INSOLVENCY JURISDICTION.

Before Mr. Justice Bayley and Mr. Justice Scott.

In re BHAGWA'NDA'S HURJIVAN, AN INSOLVENT.

Ex-parte C. A. TURNER, ESQUIRE, OFFICIAL ASSIGNEE.

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March 28;
July 14.

Insolvency—Judgment entered up under section 86 *of the Indian Insolvent Act* (11 *and* 12 *Vic., c.* 21)—*Execution—Practice—Procedure.*

A judgment entered up under section 86 of the Indian Insolvent Act (11 and 12 Vic., c. 21) is a judgment of the High Court, and must be executed under the provisions of the Civil Procedure Code.

APPLICATION for execution of judgment entered up under section 86 of the Indian Insolvent Act (11 and 12 Vic., c. 21).

In 1881 Bhagwándás Hurjivan, who was entitled to certain property, was in insolvent circumstances. Three creditors obtained judgment against him, one of whom attached the said property in execution, and subsequently (July 29, 1880,) obtained an order adjudicating Bhagwándás Hurjivan an insolvent. The other judgment-debtors then applied to attach the said property in execution in order that they might share rateably in the property under section 295 of the Civil Procedure Code (Act X of 1877), but by reason of the vesting order which vested all the insolvent's estate in the Official Assignee they failed in their application.

On the 7th September, 1881, Bhagwándás Hurjivan, the insolvent, obtained his discharge from the Insolvent Court and on that day, in accordance with the practice of the Insolvent Court in Bombay, judgment was entered up (under section 86 of the Insolvent Act, 11 and 12 Vic., c. 21) against him for the total amount of debts appearing in his schedule. The Official Assignee subsequently applied to the Judge in chamber on behalf of all the creditors of the insolvent Bhagwándás Hurjivan (other than the creditor who had attached the insolvent's property previously to the insolvency) to issue execution on that judgment under section 295 of the Civil Procedure Code (Act XIV of 1882) for a ratcable share in the property.

The application was referred to the Court, and now came on for hearing.

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Inverarity for the Official Assignee.—This application is important, because if it is now decided that a judgment of this kind entered up, as this has been, in accordance with the practice of the Insolvent Court, cannot be executed under the Civil Procedure Code, and thus give the creditors a right under section 295 to share rateably in the insolvent's property, the result will be that the policy of the Insolvent Act and of the Civil Procedure Code with regard to the distribution of property will be defeated. By the Insolvent Act the property of an insolvent is distributed among *all* his creditors. Under the Civil Procedure Code (section 295) the property of a judgment-debtor is to be distributed among *all execution creditors*. But if execution of such judgments cannot be issued under the Civil Procedure Code—if the Civil Procedure Code does not apply to a judgment entered up under the order of an Insolvent Court, then the first execution-creditor will always get his judgment-debtor adjudicated an insolvent by putting him into prison or otherwise under section 9 of the Insolvent Act. He will thus prevent execution under other decrees from being effectual, and as the judgment of the Insolvent Court does not come under the Civil Procedure Code, section 295, he will secure the whole property for himself. In other cases there will be collusion between a dishonest debtor and a friendly creditor with the same result. The object of the Official Assignee in this application is to divide the insolvent's property among all the creditors.

I submit that a judgment entered up under section 86 of the Insolvent Act comes within the provisions of the Civil Procedure Code, and must be executed under that Code. First I say that such a judgment is a judgment of the High Court. Under Rule 42 of the Insolvent Court Rules [1] such a judgment is to be entered up by the Prothonotary, who is an officer of the High Court. See also *In re Manuel Grant Castello*[2]; *In re*

(1) Rule 42.—"The Prothonotary of the High Court shall, upon the production of an order made by the Court pursuant to the 86th section of the Act 11 and 12 Vic., cap. 21, forthwith enter up judgment for the amount against the insolvent therein named, that the Court may be enabled at any future time, if it shall see fit, to issue execution on the same against the future assets of the insolvent."

(2) 8 Beng. L. R. App., 57.

