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an inherent power in the case of loss or destruction of a judicial record to restore such record," and it was held in that case that execution might issue even before the reconstruction of the record. According to Black on Judgments (volume I, section 125). "The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation."

Even if I am wrong in my opinion that the learned Additional Sessions Judge is entitled to replace the lost judgment by a new judgment and that the conviction and sentence passed by him without pronouncing the whole of the written judgment do not make them void, I think (as I said already) that it is more advisable to wait till an appeal is preferred against the conviction and the sentence by the accused in the case before the High Court takes any action.

Let the records be returned.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

1913. August 5, 6, and 26 and September 10, 11 and 12.

NAVAJEE AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE ADMINISTRATOR-GENERAL OF MADRAS AND EIGHT OTHERS (DEFENDANTS, NOS. 1 TO 6 AND LEGAL REPRESENTATIVE OF SEVENTH DEFENDANT), RESPONDENTS.*

Administrator-General's Act (II of 1874), ss. 28, 34 and 35—Civil Procedure Code (Act V of 1908), O. XX, r. 13—Suit to recover assets improperly paid by the Administrator-General—Not a suit for administration by Court—Priority of creditors—Construction of instrument of agreement—Creditor to be paid out of cheques or monies received from a third party for work done by the creditor—Charge on such cheques or monies received after Letters of Administration granted—"Specific fund" meaning of—Equitable assignment—"Payment out of a fund" and "payment when a fund is received", difference between.

Section 28 of the Administrator-General's Act (II of 1874) directs the Administrator-General to distribute the assets and contains a provision that

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* Original Side Appeal No. 31 of 1910.

nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

When probate or letters of administration have been granted to the Administrator-General there is no machinery for the administration of the insolvent estate of a deceased debtor under the law of insolvency. The practice in Bombay and Calcutta is the same as in Madras.

Order XX, rule 13 of the Civil Procedure Code (Act V of 1908) does not apply to a suit brought by a creditor of a deceased debtor against the Administrator-General (to whom letters of administration had been granted) and some other creditors to recover assets alleged to have been improperly paid by the Administrator-General to such creditors in priority to the plaintiff.

When an agreement contained a clause, viz., "It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital," the instrument operated to create a charge on cheques or monies payable for work done after the instrument, although the cheque was not given or payment made until after letters of administration had been granted to the Administrator-General.

Collyer v. *Isaacs* (1881) 19 Ch.D., 342 and *Tailby* v. *Official Receiver* (1888) 13 A.C., 523, followed.

Bansidhar v. *Sant Lal* (1887) I.L.R., 10 All., 133, referred to.

Ex parte *Nichols* In re *James* (1883) 22 Ch.D., 782 and Ex parte *Moss* In re *Toward* (1884) 14 Q.B.D., 310, explained.

When an instrument refers to specific funds out of which the claims of a creditor are to be satisfied, the creditor has a charge on such fund.

When a creditor is to be paid "out of the fund," as distinguished from "when the assignor gets the fund," a valid equitable assignment is created provided the transaction is for value.

Fisher on Mortages, page 126; White and Tudor's Leading Cases, 8th volume, I edition, page 117.

Field v. *Megaw* (1869) L.R., 4 C.P., 660, distinguished.

Ramsidh Pande v. *Balgobind* (1887) I.L.R., 9 All., 158, referred to.

APPEAL from the decree of WALLIS, J., in Civil Suit No. 163 of 1908 in the exercise of the ordinary original civil jurisdiction.

The necessary facts appear in the judgment of WHITE, C.J.

T. Prakasam and *A. E. Rencontre* for appellants.

T. R. Ramachandra Ayyar and *T. S. Natesa Sastri* for respondents Nos. 7 to 9.

P. Narayanamurti and *T. Arumainatham Pillai* for the respondents Nos. 2, 3, 5 and 6.

T. Ramachandra Rao for the fourth respondent.

WHITE, C.J.—In this case one J. S. Peters died intestate and letters of administration were granted to the Administrator-General. Thereupon it became his duty under section 28 of the Administrator-General's Act (II of 1874) to distribute the

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assets. Section 28 directs the Administrator-General to distribute the assets and contains a provision that nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively. Sections 34 and 35 contemplate suits by and against the Administrator-General. Section 35 deals with suits by creditors against the Administrator-General. The Administrator-General proceeded to administer the estate and in so doing held that defendants Nos. 2 to 6 were entitled to priority of payment by virtue of documents which they held which they contended amounted to charges given to them by J. S. Peters and entitled them to payment out of certain funds in priority to the general body of creditors. The plaintiff thereupon brought this suit making the Administrator-General the first defendant and the creditors whose claims to priority had been recognised by the Administrator-General, defendants Nos. 2 to 6.

It is admitted that Mr. Peters' estate was insolvent. The learned Judge said in his judgment: "This is a suit for the administration of the estate of the late J. S. Peters." The learned Judge's attention was not called to Order XX, rule 13 of the Code of Civil Procedure, which provides that "in the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent." I thought at one time in the course of the argument that a difficulty might arise in connection with the judgment of the learned Judge by reason of the fact that his attention had not been called to this rule and that he had not considered the question whether the rule was applicable to this suit. I was at one time disposed to think that Order XX, rule 13 of the Code of Civil Procedure did apply, but after hearing a full argument on the point I have come to the conclusion that it does not.

