Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal between Maharajah Dheraj Mahtab Chund Bahadoor and Bulram Singh and others, from the High Court of Judicature at Fort William, in Bengal, delivered 14th July, 1870.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE question in this Appeal is the proper construction of the 20th Section of Act 14 of 1859, which enacts that "No process of execution shall "issue from any Court not established by Royal "Charter to enforce any judgment, decree, or "order of such Court, unless some proceeding shall "have been taken to enforce any such judgment, "decree, or order, or to keep the same in force "within three years next preceding the applica-"tion for such execution." Was there, at any time within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favour of the present Appellant?

What took place was this. The original debtor died. The Appellant desired to have the benefit of his Judgment against the heir or heirs-at-law. In this state of things he applied to the Judge for process of execution against the Respondents as heirs, and on the 26th of December, 1861, this application was made to assume the form of a cause. It was marked and described as 106 of 1861, and was sent by the Judge to the Principal Sudder Ameen, who directed the usual notices to

issue. It is the history of that cause which we have to trace for the purpose of seeing whether it was kept alive, or whether it became at any, and what stage, inoperative.

On the 24th of January, 1862, the officer of the Court made his report that another officer, a peon, had gone to the place stated and searched for the judgment debtors, but was unable to find them, and had affixed the notice in a particular way, and served it upon the village watchman. Then, in February, 1862, the next month, the Respondent filed a petition of objections before the Principal Sudder Ameen, not disputing the service of the notice, but objecting to execution proceeding on the grounds that it was barred by limitation, and that no estate of the judgment debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the Defendant to the suit appearing, and contesting the right of the Plaintiff to have the benefit of the execution against the Defendant. In March, 1862, without any delay, the Appellant put in a petition by way of answer to the petition which the Respondent had put in, contesting the allegations in point of law that the Respondent had made. In that state of things, both parties having placed their view of their respective cases upon record, as it were, on the 4th of March, 1862, the Sudder Ameen ordered that on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that following upon this, on the 29th of November, 1862, a species of hearing was brought on before the Principal Sudder Ameen, for the purpose of discusssing all or some of the allegations which had been made in these petitions, and it was then, upon that day, the 29th of November, 1862, that the Sudder Ameen pronounced his opinion: "Whereas the heir of "the judgment debtor is a respectable woman, the "final process cannot be issued against her. Let "the number of the suit be struck off from this "Record at present."

Now I pass by the question whether that was meant to be a final Judgment, or only a temporary delay interposed in the proceeding of the suit, and I will suppose, for the purpose of

argument that it was meant to be a final Judgment. It was at this point, and at this point for the first time, that the suit which up to that time had been pending, was disposed of by any order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted, and prosecuted *bonâ fide*, and defended, and defended *bonâ fide*; and it appears to their Lordships that so long as that process was going on, so long as there were these allegations and counter-allegations as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the Appellant to have done anything but wait for the result and the Order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority, or by any prevalent course of practice in India, would have no hesitation whatever in holding that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time, and every hour of every day, until it was disposed of on the 29th of November, 1862, by the order to which I have referred.

But it has been suggested in the Judgment of the Court, in the present case, that the matter is affected by former decisions of the Courts in India, which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case which was cited upon this head, and they desire to say that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an officer of the Court, or *bonâ fide* by the applicant for enforcing the decree, or keeping it in force, would satisfy the term "some proceeding" in the 20th section; but then the Court go on to qualify that by saying that there might be things done by the Court, or there might be things done by the party which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as so far from showing diligence or vigilance on his part, might

be so tainted with want of good faith, that they would lead to a totally opposite conclusion; and in the particular case before the Court they found that there had been an application made to execute the decree, that that had been pending for a considerable time before the Court, and had ultimately been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion that the circumstance that there had been a want of diligence which obliged the Court to dismiss the cause for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th Article.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result if the mere chronicling or recording by the Court of the fact that there had been delay and laches on the part of the litigant such as obliged them to strike the suit off the file, if that act of the Court done under such circumstances were to redound to the benefit of the litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion that in the present case the proceeding which has been taken now was taken in the period of three years, because it was taken within three years after the Order of the Principal Sudder Ameen of the 29th of November, 1862, was made. We, therefore, will humbly recommend to Her Majesty that the Order should be reversed, and that the Appellant should have his costs of the Appeal.