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C. R. English(1). By clause 18 of the Letters Patent, 1865, the High Court is invested with the powers of the Insolvent Court. Clause 17 of the previous Charter of 1862 is in the same words. By that clause the Insolvent Court was merged in the High Court, and Insolvency Jurisdiction (like the Matrimonial and Admiralty Jurisdiction) became a branch of the jurisdiction of the High Court. The Insolvent Court existed as a Court separate and distinct from the *Supreme* Court, but its separate existence terminated on the institution of the High Court.

[SCOTT, J., referred to the last clause of section 638 of the Civil Procedure Code.]

In the Code (Act X of 1877) that clause was differently worded, and the alteration by the amending Act (XII of 1879) which has been adopted in the present Code, shows that the Legislature recognized the Insolvent Court as a branch of the High Court to be presided over by one of the Judges of the High Court. Moreover, if the Insolvent Court existed as a separate Court, the clause would speak of *the* Insolvent Court, not *an* Insolvent Court. The section was intended to prevent the application of chapter XX of the Code to a judgment of the High Court.

But, assuming that the Insolvent Court is not the High Court, I contend that section 649 of the Civil Procedure Code applies, and that, therefore, we are entitled to execution. Even if the judgment is a judgment of a separate Court yet when entered up by the officer of the High Court it becomes the judgment of the High Court (see cases cited *supra* and section 86 of the Insolvent Act), and being such can be executed without applying to the Insolvent Court at all. This is not now an insolvent matter. It has passed out of that stage, and so section 638 of the Code does not apply. But if that is not so, and if we must apply under section 86 of the Insolvent Act, then under that section we must apply to "the Court", not to "a Judge", and so section 638 does not apply. But if not, it may nevertheless be enforced under section 649. The Insolvent Court is a Civil Court, and this is a civil proceeding. Insolvency procedure is civil procedure, or we should not

(1) 7 Calc. L. R. 378.

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find in the Civil Procedure Code (XIV of 1882) a whole chapter (chap. xx) devoted to insolvency procedure. See also definition of "civil" in Wharton's Law Lexicon. Clauses 11 to 18, inclusive, of the Letters Patent, 1865, are under the heading "Civil Jurisdiction of the High Court". It may be suggested that the omission from clause 39 of the Letters Patent, 1865, of a provision for making rules for Insolvent Court is against me, but it is not so. That clause is not exhaustive as shown by the use of the word "including": see *per* Westropp, C. J., in *Balvantráv* v. *Purshotam*[1]. Moreover, section 91 of the Insolvent Act (11 and 12 Vic., c. 21) had already provided for the making of rules.

In one case (unreported) West, J., has held that an order under Rule 149 of the Supreme Court Rules, that an attorney should recover his costs, was a process which entitled him under section 649 to come in for rateable share of the debtor's property.

[BAYLEY, J.—Rule 42 of the Insolvent Court Rules is against you.]

That rule was passed in 1869. The later Civil Procedure Code is inconsistent with it, and overrules it.

I contend that, even if the Insolvent Court is distinct and independent of the High Court, and if its judgment is not a judgment of the High Court, yet nevertheless that the Insolvent Court would order execution of its judgment under the Civil Procedure Code. If it cannot do this, then it has no power to order execution at all. It cannot order a *fi. fa.* under clauses 34 and 35 of the Charter of the Supreme Court. These clauses do not apply to the Insolvent Court if it be a distinct Court. The Supreme Court is abolished, and the Insolvent Court cannot exercise the powers which formerly belonged to it or which are now possessed by the High Court, because, *ex hypothesi* the Insolvent Court is distinct from the High Court. Acts V and VI of 1855 are now repealed. But they referred to the Supreme Court, and, *ex hypothesi*, the Insolvent Court is distinct and is not affected by them.

July 14. BAYLEY, J.—The question in this case is whether a judgment entered up under section 86 of the Insolvent Act is to be executed under the provisions of the Charter of the late Supreme

(1) 9 Bom. H. C. Rep. at p. 106.

