what he desired to contend was that he was entitled to be heard before any letters of administration were granted to Parman at all. He still desires to raise this point, in spite of the fact that an *ex parte* order, allowing Parman's application, had been passed, before he was able to lay his petition before the court. I only wish to say that it will be open to the learned District Judge when the matter comes back to him, to consider whether under the provisions of section 114, or under the inherent powers of the court recognised by section 151 of the Code of Civil Procedure, he can or ought to reconsider his *ex parte* order, in favour of Parman, apart altogether from the provisions of section 50 of the Probate and Administration Act itself.

RICHARDS, C. J.—I agree with what my learned colleague has said.

BY THE COURT.—The order is that we allow the appeal, set aside the order of the court below and remand the case to that court for trial according to law. Cost will be costs in the cause.

Appeal decreed, cause remanded.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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April 6.

ALLAHABAD TRADING AND BANKING CORPORATION, LIMITED. (PETITIONER) *v.* GHULAM MUHAMMAD AND OTHERS (OPPOSITE PARTIES).*

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 31—"*Secured creditor*"—*Insolvency*—*Agreement appointing creditor agent for sale of debtor's goods*—*Proceeds to be paid to creditor.*

The owners of a printing and publishing business who owed money to a bank entered into an agreement with the bank the substance of which was that all books then in stock and all books to be published thereafter were to be made over at once to the bank ; that a commission at a certain rate was to be allowed to the bank on the sale of the books, and that the sale proceeds of the books were to be credited to the debtors' loan account every month after deducting the commission due to the bank. There were also other clauses, and finally one Ram Charan Shukul agreed to act on behalf of the bank as sole agent for the sale of the debtors' books.

Held that the bank was, on this agreement, entitled to rank as a secured creditor of the owners of the printing and publishing business in the insolvency of the latter.

THE facts of this case were as follows :—

One Ghulam Muhammad and his wife, Musammat Shahzadi, carried on the business of printers and publishers under the names

* First Appeal No. 49 of 1914, from an order of S. R. Daniels, District Judge of Allahabad, dated the 11th of March, 1914.

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of "The City Press," Allahabad, and "G. A. Asghar and Company," Allahabad. They had from time to time taken joint loans on promissory notes from the Allahabad Trading and Banking Corporation, Limited. Demands for re-payment were made; and on the 18th October, 1910, a registered agreement, the material portions of which are given below, was entered into between them and the Corporation :—

(1) "This agreement witnesseth that we Ghulam Muhammad and Musammat Shahzadi above named, joint proprietors of the 'City Press' as well as of Messrs. G. A. Asghar and Company, Allahabad, do hereby appoint the said Allahabad Trading and Banking Corporation, Limited, Allahabad, as sole agent for selling all and every kind of books published up to date and to be published hereafter by the said City Press and Messrs. G. A. Asghar and Company, except books, the sale of which is prohibited by law, on the following terms and conditions : (1) That all books already published and in stock at present shall be made over to the said Trading and Banking Corporation on the date of this agreement, all books to be published hereafter as soon as they are published will be made over to the said Corporation for sale on its granting a receipt for the same and it will always be held responsible for the safe custody of such books in the same manner and to the same extent as brokers are according to law held responsible ; . . . No books or publications (except newspapers) will be allowed to be sold by us, i. e. the said Ghulam Muhammad and Musammat Shahzadi and G. A. Asghar and Company.

(3) The sale proceeds of the books realized shall be placed to the credit of the said Ghulam Muhammad and Musammat Shahzadi's joint loan account every month, i. e. on the last day of each month after deducting the commission due to the said Corporation.

(7) And lastly, this agreement shall continue so long as the said Ghulam Muhammad and Musammat Shahzadi remain owners of the City Press as well as of Messrs. Asghar and Company, Allahabad, and as long as the said Allahabad Trading and Banking Corporation, Limited, exists.

