Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Syud Tufuzzool Hossein Khan v. *Rughoonath Pershaud and another, from the Court of the Judicial Commissioner of the Province of Oude: delivered 20th February,* 1871.

Present:

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice James.

Sir Lawrence Peel.

THIS is an Appeal from a decision of Sir George Couper, the Judicial Commissioner of Oude, reversing a Decree of Mr. Fraser, the Judge of the Civil Court at Lucknow, given in favour of the Appellant, the Plaintiff in a suit which he had brought to set aside an alleged illegal order of Mr. Smith, the officiating Civil Judge of that city. The order in question cancelled a Judicial Sale in execution of a Decree for a money demand made in a suit in which one Sah Banarsee Doss was Plaintiff, and Ramnath, the father of the first Respondent, was the Defendant; in which suit the Plaintiff recovered the sum of 683 rupees 3 annas. The Decree-holder, Banarsee Doss, unable to obtain payment of this demand, attached as the property of his debtor a certain claim in a pending arbitration between Ramnath, the judgment debtor, and Sheonath, his former partner. He proceeded, as if in the regular course of such executions, to its sale in satisfaction of his Decree. It was sold accordingly by auction by the Nazir of the Court, and the Appellant became the purchaser of it for the sum of 1,350 rupees.

The Claim was thus described in the Notice of Sale:—

"The Claim of Ramnath *v.* Sheonath, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to arbitrators."

The sale took place on the 25th day of October, 1866, and on the following day the Arbitrators made their award, and awarded to the first Respondent, as the son and representative of Ramnath then deceased, the partner of Sheonath, the sum of 34,000 rupees, and the outstanding debts they awarded to Sheonath. These outstandings were partnership debts due to the late firm, in respect of which neither partner, however, had incurred any special liability to the other. The submission, which was in the most general terms, and conferred the most ample discretionary powers on the Arbitrators, contained the following expressions: "The case has been made over to you for your decision. We, the parties concerned, agree to have our cause decided among ourselves, and are willing to abide by an amicable adjustment. We, therefore, of our own free will and accord declare and do state in writing that in any way whatsoever our case may be decided by you, the same will be accepted and recognized by us."

The Appellant claims to be entitled to the sum of 34,000 rupees, as purchaser of the same at the auction sale for the sum of 1,350 rupees. The sum so claimed, however, had no existence at the time of the Attachment; it was not a debt nor liability at that time from Sheonath to Ramnath's son; it was a debt created by the award, and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (in respect amongst other matters) awarded of a then extinguished share of debts which were till then debts due to the partners jointly, and became, under the award, the sole property of Sheonath. It was quite competent for the Arbitrator to award money to be paid by, instead of to, the judgment debtors and to give him the outstanding debts. The Attachment was not of a several share of the outstandings; had that claim been made it should have been asserted by a different notice, directed also to the original debtors. On its effect, if so made, it is not necessary to decide.

Mr. Smith set aside the Order directing the sale. He made his Annulling Order *ex parte,* without any notice to the Appellant, who was in ignorance of, and had no opportunity of opposing it. The Appellant, on becoming aware of the Order, petitioned Mr. Smith against it. His petition was received; it stated in detail all his objections to the Order which were fully considered; Mr. Smith, however, adhered to his opinion, and sustained his order.

In consequence of this decision by Mr. Smith, the Appellant, brought a regular suit to set aside the Order annulling the purchase, and to enforce his right as purchaser. Mr. Fraser decreed the suit in his favour; but, on appeal to the Judicial Commissioner, that Decree was reversed. From this last Decree the present Appeal has been brought.

The decision of this Appeal depends on the true construction of Section 205 of Article VIII of 1859; but before their Lordships enter upon the consideration of the effect of that section they will dispose of some other objections which were urged against Mr. Smith's Order.

The Judge proceeded, it is said, in reversing the sale on the ground of irregularity alone. The real objection, however, to this sale, if sustainable in law, is not one of irregularity, it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale.

Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncancelled.

This answer substantially disposes of another objection which was directed against the propriety of Mr. Smith's act in cancelling the sale. The act itself may have been right, though he erred in his mode of doing it.