Court, or under the provisions of the Civil Procedure Code now in force. The matter came before Mr. Justice Scott in chamber, and was referred by him to this Court, before whom it was argued on the 28th March last.

Bhagwándás Hurjivan was adjudicated an insolvent on the 29th July, 1880, and on the 27th April, 1881, he filed his schedule showing debts to the amount of Rs. 76,217-12-3. On the 7th September he obtained his personal discharge under section 47 of the Act, and judgment was ordered to be entered up against him in respect of the debts in his schedule in accordance with the practice of the Court. By the sealed order of the Court dated 7th September, 1881, it was ordered and declared that the insolvent was entitled to the benefit of the Act, and that his person should be protected from arrest until further order to the contrary in respect of the debts in his schedule, and it was "further ordered that judgment be entered up against the said insolvent in the name of C. A. Turner, Esquire, the Official Assignee of this Honourable Court, and his successor or successors for the sum of Rs. 76,217-12-3, the amount of the debt stated in the schedule of the said insolvent as due."

By Rule No. 42 of the Rules of the Insolvent Court dated 12th October, 1869, it is provided that "The Prothonotary of the High Court shall, upon the production of an order made by the Court pursuant to the 86th section of the Act 11 and 12 Vic., cap. 21, forthwith enter up judgment for the amount against the insolvent therein named, that the Court may be enabled at any future time, if it shall see fit, to issue execution on the same against the future assets of the insolvent."

On the 13th February, 1884, on a motion made in the Insolvent Court on behalf on the Official Assignee an order was made by the Commissioner in the following terms:—"It is ordered, under section 86 of the Indian Insolvent Act, that execution be taken out upon the judgment already entered up against the said insolvent in the name of the said Official Assignee against the arrears of interest accrued due and future interest to accrue due to the said insolvent in respect of the share to which he is entitled on a sum of Rs. 30,000 under the terms of the will of the late Premji

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Jivan, deceased, dated the 30th January, 1868, and under the terms of a deed of trust dated the 30th July, 1870, made between Morárji Goculdás, since deceased, and Mánekvahoo of the one part, and the said Morárji Goculdás of the other part, for the sum of Rs. 54,297-11-6, by attachment of the monies now in the hands of the executors of the said late Morárji Goculdás, being the arrears of interest due to the said insolvent in respect of his share in the said sum of Rs. 30,000 up to the 25th August, 1882, and by attachment of the monies due to him and to accrue due to him hereafter by way of interest on his said share, &c., &c."

At the hearing of this application it was suggested that it might be desirable to inquire what has been the practice of the High Court at Calcutta and Madras in cases similar to this. Accordingly, by the direction of this Court, letters were written by the Prothonotary to the officers of both these Courts requesting them to give the required information. A reply has been received from Madras, stating that no application has ever been made to the High Court there to enter up judgment under section 86 of the Insolvent Act; and Mr. Belchambers, of the High Court of Calcutta, in his reply states that only one judgment has been entered up under that section in the Court at Calcutta (in the year 1872), but that this judgment was not enforced. So that we have no precedent in either Court to assist us in determining the matter now before us.

On consideration, however, the question does not appear to present any difficulty, and I think the practice now to be followed in executing a judgment entered up under this 86th section is that which is laid down in the provisions of the Civil Procedure Code (Act XIV of 1882). [His Lordship read section 86[1].]

(1) Section 86 of the Insolvent Act.—Provided always, and be it enacted, that in all cases where any insolvent shall not have obtained his discharge in the nature of a certificate as aforesaid under this Act, the said Court for the relief of insolvent debtors may, if in the circumstances of the case, it shall think fit, before making such order for such discharge, direct a judgment to be entered up against such insolvent in the Supreme Court of the Presidency within which such Court for the relief of insolvent debtors shall be situate in the name of the official assignee or assignees, or of such official assignee as the Court shall think fit for the amount of the debts or demands stated in the schedule of such insolvent as due or claimd and of such as shall be established in the said Court against the said insolvent's