(8) And I, Ram Charan Shukla, Manager of the said Corporation, do hereby agree on behalf of the said Corporation to act as sole agent of the City Press as well as of G. A. Asghar and Company's publications under the terms and conditions mentioned above."

In pursuance of this agreement the entire stock of books was made over to the Corporation. Subsequently Ghulam Muhammad applied to be adjudged an insolvent, whereupon the Corporation claimed to be a secured creditor by virtue of a lien, as evidenced by the agreement, on the books in their possession. The claim was opposed by other creditors and the District Judge held that the Corporation was entitled to no lien on the books and ordered the books to be handed over to the receiver.

The Corporation appealed to the High Court.

Dr. *Satish Chandra Banerjee* (with him Babu *Sarat Chandra Chaudhari*), for the appellant :—

There is no comprehensive definition of a " secured creditor " in the Provincial Insolvency Act. The term is defined in the English Bankruptcy Act and in Stroud's Judicial Dictionary, means a person who holds a charge or lien upon his debtor's property as security for his debt. The word " security," again, is not defined in the Indian Law ; the definition given in Stroud's Judicial Dictionary, Second Edition, Vol. 3, p. 1815, is this :— " A security, speaking generally, is anything that makes the money more assured in its payment or more readily recoverable." Now, a reference to paragraphs (1) and (3) of the agreement clearly shows that it was an arrangement which made the money due to the Corporation more assured in its payment and more readily recoverable. It was clearly the intention of the parties that so long as the debt due to the Corporation remained undischarged, the Corporation should hold the books as security to which it was to look for payment of its debt. In any other view the insertion of paragraph (3) would be meaningless. The lower court is in error in holding that no lien could be created in the absence of express words to that effect. The parties intended that the Corporation should have a lien on the books ; and in order to create a lien all that is necessary is that possession over the goods should be obtained and the person in whose favour the lien arises should be able to retain such possession " until certain demands of the person in possession are satisfied." Halsbury's Laws of England, Vol. 19, p. 2. Stroud's Judicial Dictionary, Second Edition, Vol. 2, p. 1097.

Although, there are no express words either creating a lien or giving a security, the intention to do so is clear and that intention must be given effect to as all the necessary elements are present. Though the Corporation is constituted an agent, the agency is in the nature of one coupled with an interest, because there is a large debt due to the Corporation and the agency cannot be terminated at the will of the principals ; vide paragraph (7) of the agreement. The Corporation, therefore, is a secured creditor within the meaning of section 31 of the Provincial

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Insolvency Act. Further, the Corporation has a lien under section 171 of the Contract Act. The books having been bailed to it for the purpose of sale it became what is called a factor in that section. Under section 221, also, of the Contract Act the Corporation is entitled to a lien, as the evidence shows that the cost of printing and publishing the books came out of the moneys which had been advanced by the Corporation.

Babu *Harendra Krishna Mukerji*, (with him Mr. *S. J. Shapoorjee*, Babu *Girdhari Lal Agarwala*, Pandit *Ladli Prasad Zutshi* and Pandit *Uma Shankar Bajpai*,) for the respondents :—

The agreement was nothing more than a contract of sole agency for the sale of books ; it neither created nor was it intended to create a lien in favour of the Corporation. The preamble of the deed shows the scope of the authority given ; from the preamble it appears that the parties contemplated entering into a contract in respect of the sole agency for the sale of certain books, and from paragraph (8) it appears that the Corporation accepted the agency. The Corporation works both as a banking firm and as a trading concern, *e.g.*, selling books and other goods. Under this contract it was arranged that the appellant, Corporation, was to sell the books on certain rates of commission as a trading company, and to credit the balance of the sale proceeds towards the liquidation of a debt due by Ghulam Muhammad and his wife to the appellant, *qua* a Banking Corporation. There is nothing to show that the two transactions entered into by the appellant Corporation, in its two different characters, were contemplated to be treated as correlated to each other in such a way as to form parts of the same transaction. On the contrary, there are circumstances which go to show that the two transactions were to be kept separate and distinct. The loan was prior in date to the agency and not contemporaneous; nor was the contract of agency to subsist only so long as the debt remained unsatisfied. Then, we find that separate accounts were kept by the Corporation for the loan and for the sale of books, respectively. Further, there is no express mention of any sort of charge or lien to subsist on the books in favour of the Corporation although the loan existed from before. If the intention of the parties was to create a lien they could very easily have said so in the agreement. The omission of