The policy of the law in connection with insolvent estates of deceased persons is indicated by sections 107 to 111 of the Presidency Towns Insolvency Act, 1909. Section 108 enables a creditor of the deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive to present to the Court a petition asking for an order for the administration of the estate in insolvency. There is a further provision that a petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of Justice; but that, in that case, the Court may, on its own motion, transfer the proceedings to the Insolvency Court. Section 111 provides that sections 108, 109 and 110 shall not apply to a case in which probate or letters of administration have been granted to an Administrator-General. The result seems to be that when probate has been granted to the Administrator-General there is no machinery for the administration of the insolvent estate under the law of insolvency. We consulted the Administrator-General with regard to the practice and he has ascertained that the practice in Bombay and Calcutta is the same as here. I confess I do not quite understand the principle of the thing but this appears to be the law.

The words of Order XX, rule 13 of the Code of Civil Procedure, are almost, word for word, the same as section 10 of the Judicature Act of 1875. Before that Act the rule in bankruptcy was that a secured creditor must realize his security and prove for the balance. The rule in Chancery was that he could prove for his whole debt, but if, on the realization of the security there was a surplus, he must refund the surplus. The effect of the rule is not to apply all the principles of bankruptcy to insolvent estates but only to establish a uniformity of administration in respect of the four heads specifically mentioned in the section.

As regards the vesting of the estate about which we had a good deal of argument the rule says nothing with regard to vesting but merely deals with the heads specifically mentioned therein.

Mr. Prakasam who appeared for the appellants laid stress on the fact that under the Indian Succession Act, as he contended, this estate became vested in the Administrator-General. The nature of that vesting, as it seems to me, is different from the

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vesting in a trustee or in the Official Assignee by virtue of the operation of the law of insolvency. It gives the Administrator-General no higher title than the deceased had.

Is there anything to indicate that this suit is a suit for administration by the Court of the property of the deceased person to which the rule would apply except the fact that the learned Judge in general language describes it as "a suit for the administration of the estate of the late J. S. Peters"? Mr. Prakasam has pointed out that the plaint follows more or less closely the form of plaint which we find in the schedule to the Code as the form for an administration suit by a creditor. There is this difference. In the present suit there is the statement that letters of administration were granted to the Administrator-General. No doubt one of the prayers is that the estate and effects of the deceased may be administered under the direction of this Court. But the decree is not in the form of a decree which is made in an administration suit. The learned Judge only purported to deal with the specific question as to whether defendants Nos. 2 to 6 were entitled to priority of payment and did not deal generally with the question of administration.

If Order XX, rule 13 of the Code of Civil Procedure, does not apply, the question whether we should, in dealing with this appeal, apply the principles of law upon which the decisions in Ex parte *Nichols*, In re *James*(1) and Ex parte *Moss*, In re *Toward*(2) are based, does not arise.

It remains for us to decide whether we agree with the learned Judge as to the construction of the documents which are relied upon by defendants Nos. 2 to 6 as giving them rights in priority in the administration of the estate. I think in construing the instruments we are entitled to take into consideration the course of business between the parties.

The plaintiff at one time—I am stating the facts quite generally—financed the late Mr. Peters for the purpose of enabling him to carry out his contracts with the Madras Railway Company. After a time they ceased to do business with Mr. Peters and closed their accounts. They were paid a small sum on account. Then the defendants undertook to finance the deceased and the course of business was—again I am stating the facts generally—

(1) (1883) 22 Ch.D., 782. (2) (1884) 14 Q.B.D., 310.

they did the work and provided the materials. Mr. Peters charged the Company for the work done and for the goods supplied according to his contracts with the Railway Company paying the defendants according to his agreements with them and retaining the difference between what he paid them and what the Company paid him as a commission for himself. The learned Judge finds, and we see no reason to differ from him, that defendants Nos. 2 to 6 did the work in respect of which they claimed a charge on payments received by Mr. Peters from the Railway Company.

The instrument about which there was most discussion is Exhibit XI. That is a document which is no doubt inartistically drawn. It is in these terms:

"Agreement written 3rd September by J. S. Peters, Government Pensioner, and 4th District, 10th section contractor of Madras Railway Company, now residing at Kovur, Kistna district, to Erra Govindiah Garu's son of Errah Jagiah Subadargar, Sudra, and Inamdar of Rajahmundry, under the following conditions:—

(1) I pay you soon after I receive cheques from the Madras Railway Company for works done by you investing money under me as a task-work deducting my commissions as noted below for the following works.—

(2) My late Bankers or other debtors have no claims on your invested capital for the works you are now doing and about to do as per my orders except to the commissions I have to receive from the cheques of your works under me. It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital.

(3) In case if I fail to remit your monies soon after I receive from Madras Railway Company for works done by you as per my orders either verbal or written I am liable for breach of contract liabilities."

