reasonable and fair exercise of such a power on the assumption of its existence. We think, therefore, that the partnership must be taken to be legally continuing, and that an account must be taken on the footing of a still continuing partnership, and not limited to the time of filing the bill. The imputed misconduct in overdrawing is not of that gross character which would have justified a Court of Equity in dissolving a contract of partnership on the ground of misconduct. The evidence fails to establish the graver head of imputation, that by studied and fraudulent concealment, effected through deceptive entries in the partnership books, by his instrumentality introduced, **[127]** Mr. Russell had overdrawn his account. The evidence in fact fails to show that these entries can be brought home to Mr. Russell as his entries. Mr. Ashburner might at any time, by an inspection of the books, which was always in his power, have discovered what had been done, (as observed by Lord Eldon in his judgment in *Goodman* v. *Whitcomb*, 1st Jacob and Walker, p. 593). Mr. Ashburner seems to have considered the precautions he subsequently named, as adequate securities against extravagance or overdrawing; and to this part of the memorandum no objection appears to have been offered on Mr. Russell's part. We think the proof fails to show that a dissolution could have been obtained by resort to a Court of Equity on the ground of gross misconduct: and that no ground exists for refusing the account to the full extent for which it is asked. Mr. Russell is entitled to a moiety of the share of the retiring partner; therefore, to a seven annas share from the retirement of such party.

The case by the cross bill not being established by proof, that bill must be dismissed.

PLEA SIDE.

RADANATH SAHA *v.* A. F. SMITH, SHERIFF, &c.

GOPEENATH SAHA *v.* SAME. (1847. *July* 8. *Thursday.*)

Mofussil process Sheriff, Trespass—Pleading Justification under Act 23d of 1840.

Trespass against the Sheriff for breaking and entering three closes of the Plaintiff and seizing and sealing three godowns situate thereon. *3d Plea*—After stating that a writ had been issued by the Judge of Zillah Backergunge, directed to the Nazir of that Zillah commanding him to distrain certain lands goods and chattels as per accompanying list "A pucka built dwelling-house including out-offices and golahs or godowns, containing rice about 59,000 maunds, situated in Sotah Looty Hautcollah, belonging to Mirtonjoy Saha and others," in satisfaction of a decree against them by the Court of Sudder Dewanny Adawlut; proceeded to justify thereunder, stating that the above writ, being duly delivered into the office of the defendant as sheriff, and duly endorsed under the hand and signature of a Judge of this Court (according to the provisions of Act 23 of 1840) the defendant was directed to execute the same as such sheriff (which he did) within the limits of Calcutta and thereby committed the trespass complained of. *Demurrer* in substance, that the plea disclosed no defence to the action, and that it contained an argumentative denial of Plaintiff's property. *Held* on both points—that the plea was *good*.

TRESPASS—for breaking and entering divers, to wit three several golahs or godowns of the plaintiff, situate severally and respectively at Hautcollah in Calcutta, and **[128]** then making a great noise and disturbance therein, and staying and continuing therein making such noise and disturbance for the space of ten hours then next following; and also for then seizing and sealing the said three several golahs or godowns, and then locking up and fastening the same respectively, for a long space of time, to wit from thence hitherto, whereby the plaintiffs were disturbed in the peaceable possession thereof, and were deprived of the profits and advantages accruing from such possession, and also of divers goods, to wit 10,000 maunds of rice, of the value of Co.'s Rs. 20,000, then and still being within the said golahs or godowns.

The plaint also contained a count de bonis asportatis.

Second plea—That at the time of the committing of the said several trespasses in the plaint alleged to have been committed by this defendant, he, this defendant, was sheriff of the town of Calcutta, and that the said golahs, godowns, and goods, in the said plaint mentioned were all respectively at the time last aforesaid situate and being within the town of Calcutta, and that by an act of the Legislative Council of India, duly made and published, and entitled Act No. 23 of 1840, it was, among other things, and in substance and effect, enacted to wit as follows. "That any writ, warrant, or other process issued by any Court, Judge, or Magistrate, in the territories beyond the local limits of the Supreme Court of Calcutta, Madras, and Bombay, respectively, may be executed within those limits in manner following; a copy of such writ, warrant or other process, authenticated as such by the attestation of the Court, Judge or Magistrate signing or issuing the same, accompanied by a certified translation in the English language, shall be presented to any Judge of Her Majesty's Courts, who may thereupon, under his hand and signature, endorse and direct the same to be executed within the local limits of any of Her Majesty's Courts, by the sheriff, or by any justice of the **[129]** peace, according to the nature of such writ, warrant, or other process so endorsed as aforesaid, to any such sheriff as aforesaid, and every such sheriff shall make a memorandum of the date of such delivery, and shall execute such writ, warrant, or process in like manner as if the same had originally issued from any of Her Majesty's Courts, and had been delivered at the date as appearing by the memorandum; and such sheriff shall make no distinction as to priority or otherwise between the execution of any writ, warrant, or other process originally issued from any of Her Majesty's Courts, and the execution of any writ, warrant, or other process under this Act; but every writ, warrant, and other process, whether original or endorsed as aforesaid, shall amongst each other be subject to the same rules, touching the mode and order of execution, as are now established in respect of writs, warrants, and other process originally issued from Her Majesty's Courts of Justice," and this defendant says that whilst he was such sheriff as aforesaid, to wit on the 10th day of March, 1847, a certain writ or process from the Court and Judge of the zillah of Backergunge was duly delivered into the office of the defendant, as such sheriff as