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The Insolvent Act was passed in the year 1848, and at that time the Supreme Court of Bombay was still in existence. By clauses 34 and 35 of the Supreme Court Charter provision was made for issuing execution by writs of *fi. fa.* and *ca. sa.* These clauses are as follows :—

"34.—And we do further authorize and empower the said Supreme Court of Judicature at Bombay to award and issue a writ or writs, or other process of execution, to be prepared in manner before mentioned, and directed to the said sheriff for the time being, commanding him to seize and deliver the possession of houses, lands or other things recovered in and by such judgment, or to levy any sum of money which shall be so recovered, or any costs which shall be so awarded, as the case may require, by seizing and selling so much of the houses, lands, debts, or other effects, real and personal, of the party or parties against whom such writs shall be awarded, as will be sufficient to answer and

estate or so much thereof as shall appear at the time of such order to be due, which said order shall be filed in the said Court for the relief of insolvent debtors in India, and the production of such order or of a copy of such order, under the seal of the said Court of which order, copy and seal no proof shall be requisite other than the production of such order or copy, shall be sufficient authority to the proper officer for entering up the said judgment : and then and in every such case, and notwithstanding the provisions hereinbefore contained, if at any time it shall appear to the satisfaction of the said Court that such insolvent is of ability to pay such debts or demands or any part thereof, or that he is dead, leaving assets for such purpose, and that under the circumstances the same is reasonable and proper, the said Court may, if it shall think fit, order execution to be taken out upon such judgment against the property of such insolvent, whether the same may or not be by law vested in his assignee or assignees, for such sum of money as under all the circumstances of the case the said Court shall order such sum to be distributed rateably amongst the creditors of such insolvent according to the mode hereinbefore directed in the case of a dividend, and such further proceedings may be had upon such judgment as the Court may from time to time order, until the said debts or demands shall be fully paid and satisfied and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time or change of parties, or otherwise, but execution shall at all times issue thereon by virtue of the order of the said Court for the relief of insolvent debtors from time to time. Provided always that in case any application against any such insolvent for the purpose aforesaid shall appear to the Court to be vexatious or oppressive, it shall be lawful for the said Court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party making the same as to the said Court shall appear reasonable.

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satisfy the said judgment, or to take and imprison the body or bodies of such party or parties until he, she, or they shall make such satisfaction, or to do both, as the case may require.

"35.—And we direct and appoint, that the several debts to be seized as aforesaid, shall, from the time the same shall be extended and returned into the said Supreme Court, be paid and payable in such manner and form as the said Court shall appoint, and no other; and such payment, and no other, shall from thenceforth be an absolute and effective discharge for the said debts, and every of them respectively."

The question is whether the procedure laid down by these clauses is now to be adopted in enforcing execution of judgments entered up under section 86 of the Insolvent Act or the procedure directed by the Civil Procedure Code. It is clear that this question is simply one of procedure, and the rule with regard to the effect of legislation upon matters of procedure is well known. The rule is clearly stated by Wilde, B., in *Wright* v. *Hale*[1]. He says: "Where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is that the Act does apply without reference to the former law or procedure." Further on in his judgment he says: "What is the right the suitor has? The right of action is the right to bring the action: and what is the right to bring the action? To have it conducted in the way and according to the practice of the Court in which he brings it: and if any Act of Parlaiment or any rule founded on the authority of an Act of Parliament alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing: the right of action does not involve the right to keep all the consequences of that right as they were before. It gives him the right to have the action conducted according to the rules that are then in force with respect to procedure." The rule there laid down was

(1) 30 L. J. Ex. (N. S.) p. 40. S. C. 6 H. & N., 227.

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followed by this Court in *Frámji Bomanji* v. *Hormasji Barjorji*[1], and I think it is to be applied in the present case.

