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IN THE MATTER OF RAMSOONDER BANDOPADHYA.

might affect the decree, such as an application for a re-hearing, had to be made not to the Court to which the decree was transferred, but to the Court by which the decree was made, in this instance, the Deputy Collector; see the case of *In the matter of S. M. Juggodumba Dossee* (1).

We therefore hold, first, that no appeal would lie to the Judge; and, second, that he was wrong in holding that the Deputy Collector had no jurisdiction to re-hear the case.

The rule must be made absolute, and the decision of the Judge dated the 9th of July 1872 quashed.

Before Mr. Justice Macpherson.

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Jan. 23 & 27.

NICHOLAS EDWARD KELLY *v.* MARY HANLON.

Promissory Note endorsed by an Insolvent—Right of Official Assignee to intervene—Act VIII of 1859, *s.* 73.

THIS suit was brought to recover Rs. 7,000 due on a promissory note, dated the 15th February 1872, made by the defendant, and payable to one Charles Henry Lane, or order. Lane, on the 21st June 1872, endorsed the note to the plaintiff for value. The suit came on for hearing in the first instance as an undefended cause, when it appearing in evidence that Lane had been insolvent, and that the note had been delivered to him and endorsed by him to the plaintiff between the dates of his obtaining his personal and his final discharge. Macpherson, J., directed the suit to stand over for a week, and notice to be given to the Official Assignee. Thereupon, the Official Assignee gave notice of his intention to intervene. His application was supported by an affidavit of Mr. Dignam, his attorney, who stated that the plaint in this suit was filed on the 14th December 1872; that the plaintiff had stated in his evidence that, when the note was endorsed to him, he had paid Lane Rs. 6,000 for it, and that he knew that Lane had been insolvent; that Lane had filed his petition in the Insolvent Court on the 7th September 1871; that on the same day the usual vesting order was made; and that Lane obtained his personal discharge on the 5th November 1871. and an order absolute for his discharge in the nature of a certificate on the 11th January 1873.

Mr. *Ingram* for the Official Assignee now applied for an order that the suit be adjourned, and the Official Assignee be added as a plaintiff or defendant. The note was not negotiable by delivery. The plaintiff's title depends entirely on the act of an insolvent. If he had recovered the money, he would have recovered it merely for the benefit of Lane's creditors, and we could make him hand over the money as being money received to our use—Byles on Bills, 464, and the cases collected in the note to *Miller* v. *Race* (2). [MACPHERSON, J.—Kelly was scarcely a *bonâ fide* purchaser. He admits he knew that Lane had been insolvent.] We now ask for an order under Act VIII of 1859, s. 72.

(1) *Ante*, p. 22.

(2) 1 Smith's L. C., 16th ed., 468.

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Mr. *Goodeve* for the plaintiff contended that Mr, Dignam's affidavit made no case for the Official Assignee to come in as a party to the suit. A person seeking to intervene under s. 73 must show on his affidavit a clear right to come in, which has not been done here. It does not appear either in the affidavit, or in the evidence, that the plaintiff knew the facts; and he has not been fixed with the knowledge that Lane was insolvent when the note was endorsed. Kelly as *bona fide* endorsee, has a legal right against the defendant, and is entitled to a decree, leaving the Official Assignee to pursue whatever course he pleases—*Braithwaite* v. *Gardiner* (1). The rights of the Official Assignee will be in no way affected by the plaintiff obtaining a decree. [MACPHERSON, J.—It is rather the question whether it would not be the most convenient course for all parties to add the Official Assignee as a party.] The Court has no power to add the Official Assignee as plaintiff or defendant under s. 73. He claims adversely both to the plaintiff and the defendant, and, therefore, ought not to be added as a party—*Joy Gobind Doss* v. *Goureeproshad Shaha* (2), *Ahmed Hossein* v. *Mussamut Khodeja* (3), *Ñga Tha Ya* v. *Mi Khan Mhaw* (4). [MACPHERSON, J.—There are two courses, either of which I may adopt. I may allow a decree to be entered up for the present plaintiff, and not allow execution to issue without notice to the Official Assignee; or I may adjourn the hearing, the Official Assignee undertaking to file a plaint against the defendant.]