any mention of a charge or lien is especially significant when we find other provisions of the agreement set out in full detail. If the agreement were executed with the object of giving a security to the Corporation then one would expect some express provision as to what would happen after the debt was paid off; and also a provision that the Corporation should retain possession until the debt was discharged. Paragraph (3) of the agreement upon which the appellant specially relies provides nothing more than a particular mode in which the price of books realized was to be paid to the credit of Ghulam Muhammad and his wife. Read as a whole the document did not create any lien, nor was it treated by the parties as doing so. Section 171 or section 221 of the Contract Act does not help the appellant. Section 171 requires the existence of a specific sum due to a factor *qua* factor, and section 221, of such a sum due to the agent *qua* agent. But that is not the case here.

Dr. *Satish Chandra Banerji*, replied.

CHAMIER and PIGGOTT, JJ.—The only question for decision in this appeal is whether the appellant, the Allahabad Trading and Banking Corporation, Limited, is entitled to be regarded as a secured creditor of the respondent Ghulam Muhammad, who has been declared an insolvent. The appellant bank rests its claim to be regarded as a secured creditor (1) upon an agreement, dated the 18th of October, 1910, (2) upon section 171 of the Indian Contract Act, and (3) upon section 221 of the same Act. The learned District Judge has held that all three grounds are untenable. As regards the second and third grounds we may content ourselves with saying that we agree with the court below that neither section 171 nor section 221 of the Contract Act gives the appellant any lien on the property in question.

The first ground requires careful examination The agreement above mentioned was entered into between Ghulam Muhammad and his wife Musammat Shahzadi on the one hand and the appellant bank on the other. It begins by appointing the bank sole agent for the sale of all books already published or to be published thereafter by the City Press and Messrs. G. A. Asghar and Company. It appears that Ghulam Muhammad and his wife were owners of the City Press and carried on business also under the

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name of Messrs. G. A. Asghar and Company. The appointment of the bank as the sole agent of Ghulam Muhammad and his wife for the sale of the books is declared to be subject to several terms or conditions. The first condition is, shortly, that all books then in stock and all books to be published thereafter are to be made over at once to the appellant bank and the liability of the bank in respect of the books made over to them is specified. The second condition is that a commission of eight per cent. will be allowed to the bank on the net value of all books sold by it except school and college books on which a commission of 10 per cent. will be allowed. The third condition is that the sale proceeds of the books realized by the bank shall be placed to the credit of Ghulam Muhammad and Musammat Shahzadi's joint loan account every month after deducting the commission due to the bank. The fourth clause deals with discounts. The fifth with the giving of credit to purchasers. The sixth with the question of advertising books for sale. The seventh clause provides that the agreement shall continue as long as Ghulam Muhammad and Musammat Shahzadi remain owners of the City Press and the firm of Messrs. G. A. Asghar and Company and as long as the appellant bank continues. The eighth condition so called is an undertaking by one Ram Charan Shukul, on behalf of the appellant bank, to act as the sole agent of the City Press and of Asghar and Company on the terms and conditions set out in the agreement. The appellant bank relies principally upon the third clause of the agreement, namely, that which provides that the sale proceeds shall be credited to the joint loan account of Ghulam Muhammad and Musammat Shahzadi.