The learned Judge received this document with Exhibit X, which is a letter, dated 2nd July 1906, some two months earlier, written by Mr. Peters to the second defendant asking him to supply certain materials and carry out certain works and promising to pay him as soon as he gets the cheque from the Railway Company after deducting his commissions. Then, going back to Exhibit XI, we have this paragraph: "It is agreed that

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you (the second defendant) should have a lien or charge over cheques or monies received for works done with your capital." It was, I think, conceded that the work in question was done after the date of Exhibit XI and it was not disputed that payment was not made by the Railway Company until after the death of Mr. Peters and the grant of letters of administration to the Administrator-General. But it seems to me clear from the judgments in Ex parte *Nichols*, In re *James*(1) and Ex parte *Moss*, In re *Toward*(2) that the instrument might operate as a charge on cheques or monies payable for work done after Exhibit XI was given by Mr. Peters to the second defendant. The fact that payment was not made by the Railway Company until after letters of administration had been granted to the Administrator-General might be material if the principle of the decision in the two cases to which I have referred were applicable in this case. But, for the reasons I have stated, it seems to me that this fact is immaterial.

Mr. Prakasam contended that as the cheques did not come into existence until after the giving of the document they could not be the subject of an assignment. He relied on the decision in *Collyar* v. *Isaacs*(3). We find in that case the answer to Mr. Prakasam's contention. The Master of Rolls says :—"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The question came before the House of Lords in *Tailby* v. *Official Receiver*(4), where the question was whether a man could assign future book debts. It was held that the assignment of future book debts was good if the subject-matter of the assignment could be identified.

Mr. Narayanamurthi who appeared for some of the defendants has called our attention to certain Indian cases. I will only refer to *Bansidhar* v. *Sant Lal*(5). This was a case of hypothecation of indigo produce when it should come into existence. It was held that the hypothecation was good.

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(1) (1883) 22 Ch.D., 782. (2) (1884) 14 Q.B.D., 310.
(3) (1881) 19 Ch.D., 342. (4) (1888) 13 A.C., 523.
(5) (1888) I.L.R., 10 All., 133.

A further objection which was taken by Mr. Prakasam was that the words of the instrument were not sufficiently specific to constitute a charge. Some authorities have been cited in reference to the question. There is a case—*Ramsidh Pande* v. *Balgobind*(1)—in which the words of the instrument were of a general character "Whatever property, etc., belonging to me." It was held that the bond created a charge on the properties in the circumstances of the case. This decision was doubted in a later Allahabad case and I do not express any opinion about it. It seems to me that the words of the instrument in the present case are of a much more precise and specific character. We have a reference to specific funds out of which the claims of the creditor are to be satisfied. They are to be satisfied out of cheques or monies received for work done by the defendants which was paid for in the first instance by the defendants. The rule is thus stated in Fisher on Mortgages, sixth edition, page 126, paragraph 230:—"If, however, there is a sufficient indication that the supposed assignee is to have the benefit of the fund or chose in action in question, in addition to relying on the credit of the assignor, or, as it is sometimes put, is to be paid 'out of the fund' as distinguished from 'when the assignor gets the fund,' a valid equitable assignment is created, provided that the transaction is for value. The intention must be that the property shall pass." Applying that test here, is it "when" or "out of." It seems to me that Exhibit XI may be fairly construed as being an instrument where a man gives a charge to be met out of a specific fund.

Mr. Prakasam referred us to a passage in *Ryall* v. *Rowles*(2): "A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of such third person." In the notes, *Field* v. *Megaw*(3) is cited. The promise in that case was a promise to pay "when," not a promise to pay "out of."

Then as to the other documents which were relied on as creating a charge. Exhibit XIV is in these terms:—"I promise

(1) (1887) I.L.R., 9 All., 158.

(2) Ves Sen., 348, s.c., 1 White and Tudor's L.C., 8th Edn., at p. 117.

(3) (1869) L.R., 4 C.P., 660.

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to pay the amounts you paid to my agent N. Subba Rao Garu for interest up to 14th October 1906 amounting to Rs. 118-8-10 and Rs. 15 of to-day's total one hundred and thirty-three from the commissions due to me on your works from coming cheques."

That seems to me not a promise to pay "when I get cheques" but a promise to pay "from the commissions I should be entitled to retain out of the cheques I receive." I also think a charge was created by Exhibits V and VI. Then we have Exhibit XXI. This particular letter no doubt gives rise to a certain amount of difficulty. The words are "I will pay the amount for works you perform for timber, etc., soon after cheques for the same are received deducting the usual commission as paid by others." The course of business was, as I have said, that Mr. Peters should deduct a certain percentage for himself and pay the balance to the men who did the work, *i.e.*, the defendants. I think we are warranted in construing this as a promise by Mr. Peters to pay from a specific fund after he had deducted the commission to which he was entitled as arranged between him and the defendants.

We see no reason to differ from the learned Judge's findings of fact in this case, nor from his finding with regard to the suggestion of fraud on the part of the late Mr. Peters' agent.

There only remains the question of costs. The case is not free from difficulty and our order is the parties may take their costs, taxed as between party and party, out of the estate of Mr. Peters both here and before the learned Judge.

OLDFIELD, J.

OLDFIELD, J.—I agree.