aforesaid, which said writ or process was in substance and effect to wit as follows.

"To the Nazir of the Court of Dewanny Adawlut for the zillah of Backergunge.

"Whereas Mirtonjoy Saha, Dhumonjoy Saha deceased (his wife's name not known, but is termed Sondamoney in the wakeelut-nameh,) and Jadaub, heir of Hurrikhisto Saha, Nilkant Roy, Boycaunt Roy, (son of Ramjoy Saha deceased,) Khennissurree (wife of Ruttonjoy Roy deceased) Ramnath Saha Gourmoney (wife of Buddinath Saha deceased,) were directed by a decree of the Court of Sudder Dewanny Adawlut, under date the 3rd of December, 1845, to pay to Baboo Gopaul Loll Thacoor the sum of Co.'s Rs. 4,177-2-5 with interest at 12 per. **[130]** cent. per annum to the day of payment, which to the 17th of February amounts to Rs. 921-3, and Rs. 998 for costs of suit of the zillah Court, and Rs. 556-5-5 of the presidency Court of Sudder Dewanny Adawlut, amounting to Rs. 6,652-12-5: and whereas the said Mirtonjoy Saha and others having had notice of this decree, have omitted to liquidate the same; these are therefore to command you to levy the said sum of Rs. 6,652-12-5, and the sum of Rs. 26-2 for the cost of executing this process, by distress and sale of the lands, goods, and chattels (as per accompanying list) of the said Mirtonjoy Saha and others, and you are hereby ordered and directed to distrain the lands, goods, and chattels of the said Mirtonjoy Saha and others, and to sell and dispose of the same within thirty days, unless the sum of Rs. 6,678-14-5, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid: and you are hereby commanded to certify to me what you shall do by virtue of this warrant.—Given under my hand and the seal of the Court at Burrisaul, this 4th day of March, 1847.

"R. J. LOUGHNAN,
"*Judge.*"

List of property, &c. belonging to Mirtonjoy Saha and others—defendants—

"A pucka built dwelling-house including out offices and golahs containing rice about 59,000 maunds situated in Sootah Looty Hautcollah."

Zillah Backergunge,
Dewanny Adawlut.
4th March, 1847

"R. J. LOUGHNAN,
Judge."

And this defendant saith, that the said zillah Court of Backergunge was and is a Court of the East India Company, having competent jurisdiction and authority to **[131]** issue such writ or process as aforesaid, and that the said R. J. Loughnan was the duly constituted Judge of the said last mentioned Court, and had competent authority to sign and issue the said last mentioned writ or process; and this defendant saith, that after the said writ or process had been so duly delivered into the office of this defendant, as such sheriff as aforesaid, the same was, to wit on the 11th day of March, 1847, duly (under the provisions of the said Act No. 23 of 1840) presented to Sir Henry W. Seton, Knight, (he the said Sir H. W. Seton, Knight, being one of the Judges

of this Court,) who did thereupon, under his hand and signature, endorse and direct the same to be executed by this defendant, as such sheriff as aforesaid, within the limits of the said Supreme Court, as required by the said Act No. 23 of 1840, and thereupon the said writ or process, with the said endorsement of the said Sir H. W. Seton, Knight, thereon, was again duly re-delivered to this defendant, as such sheriff as aforesaid, to be executed as aforesaid, and thereupon this defendant did, as such sheriff as aforesaid, duly execute the same within the limits of Calcutta, and at the same time in the said plaint in that behalf alleged, in the execution of the said writ or process so endorsed as afore said, then and there committed the said several acts in the said plaint alleged and complained of as acts of trespass. Verification.

