LETCHEMANAN v. SANMUGAM et al.

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D. C., Colombo, 5,547.

Judgment upon promissory note—Promissory note in favour of " Me. A. Ru. A. Ru. Letchemanan Chetty "—Letchemanan Chetty, agent of undisclosed partners—Death of such partners—Motion by Letchemanan Chetty for writ of execution—Legal position of Letchemanan Chetty in the case—His right, as agent of undisclosed principals, to sue for and recover the debt—Customs of Tamil traders—Natukotte Chetties—Application for writ of execution—Compromise of the decree—Motion of defendant to have the compromise recorded as certified as an adjustment of the decree—Civil Procedure Code, section 349.

A borrowed money on a promissory note from Letchemanan Chetty, who, being a Tamil, was carrying on trade as "Me. A. Ru. A. Ru. Letchemanan Chetty." He received judgment under this name, and moved for a writ of execution against A, whereupon A appeared in Court and proved that " Me. A. Ru. A. Ru." represented two partners R & N; that they were both dead; that their executors were trading under the style of " Me. A. Ru. A. Ru. "; and that Letchemanan had no authority from them to continue the present action.

Held, that the conduct of A showed that he either thought that his promise to pay was to Letchemanan personally, or that he knew him to be the agent of an undisclosed principal; that in either case it was competent to Letchemanan to sue A; and that, as the debt on the promissory note had developed into a judgment and had been partly paid, the judgment with a certificate of payment and the possession of the promissory note, which would follow upon satisfaction of the judgment, would be a good defence to any claim that might be made by the executors of the plaintiff's deceased principals against the defendant.

Meyappa Chetty v. Yusoof, 5 N. L. R., 265, commented upon.

Where a writ of execution issued on 21st May, 1894, but was not put in force in consequence of an agreement entered into on 7th June, 1894, between the parties to the suit and certain other creditors of the defendant, whereby certain securities should be assigned by the defendant to his creditors, and it was provided that they should not sue the defendant so long as the said securities shall not have been realized, and that in the event of the said securities being found to be inadequate or insufficient after all reasonable and legal steps have been taken, then the said creditors " shall be at liberty to recover from the defendant the said sum of Rs. 130,000, or any balance thereof or interest thereon respectively as shall be found due and payable by them, "—

Held, upon an application of the defendant, under section 349 of the Civil Procedure Code, to have the foregoing compromise recorded as certified as an adjustment of the decree, that the agreement contemplated the future execution of the decree, and that the term " recover " was applicable to a new action as also to the requirement of the decree already obtained.

IN this action the plaintiff, suing as Me. A. Ru. A. Ru. Letchemanan Chetty, obtained judgment upon a promissory note against the defendants on 2nd May, 1894, and sued out a writ of execution, which, however, was not enforced, because of an agreement entered into between the plaintiff, defendants and

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certain other creditors of the defendants, whereby certain securities were to be assigned to the plaintiff and the other creditors. The securities having been realized, the plaintiff alleged that there was still due to him Rs. 29,319.92. He moved for a notice on the defendants to show cause why a writ of execution should not issue against them for the recovery of that amount.

The defendants showed cause, and as a preliminary objection urged that plaintiff Letchemanan could not proceed with the action as his principals were dead.

Letchemanan admitted that the judgment against the defendants was signed in favour of Me. A. Ru. A. Ru. Letchemanan Chetty, and that the firm of Me. A. Ru. A. Ru. consisted of two persons named Ramanathan and Narayanan; that Letchemanan was their agent; that the two partners were now dead; that the executors of Ramanathan's estate were trading under the style of Me. A. Ru. A. Ru.; and that Letchemanan had no authority from those executors to continue this action.

The District Judge disallowed plaintiff's application for a writ of execution on the ground that Letchemanan could no longer represent the firm for whom the present action was raised.

The plaintiff appealed.

The case came on for argument before Layard, C.J., Middleton, J., and Grenier, A.J., on the 3rd November, 1903.

Sampayo, K. C., with *H. J. C. Pereira* and *F. M. de Saram*, for plaintiff, appellant.

Dornhorst, K. C., with *W. Pereira, K. C.*, and *Wordsworth*, for defendant, respondent.

Cur. adv. vult.

