was raised at the time the order was made suspending the insolvent's

(1) (1912) 37 Bom. 243.

(2) (1863) 1 Mad. H. C. R. 217.

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discharge but it was not clear whether the question was then decided. However Mr. Wadia does not make this defence and rests his case solely on the ground that the order of 2nd October 1912 did not operate as a discharge from 2nd October 1913, and that therefore the property, even though acquired by the insolvent after that date, is divisible among the insolvent's creditors under section 52 (2) (*a*).

But I think the words of the order of discharge are too clear to admit of this construction. The order runs in the form prescribed by the rules of this Court and it is as follows :—

"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913."

The order therefore expressly grants his discharge from the 2nd of October 1913. Again the words of section 38 (*b*), under which the order was made, imply that the discharge is granted though its operation is suspended. The word "operation" would have no meaning unless there were an order which did operate as a discharge. It is not the making of the order that is suspended but the operation of the order made. The Act makes no further proceedings necessary after an order of suspension under section 38 has been passed.

If authority is needed, the case of *In re Dove*[1] is very much in point. That was under the English Bankruptcy Act, 1842. Under that Act the order of discharge was made by grant of certificate of conformity which was not effective until confirmed. An order was made suspending the grant of certificate of conformity in the following terms :—

"The said Commissioner...did adjudge that the grant of...certificate of conformity be suspended for the period of three years from the said 30th day of June now last, and did order [it to be] adjourned to the 30th day of June which will be in the year 1851."

(1) (1884) 27 Ch. D. 687.

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After this order, the new Act of 1849 abolished the necessity for the confirmation of the certificate. It was then held that the order operated as a discharge from the 30th June 1851 and that the order was a final order although in terms it adjourned the proceedings till that date. The Court said that the order of suspension of certificate was a grant of the certificate subject to such suspension. That is exactly the case here.

It is true that the practice of the Court is to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension. Practice is a useful guide where a Statute uses a language of doubtful import but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful: *Balkaran Rai* v. *Gobind Nath Tiwari*[1].

The plaintiff is therefore entitled to the injunction he seeks and in the circumstances I direct that he do recover half his costs from the defendant.

I find on the first issue in the affirmative.

Decree for the plaintiff in terms of prayers (*a*) and (*b*) of the plaint and that plaintiff do recover half his costs from the defendant.

Suit decreed.

Attorneys for the plaintiff: Messrs. *Khambatta & Co.*

Attorneys for the defendant: Messrs. *Tyabji & Co.*

G. G. N.

[1] (1890) 12 All. 129.