Demurrer to second plea.—That the same amounts to the general issue. That the plea constitutes no defence to the cause of action. That it does not deny the property of the plaintiff in the said godowns and goods, and their possessory right thereto; but if it does, still such denial is framed in an uncertain, argumentative, and circuitous manner, and by implication only:—That the plea admitting as aforesaid the possessory title of the plaintiff and the commission of the trespasses, proceeds to justify the said trespasses and seizure complained of, under **[132]** authority of law, and by virtue of process against the said Mirtonjoy Saha and others, without going on to allege that the said M. Saha and others, or any or either of them, had any title, superior or otherwise, to that of the plaintiff to the said goods and godowns, or that they or any of them possessed goods (independently of the goods of the plaintiff) within the said godowns, or even that the defendant had reasonable cause for suspecting that such was the fact:—that, even supposing the said writ in the said plea mentioned authorized the defendant to seize the very lands, goods, and chattels in the said writ specified, (without enquiring whether or not they were the property of the party against whom such writ issued,) still there ought to have been a statement or allegation in the said plea, showing that those lands, goods, and chattels so seized thereunder, were identical with the godowns, goods, and chattels in respect of which the action is brought: because, for ought that appears in the said plea, the said godowns, goods, and chattels in the plaint mentioned are other and different to the lands, goods, and chattels, which the said writ may have authorised the defendant to seize, otherwise, the plea justifies a trespass in respect of which the plaintiff does not sue.—Joinder in demurrer.

The pleadings in the case of *Gopeenath Saha* v. *Smith, Sheriff, &c.* and the points raised by the demurrer were identical with those in *Radanath Saha* v. *Smith, Sheriff, &c.* the two cases were subsequently called on and argued together.

On the opening of the argument, the defendant's counsel prayed leave of the Court, with consent of the other side, to amend the pleas, ore tenus, with reference to the last objection taken by the demurrer. An averment was accordingly introduced to the effect " that the golahs, goods, and chattels seized, were identical with the golahs, goods, and chattels in the writ and plaint mentioned."—The argument then proceeded on the other objections.

[133] Mr. *Taylor* in support of the demurrer in the case of Radanath Saha. Mr. *Morton* in support of the demurrer in that of Gopeenath.

Without the aid of the averment now introduced, the plea would clearly have been bad. In its present amended form, the question attempted to be raised is whether the sheriff is not altogether exonerated from liability in the execution of a writ, which specifically directs him to seize specific goods and chattels, as the property of the party against whom the process issues, and whether such specific direction does not relieve him from responsibility, although he seize, in fact, the property of a third party.

[*The Chief Justice.*—Is it necessary that the sheriff should look beyond the writ, which directs him to seize the identical property mentioned in it, as the property of the defendant ?]

It is submitted that his common law liability attaches in every case, whether the direction to seize be general or specific, and he is bound to make enquiry as to the true ownership. This is an execution under a mofussil writ, which directs the sheriff to seize the lands, goods, and chattels of those persons against whom the judgment in the mofussil proceeded, at the same time giving a description of certain property assumed to belong to those individuals. This was sufficient to impose upon the sheriff the duty of making enquiries as to the true ownership of the property in question. If, on enquiry, it was ascertained that it did not belong to the defendants in the mofussil suit, the sheriff might have returned "nulla bona," and such a return would have been good : because, as the form of this writ is not general, but limits the power of the sheriff to seize the particular goods and chattels in the writ described, and those only, the sheriff's duty, on his ascertaining that the goods belonged to per-**[134]**sons other than those against whom the mofussil process issued, would cease and determine :—or he might have returned the writ to a Judge of this Court for further instructions under the circumstances. The list is very loose and indefinite in its terms : so much so, indeed, that it is difficult even now to guess, whether the property actually seized is the same as that which the Magistrate, issuing the writ, intended should be seized. There may have been half a dozen persons in the possession of golahs, with rice deposited in them, in Sootah Looty Hautcollah,—and already several persons appear as plaintiffs upon the records now before the Court, and under discussion, claiming various portions of the property seized. But this description of the goods after all is mere surplusage. If this property, instead of being specifically mentioned in the writ, had been manually pointed out by the creditor himself, it is clear that the sheriff would have been liable, had the property seized turned out to be that of the wrong person. The written direction to seize in no respects differs from a verbal one. In the latter case the sheriff is bound to make enquiries, and there is no reason why he should not in the former. The Act No. 23 of 1840 contains express directions that the process and execution of these writs, after delivery into the hands of the sheriff, shall be assimilated to the practice of this Court, and the sheriff's liabilities in respect thereof shall be the same. The form of writs of execution adopted in this Court is general, not

specific. When, therefore, a mofussil writ under this Act is placed in the hands of the sheriff for the purpose of being executed, the form should be general; otherwise it is irregular, and ought not to be endorsed by the Judge, or to be executed at all.

[*The Chief Justice.*—There is a form of writ in this Court directing the sheriff to seize a specific chattel, for **[135]** instance in detinue, where the direction is to seize the very thing detained.]