By the Royal Charter Act (24 and 25 Vic., c. 104, sec. 8) the Supreme Court of Bombay was abolished, and under the Charter of August, 1862, the High Court came into existence. It was contended in argument that the Insolvent Court thereupon became merged in the High Court. I do not think so. I think it continues still in existence side by side with the High Court. It is constituted by a separate Act of Parliament (11 and 12 Vic., c. 21) which is still in force. By section 3 of that Act the Insolvent Court is ordered to be held, and I know of no ground which would justify us in holding that the Court so constituted and directed "to be holden once a month at least throughout the year" has been abolished. Section 73 provides that there shall be an appeal from the Insolvent Court to the Supreme Court, and section 76 gives the Supreme Court power to make rules for the Insolvent Court. These powers have now been transferred from the Supreme Court to the High Court, but I do not see that they affect the separate existence of the Insolvent Court.

Is there anything in the charter of the High Court or in the Civil Procedure Code which indicates that in cases like the present the old procedure should be followed rather than the new procedure laid down by the Code. The proceedings in the present case commenced in July, 1880, when Bhagwándás Hurjivan was adjudicated insolvent. The Civil Procedure Code then in force was Act X of 1877. The order for execution was made on 13th February, 1884, the Civil Procedure Code then in force being Act XIV of 1882. In both these Codes the provisions which are material to the present case are substantially the same.

The section relied on by Mr. Inverarity was section 649[2]. [His Lordship read the section.] I think there can be no doubt that the order for execution, whether it be regarded as one issued by the High Court or by the Insolvent Court, was a civil proceeding.

(1) 3 Bom. H. C. Rep. 49.

(2) Section 649.—The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding.

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The Insolvent Court, too, is a Civil Court existing for the purposes of giving relief to persons unable to pay their debts, so that whether we consider the nature of the order or the character of the Court by which it was made, I think the case comes within this section, and that these provisions are to be applied. Formerly the Insolvent Court availed itself of the machinery of the Supreme Court as auxiliary to its own, and since the institution of the High Court the machinery of that Court has been used by the Insolvent Court in the same way. The 18th clause of the Charter provides that one of the Judges of the High Court shall preside in the Insolvent Court, and that clause is one of a series of sections which come under the general heading "As to Civil Jurisdiction".

In the present case the Insolvent Court made the order. That order was taken to the Prothonotary of the High Court, who thereupon entered up judgment. I think the judgment became a judgment of the High Court, and the subsequent proceedings in enforcing that judgment are to be taken under the provisions of the Civil Procedure Code. I see no distinction between this case and that of an ordinary money decree. In February of this year it was discovered that the insolvent had assets available for his creditors; an application was immediately made to the Insolvent Court, which issued its order that these assets should be realized by the ordinary execution process for the benefit of those creditors.

It was said that the difficulty arose from the concluding clause of section 638 of the present Civil Procedure Code (Act XIV of 1882) which provides that "nothing in this Code shall extend or apply to *any Judge* of a High Court in the exercise of jurisdiction as an Insolvent Court." The words in the previous Code (Act X of 1877) are slightly different, *viz.*, "Nothing in this Code shall apply to *any High Court* in the exercise of its jurisdiction as an Insolvent Court." I do not see that the alteration in the new Code makes any real difference because it is *the Court* through the Commissioner which exercises the jurisdiction given by the Insolvent Act, and it is immaterial whether you speak of a Court or of a Judge. What has the Judge done here? He has made the

order that execution shall issue. But execution is not taken out from the Insolvent Court. That Court has no machinery for that purpose. It is taken out through the Prothonotary of the High Court, and it must be deemed to be a proceeding of the High Court regulated, therefore, by the provisions of the Code.

The effect of legislation dealing with procedure upon proceedings instituted subsequently was fully discussed in *Ratansi Kalliánji's Case*(1), where the question was whether the new Code (Act X of 1877) applied in case of debtors already imprisoned under the previous Code. There it was held that the new Code did not apply. Westropp, C. J. (at p. 165) says: "It seems to me impossible to account in a manner respectful to the Legislature, for its silence in the new Code on these matters, except on the highly reasonable supposition that it deemed them to be sufficiently provided for by section 6 of the General Clauses Act either as things done, or proceedings commenced before the new Code which repealed the old Code came into operation. This hypothesis is perfectly consistent with the existence of an ample field for the operation of section 3 of the new Code, removing, as such a supposition would, from the scope of that Code such proceedings (after decree) as had been initiated before and were pending when the new Code came into force, and leaving within its range all proceedings (after decree) initiated subsequently to its coming into force, even though the suits, in which such last-mentioned proceedings may be taken, are suits which were commenced and the decree itself was made before the new Code came into operation." In that case all the Judges seemed to be of opinion that if nothing more than merely the passing of a decree against the debtor had taken place before Act X of 1877 came into force the provisions of that Act would have applied to any subsequent proceedings to enforce it, and would have regulated the term during which imprisonment in execution could be prolonged, *viz.*, six months. In the case before them, however, the debtor had been already arrested and imprisoned in execution before the new Code came into force, and the old law which was in operation at the time of his arrest permitted imprisonment for