10th November, 1903. LAYARD, C.J.—

The plaintiff brought this action, styling himself in the plaint as Meyna Ana Runa Ana Runa Letchemanan Chetty, to recover from the defendants on a promissory note made by them in his favour the sum of Rs. 40,000 and interest.

On the 2nd May, 1894, a decree was entered in favour of the plaintiff as follows:—

"This action coming on for final disposal before D. F. Browne, Esq., the District Judge of Colombo, on the 23rd and 28th days of April, 1894, in the presence of the Hon. the Attorney-General with Mr. Advocate Loos, instructed by Messrs. Loos and Van Cuylenberg, Proctors, on the part of the plaintiff, and of Messrs. Dornhorst and Van Langenberg, Advocates, instructed by Mr. Arthur Alvis, Proctor, on the part of the defendant: It is ordered and decreed that the defendants do jointly and severally

pay to the plaintiff the sum of Rs. 40,000, with interest thereon at the rate of 9 per cent. per annum from 1st February, 1894, till payment in full. And it is further decreed that the defendants do jointly and severally pay to the plaintiff his costs of this action."

On the 21st May, 1894, a writ of execution was issued on the plaintiff's application; execution under the writ, however, was not proceeded with at the request of the defendants, as an agreement was entered into between the plaintiff, the defendants, and certain other creditors of the defendants for the assignment of certain securities to the plaintiff and the other creditors.

These securities, the plaintiff alleges, and the defendants admit, have been realized, and the plaintiff alleges that after crediting the defendants with the amount realized as his proportion of the securities, there was and is still due to him a balance sum of Rs. 29,319.92, with interest thereon at 9 per cent. per annum from the 14th August, 1898.

On the 14th March, 1903, plaintiff moved for a notice on defendants to show cause why writ of execution to recover that amount should not issue.

Notice was allowed. No motion was made to issue writ, however, until the 1st September, 1903.

In the interval, on 24th April, 1903, the first defendant commenced proceedings, under section 349 of the Civil Procedure Code, to have the adjustment set out in his affidavit, dated the 20th of that month, recorded as satisfied.

On the 8th September last the issue of the writ was disallowed by the District Judge on the ground that Letchemanan Chetty (the plaintiff), in the witness-box on the 1st September, 1903, admitted that he instituted this action as the agent of Ramanathan Chetty, who was a principal in the firm of Meyna Ana Runa Ana Runa, and that the judgment in the case must be regarded as one in favour of Meyna Ana Runa Ana Runa, and that Meyna Ana Runa Ana Runa is the real plaintiff, and that, as Ramanathan is dead, the plaintiff no longer represents the firm Meyna Ana Runa Ana Runa.

The plaintiff has appealed against that judgment, and the question to be decided is, Who is the plaintiff on the record, and in whose favour is the judgment and decree ?

Up to the 1st September Letchemanan Chetty was treated by the defendants and the District Court as the plaintiff, and the defendants from the date of the institution of the action in 1894 until September, 1903, recognized Letchemanan Chetty as their creditor both on the original promissory note sued on and on the judgment and decree of the same year.

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The District Judge has decided that this was all a mistake, and that Letchemanan Chetty is not the real plaintiff, but that the members of the firm Meyna Ana Runa Ana Runa are the real plaintiffs on the record. Is he right ?

There is no provision in our Procedure Code, such as there is in the English rules, made under the Judicature Act, which authorize any two or more persons claiming as co-partners and carrying on business within the jurisdiction of the High Court in England to sue in the name of the firm of which such partners were members at the time of the accruing of the cause of action.

These rules are not binding on us in Ceylon; they are no part of the general law of partnership; the rule in England itself is limited to the case of persons carrying on business within the jurisdiction of the English High Court.

Our Procedure Code has no similar provision, neither does it provide, as the English rules do, for the discovery of the individuals composing the firm when an action is instituted in the name of a firm.

According to our procedure, where persons claim as co-partners they must appear individually in their own names, and if they obtain judgment it must be entered up in favour of them individually.

It is impossible for us to hold that the judgment was entered up in 1894 in favour of some unknown individual or individuals trading under the name and style of Meyna Ana Runa Ana Runa. The contention of respondents is that by prefixing the initials M. A. R. A. R. to his name Letchemanan Chetty gave himself out to the world as agent of a firm.