No doubt, the judgment in order to be consistent and regular, must follow the nature of the original cause of action, but even in detinue, although the judgment is that "plaintiff do recover the very goods and chattels sued for, or their value," still the sheriff is directed to distrain on *all* the lands and chattels of a defendant within the bailwick to satisfy that judgment. In execution for debt, however, the form in this Court is invariably general, and the writ set out in the plea discloses this to have been an execution for *debt*. Had this writ therefore been issued out originally from this Court, the form should, and in fact would have been, as of course, general; and as the practice in regard to these mofussil writs is assimilated to that of this Court, the form of the writ under discussion ought to have been general also.

[*The Chief Justice.*—The mandatory part directs the sheriff "to levy by distress on the lands, goods, and chattels, as per accompanying list, and to sell the same," this is analogous to the writ of distringas of this Court.]

It is submitted that is not so. Even in the writ of distringas in detinue, the mandate is to distrain on *all* the lands and chattels within the bailwick, until a further command be issued to the sheriff, so that the defendant render the chattel or the value thereof. But the form in the present instance is analogous to none known in the practice of this Court. With regard to the fact of the endorsement of the writ by a Judge of the Supreme Court, it can scarcely be thence inferred, that the sheriff acted *judicially*, inasmuch as that endorsement operated only as an authority to execute the writ according to its exigency within the jurisdiction of this Court. The mandate being **[136]** to the sheriff, shows that he acted in a ministerial capacity only, and without the endorsement of the Judge, he could not have acted at all. If the sheriff be not liable, a mofussil creditor may point out any lands or goods, belonging to strangers, within the jurisdiction of the Supreme Court, as the property of his debtor; and having thus illegally satisfied the debt due to himself, he may, by avoiding the jurisdiction, render the party suing in respect of the trespass wholly without remedy.

Mr. *Dickens* in support of the pleas was stopped by the Court.

SIR L. PEEL, C.J. It may be proper to consider upon the construction of this act, whether a process in this form should hereafter be endorsed; that, however, at present, it is unnecessary to decide. The real question is, whether the sheriff who executes a mofussil writ, endorsed under the hand of a Judge of this Court in the manner directed, can be made liable in trespass. Now the sheriff need not look beyond his writ, for that is his protection. On these pleadings it must be assumed that the Court below had competent jurisdiction to issue

the writ; the mandatory part of it directs the sheriff "to proceed by distress and sale of the lands, goods, and chattels of the said Mirtonjoy Saha and others, as per accompanying list:"—this is analogous to certain writs both in real and mixed actions, which proceed against specific lands or goods and chattels: as, for instance, in replevin. The sheriff is protected, if he obeys the mandate. The general direction is equivalent to a direction that the sheriff is to execute the writ in a mode similar to the practice of this Court. Suppose the Court to be in error in thus directing the sheriff, the latter is not therefore responsible; the fault would be that of the Court and not of the sheriff. It is like applying a wrong form of **[137]** writ to the particular action; the Court might be wrong, but the sheriff need not look beyond his writ.

It has been questioned whether this writ sufficiently points out the specific property to be seized. We think it does so: there is certainly no direction to seize the goods of the party generally; and unless the direction were specific, the sheriff would, in fact, have nothing to seize. The obscurity here is in the vagueness of the description of the specific things attempted to be described. The substantial objection therefore cannot prevail. Nor do we think the pleas contain an argumentative denial of the property of the Plaintiffs.

Demurrers overruled.

THE QUEEN *v.* OGILVIE, IN RE RADACAUNT DUTT.

(1847. *8th July, Thursday.*)

Habeas corpus, Right of Hindu father to Custody of infant child.

When an infant, supposed to be improperly in custody, is brought up on *habeas corpus*, the Court will (if he appear to be capable of exercising a sound judgment and discretion) allow him to depart wherever he lists; minority simply will not entitle a father to the custody of his child.

A WRIT of habeas corpus was moved for to be directed to one James Ogilvie, of Cornwallis-Square, Simlah, in the Town of Calcutta, commanding him to bring up to the Supreme Court, the body of Radacaunt Dutt, an infant under the age of 16 years, alleged to be detained in his custody. The writ was obtained upon an affidavit in substance to the effect "that Radacaunt Dutt was an infant of the age of 14 years 11 months and 19 days; that he had for some time previously received his education as a day-scholar at Queen's College in Cornwallis-Square, Simlah, in Calcutta, of which institution James Ogilvie was resident teacher and superintendant, and whereof he had the management. That one evening Ramchund Dutt, the father of Radacaunt, finding the child had not returned home, proceeded to the school, and on ascertaining his son to be there, requested James Ogilvie to allow him to take him away; James Ogilvie replied that Radacaunt was not forcibly restrained from **[138]** accompanying his father, and the child might go, if he wished it, but (he added) that no force should be used to compel him to do so. Whereupon Ramchund attempted to lead Radacaunt away, but resistance was made by