On behalf of the general body of creditors it is contended that the agreement of the 18th of October, 1910, evidences no more than a contract of agency, and it is argued that the parties cannot have intended to make the books security for any particular loan, seeing that it is expressly provided that the agreement is to last so long as the two businesses owned by Ghulam Muhammad and his wife exist, and so long as the appellant bank continues to do business; it is said that if the intention had been to make the books security for the benefit of the appellant bank, some express provisions would have been made regarding the proceeds of sale after the loan was paid off. Stress is also laid on the fact that

the agreement does not in express terms confer either a lien or a charge on the bank.

The learned District Judge says that the claim of the bank based upon the agreement of the 18th October, 1910, is obviously untenable, for the agreement does not provide that the books shall be regarded as security for the debt or that the creditors shall have a lien on them, and that the third clause on which the bank relies so much prescribes merely the way in which the sale proceeds shall be applied. On behalf of the bank it is contended that the agreement should be construed as a whole, and that the test is whether the parties to the agreement intended that the bank should, under it, have special facilities for recovering the advances which it had made. The expression " secured creditor " is not defined in the Provincial Insolvency Act. For the purposes of this case both sides are content to accept the definition contained in the English Bankruptcy Act, according to which *secured creditor* means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. The word security is not defined in the Indian Act or in the English Act. On behalf of the bank it is contended that the word means and includes anything that makes payment of the money more secure or the money more readily recoverable. There can be no doubt that the agreement was intended to give the appellant bank the exclusive right to sell all the books published by the debtor and his wife and to appropriate the whole of the proceeds, after payment of the commission, towards the discharge of the joint loan account. According to the agreement the bank had a right not only to retain when handed over the books of the debtor and his wife and sell them, as provided in the agreement, but a right to call upon the debtor and his wife to deliver all books, as they were published, for the purpose of being sold by the bank. It seems to us impossible to avoid the conclusion that the intention was to confer a security upon the bank. A question might arise as to whether the general body of creditors would not be entitled to any surplus proceeds available after discharge of the bank's claim. We are informed, however, that there is no prospect of there being any balance after the discharge of the bank's claim and that we need

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not consider the question any further. We hold that the agreement was intended to give the appellant bank a lien or charge on the books and that therefore, the bank is entitled to be regarded as a secured creditor. We allow this appeal and set aside the order of the District Judge. Costs of this appeal and of the proceedings in the court below will be paid out of the estate. In the circumstances this means that the appellant bank will be entitled to add its costs to the amount due to it under the agreement.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji.

1915
April 6.

ROBERT WILLIAM ANDERSON (DEFENDANT) *v.* THE BANK OF UPPER INDIA LIMITED (PLAINTIFF).*

Construction of document—Mortgage of stock-in-trade of business—Schedule of stock-in-trade forming part of mortgage.

Where the stock-in-trade of a business was mortgaged as security for a loan and a list of the specific articles of which it consisted was attached to the mortgage-deed, it was *held* that the mortgage did not include stock acquired after the date of the mortgage to replace that which had been sold. *Tapfield* v. *Hillman* (1) and *Coltman* v. *Chamberlain* (2) referred to.

THIS was a suit brought by the Bank of Upper India seeking to be put into possession of the chattels, goods, stock-in-trade, book-debts, securities and moneys and the business belonging to a firm of merchants carrying on business under the style of Burton & Co., at Bareilly, or in the alternative that the Bank should have a decree for the sum of Rs. 18,839-5-6 against the defendants jointly and severally and that in default of payment, the business should be sold for the realization of their debt.

The court below has given the plaintiff Bank a decree directing the defendants to pay the sum of Rs. 18,839-5-6 together with interest and costs, and further that in the event of the amount in the hands of the receiver (who had already been appointed) not being sufficient to pay the plaintiff's decree, the receiver should call for tenders and sell the business of Messrs. Burton & Co., with the "good-will" &c. as a going concern.

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* First Appeal No. 293 of 1913 from a decree of Pirthiwi Nath, Subordinate Judge of Bareilly, dated the 3rd of May, 1913.

(1) (1843) 6 Man. and Gr., 245. (2) (1890) 25 Q. B. D., 328.