

are necessary to create a charge on the property if the intention of the parties is sufficiently expressed by the words used in the instrument. There is also a decision of the Agra High Court, by Morgan, C. J., and Roberts, J., of the 30th January 1867, *Martin v. Purram* (1), which takes the same view.

L. S. Jackson, J.—I concur in the judgment delivered by the Chief Justice.

E. Jackson, J.—I am of the same opinion.

Markby, J.—This case was referred to the Full Bench by Mr. Justice Bayley and myself, because we thought the document which we were called upon to construe was a simple covenant not to alienate until payment of the money due under a bond of the same date, and we thought it desirable to ascertain whether such a document constitutes a mortgage. For the translation which was then agreed upon by the pleaders on both sides as the basis of our judgment, the Full Bench has substituted one made by an officer of the Court, upon which, I understand, our present judgment proceeds.

All the members of the Court, except myself, think that there are to be found in this new translation expressions which amount to more than a mere covenant not to alienate—expressions which indicate an intention to create a mortgage.

Of course if this is so, the general question upon which Mr. Justice Bayley and myself expected the decision of the Court to turn does not arise; but I own that I have had some difficulty in discovering, even in the new translation, the expressions which indicate an intention to create a mortgage apart from a covenant not to alienate; and I should have still preferred that the decision of the Court should have turned upon the mere general question which we suggested. As, however, this will not be the case, I think it is sufficient for me to say, that I doubt whether the document before us is any thing more than a simple covenant not to alienate until payment of the bond.

(1) 2 Agra H. C. Rep., 124.

B. L. R. Vol. V, p. 309.

(Original Civil.)

The 11th July 1870.

Before Mr. Justice Norman.

In the matter of JOHN BODRY, an Insolvent.

Distress—Vesting Order, Time of Operation of—Priority of Official Assignee.

A distress levied after the filing of the petition of insolvency, but before the vesting order is drawn up, is invalid as against the Official Assignee.

A vesting order is made when it is given by the Court, and not at the time it is drawn up, signed, and sealed.

THIS was an application, on notice, for an order that the Official Assignee and assignee of the insolvent J. Bodry should forthwith release the property of the insolvent distrained by his landlord, Alibax Cazi, on July 1st; and that the same should not be sold by him, or, if sold, that the said Alibax Cazi should be paid the full amount of rent due to him by the insolvent from the proceeds of sale; and that the costs of application be paid by the Official Assignee.

From the affidavits put in in support of the application, it appeared that certain premises in Calcutta had been let on lease by Alibax to J. Bodry at a rent of rupees 275 per month, payable on the 15th day of each succeeding month for the month past; that the bills for rent for the first five months of 1870 were presented to him for payment as they respectively became due, but he omitted to pay them, until in June 25th, he paid rupees 100 for part of January, and promised to pay the balance for January, viz., rupees 175 by the 6th July; that five days after the payment, viz., on the 1st July, Alibax was informed that J. Bodry intended to take the benefit of the Insolvent Act, and he thereupon on the same day instructed his attorney, Mr. Fink, to distrain the property of the said John Bodry for rupees 1,275, being the amount for the first five months of the year less rupees 100 already paid; that he granted and signed a warrant of distress to one of the bailiffs of the Sheriff of the town of Calcutta, authorizing him to distrain the premises; that the bailiff did, accordingly, on July 1st, at 12-15 P. M., distrain four billiard tables on the said pre-

mises, the property of the said J. Bodry, but the Official Assignee claimed to be in possession on behalf of the creditors of the said J. Bodry.

It also appeared that prior to the seizure by the bailiff, J. Bodry had filed his petition of insolvency, but that no vesting order had been sealed, signed, or deposited with the Assignee; and that no schedule had been filed or presented by the said insolvent, nor was there then filed or presented any order or petition for time to file the schedule.

Mr. Hyde, in support of the application, contended that the 6th Section of the Insolvent Act made it necessary for the insolvent, at the time of presenting his petition, to present his schedule also, or to obtain further time from the Court in which to file it; that neither of those alternatives having been complied with in this case, the vesting order made therein was invalid; and that a distress made between the filing of the petition of insolvency, and the making of the vesting order, was valid as against the Official Assignee.

The effect of the vesting order, made under Section 7 of the Insolvent Act, is to vest all the property in the Official Assignee; and at Common law, a distress made on the property, while left on the premises, would be a perfectly legal one. But by Section 22 of the Insolvent Act, it is enacted that, "after the making of the vesting order, no distress shall be made for rent due before the vesting order;" the section does not preclude a distress being made between the filing of the petition and the making of the vesting order. The words of the English Act, 7 & 8 Vict., c. 96, s. 18 are different; there the filing of the petition is the time fixed, after which no distress levied would be valid. If the Legislature had intended the Indian Act to be the same, the same words would have been introduced as in the English Act. Such distress was valid, even though no sale had taken place under it.—*Wray v. The Earl of Eyremont* (1), a case decided on the Insolvent Act, 7 George IV, c. 57, s. 31.

Mr. Ingram, for the Official Assignee, contended that the distress having been made after the filing of the petition, was invalid. Section 22 of the Insolvent Act makes it invalid if made after the vesting order; and by Section 7, the filing of the petition and the making of the vesting order are contemporaneous, and date from the

same time; the words are:—"upon the filing of any such petition as aforesaid, it shall be lawful for the Court, and the Court is hereby authorized and required to order, &c.;" and the vesting order must be taken to be made and operative when delivered orally by the Court, and not only after the time occupied in writing it and signing and sealing it.

Mr. Hyde in reply.

Norman, J.—The vesting order must be deemed to have been made, at the time when it is given by the Court, and not from the time when it is possibly drawn up. The distress, having been made after the time when the vesting order was thus made, was invalid. The application is refused with costs.

Application refused.

Attorney for Applicant: *Mr. Fink.*

Attorneys for the Official Assignee: *Messrs. Carruthers & Co.*

B. L. R. Vol. V, p. 312.

(*Privy Council.*)

The 1st March 1870.

Present:

*The Right Hon'ble Sir James Colville,
Sir R. Phillimore, Lord Justice
Giffard and Sir Lawrence Peel.*

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL (*Defendant*),

versus

MUSSAMUT KHANZADI (*Plaintiff*).

*On Appeal from the High Court, North-Western
Provinces.*

**Acts of Government Officials Binding
Government—Act IX of 1859.**

Where, by a decree of the Special Commissioner's Court, established under Act IX of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials of making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government