

payable in Calcutta; they are then negotiated, and in the ordinary course of business pass through various hands, and are presented in Calcutta. On these bills an implied contract arises, the plaintiff by accepting, promising to pay the bills 51 days after date, and the defendant undertaking to indemnify the plaintiff, if he has not sufficient funds in his hands to meet them when they become due. This is a sufficient indemnifying. This case does not exactly resemble any other case, as where bills are sent down to Calcutta to be accepted by the agent of the drawer, because here they have passed through the hands of third parties, nor as where there has been an interview between the plaintiff and the servant or agent of the defendant, and where an express contract has been come to. This, however, makes no difference. The bills were made payable and presented in Calcutta, and therefore I think, the whole cause of action arose in Calcutta.

MARKBY, J., concurred.

Attorney for the plaintiff: *Mr. Paliologus.*

1868

DHANRAJ
v.
GOBINDA-
RAM.

Before Mr. Justice Norman.

WINTER v. GARTNER.

1868

June 25.

Execution-Creditor—Attachment—Insolvency of Judgment-Debtor—Sale by Order of Official Assignee—Subsequent dismissal of Insolvent's Petition—Attachment by another Execution-Creditor—New Vesting Order.

Property of A. was attached under a decree obtained by B. After the attachment, but prior to the sale, A. was adjudicated an insolvent, and the usual vesting order was made. On the following day, the agents of the Sheriff by the order of the Official Assignee, sold the property attached for the recovery of the amount of B's decree, &c., and the proceeds of the sale were handed over by them to the Official Assignee. Subsequently, the petition of the insolvent was dismissed. Immediately thereupon, on the same day, C., another execution-creditor attached the proceeds of sale in the hands of the Official Assignee. B. applied to the Court to order the Official Assignee to hand over the proceeds to the credit of his cause. On the same day, A. filed a fresh petition in the Court for the Relief of Insolvent Debtors and a second vesting order was made. C. claimed that the proceeds of sale should be handed over to him. *Held*, that B. was entitled to have the proceeds paid to him.

1863
 WINTER
 v.
 GARTNER.

THIS was an application on behalf of the plaintiff, that the Official Assignee of the Court for the Relief of Insolvent Debtors might be ordered to pay the sum of rupees 1,936-0-9 to the credit of this cause.

On the 26th of September 1867, the plaintiff obtained a decree for the sum of rupees 2,118 and costs, and procured an attachment to be issued against the personal property of the defendant, under which the Sheriff of Calcutta seized certain movable property of the defendant. On the 5th of February 1868, the Court ordered that the Sheriff should sell the property attached in execution of the decree, and pay the proceeds of such sale to *the credit of this cause.* On the 27th of February, when the Sheriff was about to sell the property, through the agency of Messrs. Mackenzie, Lyall & Co., the defendant filed his petition in the Court for the Relief of Insolvent Debtors, and was adjudicated an insolvent, and on the same day a vesting order was made. On the 28th February, Messrs. Mackenzie, Lyall, & Co. sold the property. The catalogue was headed "*Winter v. Gartner—*" "Mackenzie, Lyall, & Co. are instructed by John Cochrane, Esq., Official Assignee, to sell by auction, &c., the stock-in-trade, &c., for the recovery of the sum of rupees 2,118, with interest at 6 per cent., &c., and rupees 269-15 for certain taxed costs, &c., besides Sheriff's charges, poundage, &c." The net proceeds of the sale, amounting to rupees 3,253-5-3, were, on the 27th of April, paid by Messrs. Mackenzie, Lyall, & Co., to the Official Assignee. On Saturday, the 13th of June, the petition of the insolvent came on for hearing, and on such hearing, the petition was dismissed. On the same day, immediately after the dismissal of the petition, another creditor, Mr. John, attached the proceeds of sale in the hands of the Official Assignee, but on the morning of the day on which this application finally came before the Court, the defendant again presented his petition to the Court for the Relief of Insolvent Debtors, and a fresh vesting order was made. Mr. John, in his affidavit, stated that, on the 6th of January 1868, he obtained a decree against the defendant for the sum of rupees 2,000, with interest, and on 10th of January obtained a writ of execution under which the Sheriff attached the same property, which had before been seized by him no

behalf of the plaintiff. He also alleged that the sale took place not under directions of the Sheriff, but by the authority of the Official Assignee.