Mr. *Ingram* in reply submitted that the Court ought to dismiss the suit at once. The cases cited by Mr. Goodeve do not apply. The question in *Braithwaite* v. *Gardiner* (1) was one of estoppel, not of the real owner stepping in and saying that the plaintiff never had any title—*Thomason* v. *Frere* (5) and *Pinkerton* v. *Marshall* (6).

Cur. adv. vult.

MACPHERSON, J.—The plaintiff sues as endorsee of a promissory note, made by the defendant in favor of one Lane, who endorsed it to the plaintiff. The promissory note was given to Lane pending his insolvency,—that is to say between the dates of his obtaining his personal and his final discharge; the note, therefore, was the property of the Official Assignee, if he chose to claim it, and not the property of Lane. It is true that so long as the Official Assignee did not interfere or claim the money, the maker of the promissory note was liable to Lane, and Lane or Lane's endorsee for value could sue upon it—*Drayton* v. *Dale* (7). But it is also equally true that the Official Assignee had a right to intervene, and so defeat the right of the insolvent at any moment: and *Crofton* v. *Poole* (8) is an authority that the Official Assignee may come in at any moment, even after action brought. *Braithwaite* v. *Gardiner* (1), on which Mr. Goodeve relied, carries the case

(1) 8 Q. B., 473.
(2) 7 W. R., 202.
(3) 3 B. L. R., A. C., 28, note.
(4) 5 B. L. R., 371.
(5) 10 East., 418.
(6) 2 H. Bl., 334.
(7) 2 B. & C., 293.
(8) 1 B. & Ad., 568.

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no further than this, that as between the maker of the note and the insolvent, the maker, having promised to pay the insolvent or order, can not afterwards dispute the insolvent's right. The decision in *Braithwaite* v. *Gardiner* (1) does not touch the question as to the right of the Official Assignee to intervene.

It is clear to me that the Official Assignee has a right in some shape or other to intervene in this matter, and prevent the money being lost to the estate of the insolvent. The question is, in what form should he intervene? I might almost say that there is sufficient evidence, as the case now stands, to justify me in adding the Official Assignee as a defendant, and then dismissing the suit, allowing the Official Assignee to raise the defence which the present defendant is estopped from raising. But the better course probably will be to postpone the further hearing of this suit for a month, to enable the Official Assignee to institute a suit upon the promissory note. If the Official Assignee does not institute a suit within a month I shall take it that he does not intend to claim the money, and that he assents to a decree being made in this suit in favor of the plaintiff.

On the facts now before me, there is much reason for believing that the transaction was simply an arrangement to prevent this money from falling in to the Official Assignee's hands.

Before Mr. Justice Pontifex.

RUSSICKLALLDAY AND OTHERS *v.* JADUBRAM DAY AND OTHERS.

1873
April 1.

Security for Costs by Plaintiff residing out of the Jurisdiction of the High Court—Act VIII of 1859, *s.* 34.

THIS was a suit for the administration of the estate of a deceased Hindu. The plaintiffs resided at Chandernagore, out of the jurisdiction of the High Court, and it was admitted by the defendants that the plaintiffs had a certain interest in the property, the subject matter of the suit; but the extent of that interest was disputed.

Mr. *Branson*, for the defendants, applied that the plaintiffs might be ordered to furnish security for costs under s. 34 of Act VIII of 1859.

Mr. *Evans*, for the plaintiffs, was not called upon.

PONTIFEX, J.—The provisions of s. 34 of the Code of Civil Procedure are not intended to apply to a case like the present, where the plaintiffs bring a suit for the administration or partition of property in which, as is admitted by the defendants, they are entitled to a share, the extent of such share being in dispute. The motion must be dismissed with costs.

(1) 8 Q. B., 473.