(1) I. L. R., 2 Bom., 148.

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two years in execution. Green, J., in his judgment said (p. 208): "I think that for the execution of decrees in suits commenced before that date, and whether such decrees themselves be of a date prior or posterior to the same date, the parties can, after the said 1st October, 1877, resort only to the provisions of the new Code, and that, for instance, under any warrant of arrest ordered to issue subsequently to that date, whether in execution of a decree prior or subsequent to the same date, the judgment-debtor cannot be imprisoned for a period longer than six months."

In the present case all the proceedings in connection with the insolvency have taken place since 1880. At that time the Code (Act X) of 1877 was in force, and that Code does not differ in any material particulars from Act XIV of 1882.

Being of opinion that this is a matter of mere procedure, and that the judgment in question is a judgment of the High Court, I have no doubt that the proper procedure to be taken in the present case is that which is laid down in the Civil Procedure Code, and not that which is provided in the 34th, 35th clauses of the Charter of the late Supreme Court. The decree should be executed under the Code.

SCOTT, J.—I fully concur with the conclusions arrived at by my learned brother. I had considerable doubt on the question when I referred it to a Division Court, but further consideration and the able argument of counsel have made the matter quite clear.

The question referred relates to the procedure to be followed in execution proceedings resulting on a judgment entered up by the Insolvency Court under section 86 of the Indian Insolvency Act.

Under section 86 of that Act the Insolvency Court may, in its discretion, before making the order for discharge under section 60 of the same Act, direct a judgment to be *entered up against the insolvent in the Supreme Court* for the amount of the debts in the schedule. And if at any time it shall appear to the satisfaction of the Insolvency Court, that the insolvent is able to pay all or any part of the debts, or that he is dead, leaving assets, *the Insolvency Court may in its discretion order execution to be taken*

out upon the judgment entered up in the Supreme Court for any sum the Insolvency Court may think proper: and the sum realized shall be divided as in the case of a dividend.

The present question arises concerning such a judgment entered up during the existence of the Supreme Court. The execution of the judgment has been sanctioned by the Insolvent Court, and we are asked to decide whether the execution to be taken out should or should not be conducted in accordance with rules concerning execution laid down in chapter xix of the present Civil Procedure Code.

There is no doubt that the High Court exercises the same jurisdiction, took over all the work, and inherited all the powers that were vested in the Supreme Court whose jurisdiction it superseded. Under the 9th section of the High Court Charter the judgments entered up in the Supreme Court by the Insolvency Court would be transferred to the High Court. Had they been executed in the time of the Supreme Court there is no doubt they would have been executed according to the Supreme Court Procedure. But as that Court is abolished, and the High Court has inherited all its duties and powers, how ought those judgments to be executed now?

The transfer of all duties and powers to the High Court would obviously include the transfer of this unsatisfied judgment, and creditors of the insolvent are, *ex debito justitiæ*, entitled to its execution. Yet as the Supreme Court with all its execution machinery has been swept away it is clear that either the judgment must be executed under the execution rules of the High Court contained in the present Procedure Code, or it cannot be executed at all. The question, therefore, turns on the applicability of the Procedure Code.