No doubt our Court has recognized ever since 1866 that a Chetty who signs his principal's initials binds his principal, provided the agent had authority to bind his principal (*Rámanáthan's Reports, 1863-1868, p. 209*).

He could not, however, as pointed out by Chief Justice Cayley in the case of *Letchimen Chetty v. Peria Carpen Chetty (11 S. C. R. 193)*, bind his principal by so doing unless he had express authority to do so.

Chief Justice Cayley also says in his judgment in that case that as long as the agent continued to be the agent of his principal his principal's initials were as much a portion of his name as it was of the principal's.

It is argued that the defendants, being Tamil, must have known when they made the promissory note in plaintiff's favour, that their creditor was not the plaintiff, but the firm Meyna Ana Runa Ana Runa. This certainly does not accord with Chief Justice Cayley's judgment above referred to, because he lays down that his principal's initials were as much portion of the agent's name as they were of the principal's, as long as he continued agent of the

principal. Further, in a later judgment he holds that the initials may be simply designative or they may denote agency; that is, they may either be part of the personal name which the man chooses to adopt for the ordinary purposes of life or business, or they may indicate that he intends to represent himself as the agent of some firm or individual carrying on trade under the style of those initials (*4 S. C. C. 92*).

To bring home knowledge to a Tamil Mr. Berwick, in a judgment reported at the foot of Chief Justice Cayley's judgment, says: "The Tamil must know a signatory's patronymic, and, if knowing it, he finds some other name prefixed to the individual name in the signature, he has notice that that signature is made in a representative and not in a personal capacity."

There is nothing to show in this case that the defendants knew what the patronymic of the plaintiff was; and we cannot assume that they did.

Their conduct throughout the case shows that they either thought they were promising to pay Letchemanan Chetty the money, or that they knew Letchemanan was agent for some undisclosed principal. If they contracted with Letchemanan Chetty personally, he was entitled to sue; if, on the other hand, as now appears from Letchemanan Chetty's evidence, he was acting for an undisclosed principal and the defendants contracted with him in his own name, he can sue the defendants.

He did so sue, and obtained judgment.

It appears to me that even if he had not the original right to sue, the contract has passed into a judgment, and the defendants cannot now raise the objection that on the contract he could not sue.

In the converse case Lord Tenterden in *Thompson v. Davenport* (*9 B. & C. 78*) said: "If at the time the seller knew not only that the person who is nominally dealing with him is not principal but agent, but also knows who the principal is, and notwithstanding that knowledge chooses to make his agent his debtor, then, according to *Addison v. Gandasequi* (*4 Taunt. 574*) and *Paterson v. Gandasequi* (*15 East 62*), the seller cannot afterwards, on failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between one and the other."

In *Kendall v. Hamilton* (*4 App. Cases, 504,*) Lord Cairns said: "Now I take it to be clear that where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but if he sues the agent and recovers judgment he cannot afterwards sue the principal, even although judgment does not result in satisfaction of the debt."

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If the agent can be sued by the other party to the contract he can himself sue such other party.

I think it is a well-established rule of law that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it (*Sims & Bond, 5 B. & Ad. 289*), the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if had been a contracting party.

It was suggested in the course of argument that Cayley, C.J., in a judgment reported in *4 S. C. C. 111*, had departed from the ruling of Lord Cairns in the judgment above cited, and I was rather inclined during the argument to think he had. I find that I was mistaken.

Cayley, C.J., in that case held that the principals were liable to be sued notwithstanding that the plaintiff had brought an action against the agent to recover the same claim and had been non-suited.

The plaintiff had not recovered judgment against the agent. That is consistent with Lord Cairns' judgment, for the words that he uses are not merely " if he sues the agent and proceeds to judgment," but " if he recovers judgment against the agent." On reading Chief Justice Cayley's judgment I sent for the record in D. C., Colombo, 78,900, and find on reference to it that the plaintiff was non-suited in that case, although he sued the agent attaching the initials of his principals in front of the agent's own name, and though the defendant's agent signed the proxy with the initials of his principals in front of his own name, on the ground that the plaintiff had entered into the contract with the principals and they were the proper parties to be sued—thus establishing, what I have earlier in this judgment pointed out, that according to our procedure the individual partners must, to be bound by a judgment, be actual parties to the suit, and cannot be reached through their agent if he is sued with their initials in front of his name, and that such an action was merely one against the agent personally.