1868

WINTER
v.
GARTNER.

Mr. *Lowe*, for Mr. John, opposed the application.—The property is rightly in the hands of the Official Assignee under section 7 of the Insolvent Act. Until attached property has been sold, it belongs to the judgment-debtor, and on his becoming insolvent, would be vested in his Assignee under the order of the Insolvent Court: *Ramprasad Roy v. Kalachand Das* (1). Here the sale had not taken place when that order was made. It was to have taken place on the 27th February under the direction of the Sheriff, but the goods were handed over to the Official Assignee, and the sale took place on the 28th, under the authority of the Official Assignee. The fact that the petition was afterwards dismissed does not make the Official Assignee a wrong-doer as regards the sale. This is provided for in section 7. The money has never come into the hand of the Sheriff. When money has been attached by an order of the Court, an order of the Court must be obtained before it can be released and handed over to the judgment-creditor. *Tujanchand v. Jawahir Mall* (2). Before this has been done, he is not entitled to the proceeds of sale. A vesting order of the Insolvent Court is now in force. That is a good order, and by it these proceeds are vested in the Official Assignee.

Mr. *Marindin*, in support of the application.—The 7th section of the Insolvent Act does not apply to this case, for there has been no adjudication. An order was made, but all the proceedings under it are null and void, by the subsequent dismissal of the petition, and although the Assignee would be protected by the order from all actions, &c., in respect of what he had done under it, yet it would not operate to take away the rights of the judgment-creditor, and immediately the petition was dismissed, he was entitled to be paid. If the Official Assignee had taken property of a person, wrongfully supposing it to be in the order and disposition of an insolvent, and the petition of

(1) 1. I. J., N. S., 325 & 373. (2) S. D. R. (N. W. P.), 1864, 128.

1868

 WINTER
 v.
 GARTNER.

the insolvent had been afterwards dismissed, though no action would lie against the Assignee for his acts, yet the rights of the true owner of the property to have it restored would not be affected. The sale was perfectly valid, and took place by authority of the Sheriff, although not on the day originally fixed. The case of *Ramprasad Roy v. Kalachand* (1). is not similar to this, for there the judgment-creditor had taken no proceedings to sell the property, but here instructions to sell had been issued, and a day fixed for the sale.

NORMAN, J.—(After stating the facts). The question is, whether under these circumstances, the plaintiff is entitled to have the monies in the hands of Mr. Cochrane paid to the credit of this cause. In cases which have come before this Court, it has been repeatedly determined, that property of a judgment-debtor seized in execution of a decree, remains, notwithstanding the seizure, the property of such judgment-debtor, and, consequently, if he becomes insolvent before sale, the specific property passes to the Official Assignee under the provisions of the 7th section of the Indian Insolvent Act. But the monies realized by a sale in execution do not belong to the judgment-debtor. They are realized by the sale of his property under the process of the Court, and we must look to the provisions of Act VIII. of 1859, under which the sale takes place, to see to whom the proceeds are appropriated by that Act. Now the 270th section provides, that “when property is sold in execution of a decree, “the person on whose application such property was attached, “shall be entitled to be first paid out of the proceeds thereof.” Therefore, until the execution-creditor has been paid, no other person has any right to the money. It follows that the Official Assignee acquires no title to the monies except a right to the surplus after satisfaction of the decree.