In the consideration of this question it is important to bear in mind that although, *ex post facto*, legislation, or, in other words, the retroactivity of new laws is not admitted in matters of substantive right, that rule does not apply to enactments which affect only the procedure and practice of the Courts. It does not follow that because a suitor has a cause of action he has also a vested right to enforce it by the course of procedure and practice

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which was in force when he began his suit. If an Act of Parliament alters the mode of procedure, he has no other right than to proceed according to the altered mode. See Maxwell on the Interpretation of Statutes, p. 199; *Wright* v. *Hale*[1]; *Attorney General* v. *Sellem*[2].

The principle laid down in *Wright* v. *Hale* was followed in *Kimbray* v. *Draper*[3]. Lord Justice Blackburn there says: "The canon of decision in *Wright* v. *Hale* is that when the effect of an enactment is to take away a *right, primâ facie* it does not apply to existing rights, but when it deals *with procedure only, primâ facie* it applies to all actions pending as well as future."

In the present case from the time the Insolvency Court accorded leave to execute the judgment which occurred in 1881, there only remained the formal application to the Prothonotary for execution. No question of vested right remained unsettled. There only remained, therefore, a pure matter of procedure to which, on the authority just cited, the existing law applies, although another law may have been in vigour at the time this case was commenced. It is clear, therefore, that the present rules of procedure apply, unless there is specific legislation to the contrary.

All existing legislation as regards execution is to be found in chapter xix of the Code of Civil Procedure. The Code further says (see section 649) that chapter xix is applicable to the execution of any judicial process ordered by any Civil Court in any civil proceeding. In the present case the Insolvency Court—undoubtedly "a Civil Court" in its realization of assets for distribution—orders "execution of a judicial process"—to wit, the judgment entered up under section 86. Thus the case is one to which section 649 clearly applies. But section 638 was cited in opposition to this conclusion. That section says that nothing in the present Code of Procedure shall apply to "any Judge of the High Court in the exercise of jurisdiction as an Insolvent Court." But the Insolvency Court has nothing to do with the procedure to be followed in the execution of this judgment. It is a judgment entered up in the High Court which

(1) 30 L. J. Ex. 40 *per* Wilde, B. (2) 10 H. L. C. 704 *per* Lord Wensleydale.
(3) L. R., 3 Q. B., 161.

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remained suspended until the Insolvency Court gave its sanction for execution. But the execution itself is a proceeding of the High Court with which the Insolvency Court has absolutely no connection. The Insolvency Court itself has no power of execution at all. It can only enter up judgments under section 86 of its Act, and those judgments are not executory without its sanction. But once they are executory, the execution is carried out by the High Court in its ordinary and not in any way in its insolvency jurisdiction. I do not think, therefore, this case comes within section 638.

In conclusion I am of opinion that this execution must be carried out according to the rules laid down in chapter xix of the present Civil Procedure Code (Act XIV of 1882).

Attorneys for the Official Assignee.—Messrs. *Smith and Frere.*

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Birdwood.

BHIKAIJI RA'MCHANDRA OKE (ORIGINAL PLAINTIFF), APPELLANT, *v* NIJA'MALI KHA'N (ORIGINAL DEFENDANT), RESPONDENT.* *May 5.*

Khoti Settlement (Bom.) Act I of 1880—Land Revenue Code (Bom.) Act V of 1879, Sec. 162—Khot's right to profits for one year when khoti village under Government attachment—Right to levy same from khoti co-sharer—Limitation.

The position of a *khot,* in the villages to which the Bombay Khoti Act I of 1880 has been extended, is that of a superior holder, and in the event of attachment of his village his rights in respect of *khoti* profits, on his resuming the management of the village, would be regulated by section 162 (1) of the Revenue Code,

*Second Appeal, No. 610 of 1883.

(1) Section 162—The village or share of a village so attached shall be released from attachment, and the management thereof shall be restored to the superior holder on the said superior holder's making an application to the Collector for that purpose at any time within twelve years from 1st of August next after the attachment.

* * * The Collector shall make over to the superior holder the surplus receipts, if any, which have accrued in the year in which his application for restoration of the village, or share of a village, is made, after defraying all arrears and costs; but such surplus receipts, if any, of previous years shall be at the disposal of Government.