It was further attempted to support the judgment of the District Judge by reference to a passage in a judgment of Bonser, C.J., in *5 N. L. R. 266*, in which he seems to lay down that where the plaintiff, one Meyappa, sued prefixing to his initials certain Tamil initial letters, it was an action by the firm who carried on business under those initials.

I have looked into the District Court record of the case in which Bonser, C.J., gave that judgment in appeal, and I cannot find that there was any material to show that Meyappa was agent for any firm until the defendant's affidavit was filed.

I am inclined to think that Bonser, C.J., could not have meant to hold that the action was one of the firm.

If he did, for the reason given by me above, I cannot agree with him.

His opinion is not in accordance with that of the previous judgments of this Court.

I, however, think, it was obviously right and just to let the defendants in to defend in that case when it became clear, as stated by Bonser, C.J., that Meyappa the plaintiff was the agent of the firm, and the defendants swore in their affidavit that he was the attorney of the firm, and that the debt he was suing for was a debt due to the firm, and that from the same firm there was due to the defendants a large sum of money.

In my opinion the order of the District Judge is wrong; the plaintiff is entitled to enforce the judgment in his favour. I can find no authority for allowing the defendants to go behind that judgment.

The order of the District Judge must be set aside and the case be returned to the District Court for the Judge to decide on the merits of the cross applications of the plaintiff, on the one hand, and of the first defendant, on the other hand. The appellant is entitled to his costs of appeal.

MIDDLETON, J.—

I agree with my lord that it is impossible to say that Letchemanan Chetty is not the plaintiff in the record, and he got judgment and received part payment before it was disclosed to the defendants otherwise than by inference from the letters preceding this name that he was an agent for an undisclosed principal.

In my opinion this decree, with a certificate of payment and the possession of the promissory note which would follow upon satisfaction of the judgment, would be a good defence to any claim that might be made by the executors of the plaintiff's deceased principals against the defendants.

The plaintiff by his possession of the promissory note would seem to me to have implied authority from his principals to sue, recover, and give receipts for payments, and this authority, which has developed into a judgment in his favour personally, in my opinion would not be terminated until the completion of the proceedings for which it had been delegated to him.

The defendants would, therefore, be discharged by payment to him (*Elliot v. Merryman, White & Tudor, Leading Cases, 896; Barn 78*).

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I think, therefore, plaintiff is entitled to enforce his judgment, and agree that the order of the District Court should be set aside with costs.

GRENIER, A.J.—

I entirely agree. I can see no legal or equitable grounds upon which the appellant can successfully resist the plaintiff's application for re-issue of writ. The appellant had acknowledged the plaintiff as his creditor up to the time the application was made, and he should not be heard to say that he is not liable to pay whatever is due at present on the promissory note simply because the plaintiff's principals are dead.

Upon the case going back to the District Court for the consideration of the cross applications of the plaintiff and the first defendant, it was contended for the defendants that after the amount of the judgment in favour of the plaintiff had been reduced to Rs. 29,319.92 there was an agreement in writing notarially entered into between the plaintiff and defendants in supersession of the decree, and that plaintiff was therefore not entitled to apply for execution on the original decree. It was urged that his remedy was by action on the agreement.

The District Judge, Mr. J. Grenier, following the judgment of Withers, J., in C. R., Colombo, 5,552 (*3 S. C. R. 168*), held that plaintiff could not be allowed to issue execution on the original decree, but that his remedy should be by action upon the agreement.

The plaintiff appealed.

The case came on for argument before Wendt, J., and Middleton, J., on the 31st August, 1904.

F. M. de Saram, for plaintiff, appellant.

Dornhorst, K.C., for defendant, respondent.

Cur. adv. vult.