Mr. Fraser appears to have supposed a Judge of that Court unable to correct his own error, in sending forth, *per incuriam,* an invalid Order which he would not have made if duly informed.

To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid Order is not simply permitted to, but is the duty of a Judge who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor. It

would be a serious injury to the suitor himself to suffer him to attempt to execute an inoperative Order.

If, then, the decision appealed from be correct, no other objection can reasonably be urged against the course adopted by Mr. Smith than this, that he did irregularly without notice that which it was his duty by a more regular course to do.

Their Lordships are satisfied, however, that no harm or wrong was done by Mr. Smith's suspending *ex mero motu* an order which appeared to him *ex facie* improper—and this was in effect and substance what he did.

The section on the true construction of which the decision of this Appeal depends is Section 205 of Article VIII of 1859. After an enumeration of many specific subjects of execution of various natures, the section, at its close, employs very general words, as if to include all property not enumerated. These words, "all other property whatsoever, moveable or immoveable," are in substance the same with the words in the old writ of sequestration pending a suit under the old procedure of the Company's Courts in India. (See the form in Macpherson's Civil Procedure, 3rd ed., p. 196.) This writ issued pending a suit to restrain an alienation commenced, or supposed to be about to be made, on the part of a Defendant in fraud of his creditor.

Of this writ and the ordinary writ in execution the author says that scarcely any kind of *property* is exempt from its operation. The old writ of seizure in the same Courts has words less extensive in their import than those in the former writ; and it is obvious that the former, which more resembles an assignment than an ordinary writ of execution, may have had, by reason of the apprehended danger of waste of inchoate demands which might result in debts, a wider effect than the writ of actual execution.

The process now under consideration is one differing from both, it is similar to the seizure of effects in the hands of a garnishee. The question is on what property that proceeding operates, and not what is the widest reach of any execution, including the appointment of a receiver, which these Courts may issue.

The Judgment under appeal refers to a late

authority in support of it, which appears fully to bear out the position for which it was cited, viz., that the sums attached must be not inchoate, but existing and definite. No case was quoted in opposition to it.

The section uses the word property, not claim nor right. A mere right of suit is not property, but a title to recover future property.

A debt or property, which is seizable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. The Judge refers to a passage relating to unproved assets which proceeded from a Directory Order of the late Sudder Dewanny Adawlut.

It is certainly said in Mr. Macpherson's work before referred to, that unproved assets may be seized by attachment; but it is also said, in a passage where he is plainly referring to the said Order in the same work, that mere rights of suit cannot be attached. These two apparently, but not really, conflicting, positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Various passages from Mr. Macpherson's work on Civil Procedure noted below show that future property cannot be attached. It appears plainly from these passages that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A be held by A subject to an option in B to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day may be attached, whilst a salary, wages, or money claim accruing due, may not: and it is added that if a creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the debtor and arrangement with him, and not by an attachment by the act of a Court, (see p. 432—434, 3rd edition). Mr. Leith referred in his argument to the family property of Hindoos, and urged such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property; that a Decree-holder can reach it. It is

specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a receiver.

In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*; it was wholly uncertain, as Sir George Couper has correctly explained in his Judgment in what the Arbitration might terminate.

Their Lordships think that this very case affords a clear proof of the wisdom of that construction which the Judgment under appeal has put upon the words of this Act. The Courts have power to secure at once the rights of creditors and those of debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if, under colour of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators" could be put up to judicial sale: a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been "all the claims of Ramnath against all his debtors." It is obvious, moreover, what a door of fraud would be opened if, pending a reference, the award of the Arbitrators could be put up for sale.

Their Lordships throw no kind of doubt on the power of the Court, by sequestration or direct seizure, notice to debtors or otherwise, to sell or administer, in execution of a Decree-creditor's claim all that the former law allowed him. They do not find in the Act which apparently regulates rather than extinguishes any prior right of a creditor, any evidence of intention to exempt property from executions, but they agree in the observation of the Judge that the code of procedure is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes. Sections 236, 241, and 243 of the Code provide sufficiently which debts due to the Judgment

debtor may be received and applied in satisfaction of the Judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied that there is nothing in that code to authorize such a sale as has been professed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled.

Their Lordships will therefore humbly advise Her Majesty that this Appeal be dismissed.

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