In the present case, the monies did not come into the hands of the Sheriff, and Messrs. Mackenzie, Lyall, & Co. did, in point of fact, sell under the orders of the Official Assignee, and paid over the money to him. But I think, it must be taken

(1) 1 I. J., N. S., 325 & 373.

that Messrs. Mackenzie, Lyall, & Co. having been authorized to sell by the Sheriff, as well as by the Official Assignee, must be deemed to have sold under all the authorities which they possessed. Indeed it is pretty clear from the form of the headings of the catalogue, that they intended to exercise all such authorities, if that were material. Now the authority of the Sheriff was perfectly good, legal, and valid, and it subsisted at the time of the sale. The Official Assignee was acting under an adjudication made by a Court having no jurisdiction, and which was afterwards annulled. Although, for many purposes, a sale under a petition which is afterwards dismissed, is valid under section 7 of the Indian Insolvent Act, for instance, so as to give a title to the property sold, or to protect the Official Assignee or the broker or auctioneer, who has acted under his instructions, it cannot, in my opinion, operate so as to affect the rights of the execution-creditor. The sale gives to the Official Assignee no title to the proceeds; nor can it alter the rights of the debtor. The directions given by the Official Assignee, acting under a void adjudication, to the auctioneer, must, as against the Sheriff, under whose authority the sale was being legally conducted, be treated as a mere unauthorized attempt by a stranger to interfere with the execution of the order for sale. That being so, the sale must be deemed to have taken place in execution of the decree.

Under section 270 of Act VIII. of 1859, the right of the execution-creditor to the proceeds of a sale attaches immediately upon the sale. It is, then, wholly immaterial whether the auctioneers who, as I have said, must be taken to have been the mere agents of the Sheriff for the purpose of conducting the sale, did, in fact, pay over the money to the Sheriff, or not. We have seen that neither the interference of the Official Assignee, nor the receipt of the money by him, can give to the judgment-debtor any right to the proceeds of the sale. On the dismissal of the petition, the Official Assignee became liable to pay over the proceeds of the sale, either to Messrs. Mackenzie, Lyall, & Co., or to the Sheriff. The proceeds of sale in his hands were not monies belonging to the defendant, Gartner, and therefore the subsequent attachment by Mr. John is wholly inoperative, and

1868

WINTER
v.
GARTNER.

1868

WINTER
v.
GARTNER.

for the same reason these monies did not pass under the subsequent insolvency of Gartner.

On these grounds, I am of opinion, that the plaintiff is entitled to the order prayed for, *viz.*, that the money remaining in the hands of Mr. Cochrane be paid to the Comptroller General of Accounts to the credit of this cause.

The plaintiff is entitled to the costs of this application against the defendant, as part of the costs of the execution.

Attorneys for plaintiff: *Messrs. Judge and Hechle.*

Attorney for Mr. John: *Mr. Carapiet.*

Before Mr. Justice Markby.

1868

July 18.

IN THE MATTER OF TIETKINS, AN INSOLVENT.

Jurisdiction—Residence—Insolvent Act (10 & 11 Vic., c. 21.), s. 5—Letters Patent, 1865, s. 18.

The petitioner came down from Cawnpore, where he had resided for some time, to Calcutta, to file his petition. He stated that he intended to settle in Calcutta on obtaining his discharge. *Held*, that his being in Calcutta under these circumstances did not constitute residence. *Held* also, that by s. 18 of the Letters Patent, the jurisdiction of the Insolvent Court has been narrowed to the Bengal Division of the Presidency of Fort William, *i.e.*, that portion of the Presidency over which the authority of the Lieutenant-Governor of Bengal extends.

Semle—Under s. 5 of the Insolvent Act, the residence of the petitioner must be within the local limits of the Ordinary Original Jurisdiction of the High Court.

ON the hearing of the petition of Tietkins, an insolvent, a preliminary objection was taken that the Court had not jurisdiction to entertain the petition of the insolvent, on the ground that he was not resident within the jurisdiction, within the meaning of section 5 of the Insolvent Act.

Mr. *Woodroffe* for the petitioner.

Mr. *Kennedy* and Mr. *Lowe* for opposing creditors.

The facts of the case sufficiently appear in the judgment.

MARKBY, J.—I am satisfied that I have no jurisdiction in this case.