12th October, 1904. WENDT, J.—

This is an appeal against the District Judge's refusal to issue execution upon the decree in plaintiff's favour. Briefly stated, the ground of the refusal is that the decree was superseded by a subsequent agreement between plaintiff and defendants. The decree was dated 2nd May, 1894, and condemned defendants to pay plaintiff Rs. 40,000, with interest at 9 per cent. from 1st February, 1894, and costs. A writ of execution issued on 21st May, 1894, but was not put in force in consequence of the arrangement arrived at between the parties and embodied in a notarial

agreement dated 7th June, 1894. In the interval plaintiff had lent defendants a further sum of Rs. 10,000, making their total debt to him Rs. 50,000; and the defendants were likewise indebted to one Arunasalem Chetty in Rs. 30,000, to one Colandavel Chetty in Rs. 30,000, and to one Cuppan Chetty in Rs. 20,000, being an aggregate debt of Rs. 130,000 " for principal, interest, and costs." The agreement was between the defendants of the one part, and the plaintiff and the three other Chetties of the other part. It recited the debts in the way I have just set forth, and also the fact that it had been agreed by and between the parties that the said claims due and payable by the defendants should be settled in the manner following, viz., that the debts should in future bear interest at 11 per cent.; that the defendants should assign the Chetties certain specified securities; that the four Chetties should apply all sums realized from such securities in reduction of the debt of Rs. 130,000 and interest thereon in proportion to the respective sums due and payable to the Chetties respectively—the interest to be first discharged and the surplus applied in reduction of principal in the proportions aforesaid; and that the Chetties should not " sue, arrest, attach, seize, levy, or prosecute the defendants or their lands, goods, or chattels for and on account of the said sum of money or of any part or balance thereof due to them respectively, so long as the said securities or sums of money or the benefits and advantages under the said recited deeds to be assigned as aforesaid shall not have been realized. Provided that in the event of the said sums of money, securities, and benefits and advantages to be assigned as aforesaid being found inadequate or insufficient after all reasonable and legal steps have been taken by the said Chetties, then the said Chetties or their respective aforewritten shall be at liberty to recover from the defendants the said sum of Rs. 130,000, or any balance thereof or interest thereon respectively as shall then be found due and payable by them."

On 16th March, 1903, the plaintiff presented the usual application for execution in respect of a balance of Rs. 29,319.82, with interest thereon at 9 per cent. from 14th August, 1898, showing in the " adjustment " column a payment of Rs. 10,680.68 on account of principal and interest up to 14th August, 1898. The application was accompanied by an affidavit of the plaintiff setting forth the agreement and stating that, the securities mentioned having been duly assigned to the Chetties, they had realized therefrom the sum of Rs. 113,431, of which the proportion due to and received by plaintiff was Rs. 43,627.30, which left a balance of Rs. 20,312.82 due by defendants on the decree, with interest at 9 per cent. from 14th August, 1898. The affidavit also stated

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subsequent facts connected with proceedings against the administrator of one C. Tambyah, the debtor on certain of the securities assigned by defendants.

By way of showing cause against the plaintiff's application the defendants filed the affidavit of the first defendant, which expressly admitted all the facts stated in plaintiff's affidavit up to the realization of the securities and the sums so produced, and did not deny the balance deposed to by plaintiff as still due. It proceeded to state that on 8th January, 1902, an agreement was come to between plaintiff and defendants and another person not named, whereby plaintiff was to be paid Rs. 11,573.25 in full settlement of all moneys due to him, and plaintiff was to convey to one S. Tambyah certain land. First defendant further deposed to payment or satisfaction of this last-mentioned sum save as to Rs. 2,000, but averred that plaintiff had failed to convey the land as agreed. On 24th April, 1903, before plaintiff's application was discussed, the defendants applied, under section 349 of the Code, to have the compromise just mentioned recorded as certified as an "adjustment" of the decree. In September, 1903, plaintiff's application was dismissed, no order being made on defendants' application, but the Supreme Court set aside this dismissal and sent the case back for the District Court to decide on the merits of the respective applications of plaintiff and defendants.

The two applications having been discussed again, the learned District Judge, on 15th December, 1903, dismissed plaintiff's application, professing to follow the decision in the case of *The Bristol Hotel Company v. Power* (*3 S. C. R. 168*). He held that the agreement of 7th June, 1894, superseded the decree, because, after it was entered into, plaintiff had not taken any steps by way of execution until March, 1903, and because the agreement nowhere said that, in default of the defendants paying any amount that might be found due at any time after its execution, plaintiff was at liberty to issue execution as if the original decree was still in existence and operative as a decree. As to the first of these grounds, the time necessarily occupied in realizing the assigned securities, in my opinion, explains the delay consistently with the continuance in force of the decree. As to the second ground, I think the agreement, read as a whole, does contemplate the future execution of the decree. It implies the existence of decrees in favour of the creditors, and provides that they shall not sue the debtors (the term "sue" being appropriate to a new action), arrest, attach, seize, levy their lands goods, or chattels (words appropriate to the execution of decrees already obtained) until the securities shall have been realized; and that in case of such securities proving inadequate the

creditors shall be at liberty to "recover" the balance of the debt. I do not see why should we construe the term "recover" as applying to a new action only and not to the enforcement of decrees already obtained, and towards the satisfaction of which the securities were to be applied.

The District Judge further quoted the words of Withers, J., in the case cited, to the effect that the decree-holder, if he wished to execute the agreement as a decree, must have it certified of record as an adjustment under section 349, and held that as plaintiff was not applying to have the present agreement so certified he must fail. I do not, however, see why the plaintiff's application for execution for the balance debt should not be regarded as embracing an application to have the agreement certified. No special procedure is prescribed for the latter application: the decree-holder is merely to "certify" the adjustment to the Court. It might well be by motion. The present application gives the Court the fullest information of the facts, sets out the agreement, and what was done in pursuance of it, and shows a balance due upon the decree, for which execution is prayed. I think it might be, and ought to be, regarded as comprising both the certificate and an application for execution upon the footing of it. And if it is so regarded, I think nothing has been shown which would disentitle plainiff to his writ of exećution, unless, indeed, defendants are able to establish the later compromise which they set up.

It was argued in appeal that the agreement was not an "adjustment," because it was not confined to the parties to the decree but brought in outsiders. and also because it dealt not only with the judgment debt, but also with a later debt of Rs. 10,000. As to these objections, I do not think that plaintiff has surrendered to his co-creditors any part of his rights under the decree. The agreement in fact simply amounts to this. A man has a number of creditors and owns certain securities which he wishes to be applied in payment of his debts. One of the creditors holds a decree for one claim, and has another claim upon which he has not sued. The parties meet, and it is agreed that the securities should be assigned to the creditors, and that until they have been realized and applied in due proportions to the reduction of the debts no legal proceedings should be taken against the debtor. The securities are in due course realized, the decree-holder gets his dividend, and duly applies it in reduction of his judgment. Why should he not get execution for the balance? He would have been entitled to it if the debtor had directly paid him in cash the amount of the dividend, and why

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should it make a difference that the payment was not simple and direct but was recovered in a tedious and roundabout way.

For these reasons I think the plaintiff is entitled to execution as prayed for, unless the defendants succeed in having the adjustment which they allege certified under section 349. The dismissal of plaintiff's application will, therefore, be set aside, and the case sent back for the hearing and determination of defendants' application. The plaintiff will have his costs up to date in both Courts.

MIDDLETON, J.—

Since the argument in this case I have had an opportunity of carefully perusing the agreement of 7th June, 1894, and I agree with my brother Wendt in the order to be made. I think the difficulty of realizing the assigned securities may fully account for the delay that has occurred.

Looking at the wording of clause 4, it would have been surplusage to use the five words following the words " shall not nor will not sue, " if the agreement had not intended that the then existing rights of all the different creditors were to be suspended till the realization of the securities was complete.

It was not necessary to use these words relating to execution in order to conserve the rights of the other creditors, who, if they could sue, would have execution as a matter of course upon judgment. I should construe that clause, therefore, as having in contemplation the suspension of the plaintiff's right to execution on his judgment, and that of the other creditors to sue in the usual way until the realization of the securities.

The word " recover " also is wide enough to include a levying in execution and suing.

If the agreement had been intended to operate in satisfaction or substitution of the plaintiff's judgment, I am at a loss to understand why the parties did not expressly declare this.

I see no objection to the application for execution of the balance of plaintiff's debt, which is apparently admitted, being treated as embracing an application to have the agreement certified.