creditor who might put in an execution. As soon as the *bonâ fide* creditor put in his execution, and sold the property, these sham decree-holders, who would really represent the judgment-debtor might come in, and completely sweep away all the assets from the *bonâ fide* decree-holder.

1884

IN RE SUNDER DASS.

But thereby says Munshi *Mahomed Yusuf*, if his client did improperly get hold of the assets, he might be made to disgorge them by a suit.

That is perfectly true; but, on the other hand, his client might run away with the money, and it is not always easy to get back money out of the hands of a dishonest person. We think that a Court is bound to see, on occasions of this kind, when assets are to be distributed, whether the claimants are *bonâ fide* decree-holders within the meaning of the section; and even if the Court should decide in favor of the claimants, the last clause but one of s. 295 is intended to give the person or persons who may be affected by that decision, the right to bring a regular suit to establish his or their rights.

We think, therefore, that the rule must be discharged.

Rule discharged.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Prinsep.

1884 *September* 10.

SOTISH CHUNDER LAHIRY (ONE OF THE PLAINTIFFS. DECREE-HOLDERS) PETITIONER *v.* NIL COMUL LAHIRY AND OTHERS (JUDGMENT-DEBTORS) OPPOSITE PARTIES. *

Sale in Execution of estate of deceased—Suit against representatives of deceased husband's estate.

In 1862 a suit for mesne profits was brought against certain persons as being the heirs of one Romanath Lahiry deceased, among whom were his widow and two infant sons; during the pendency of this suit, the two infant sons died; and the widow was made a defendant as representing the estate of her deceased sons.

The suit was decreed in favor of the plaintiffs in 1875; and on the plaintiffs applying for execution the widow objected that 5-16th of the properties, against which execution was sought, was the property of her adopted son

* Civil Rule No. 539 of 1884, against the order of J. J. S. Driberg, Esq., Deputy Commissioner of Dhubri, dated the 31st of December 1883.

1884

SOTISH CHUNDER LAHIRY v. NIL COMUL LAHIRY.

whom she alleged to have adopted in 1874; the adopted son was not made a party to the suit; this objection was overruled, but the same objection was taken by the adopted son through his natural father as his guardian and next friend, and the Court released the 5-16th share from attachment, and allowed the objection.

Against this order some of the plaintiffs appealed, but pending the appeal another of the plaintiffs applied to the High Court under s. 622 of the Code of Civil Procedure to have the order set aside. The Court, whilst refusing to interfere with the order, inasmuch as there appeared to be no material irregularity therein, pointed out to the lower Court that the decree of 1875 having been obtained on account of a debt of Romanath Lahiry's, and being against the widow as representing her husband's (Romanath's) estate, the estate would be answerable for the debt, whether the widow or the adopted son representated the estate, supposing the decree to have been properly obtained. The principle in *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (1) followed.

ON the 25th July 1854, one Kali Chundra Lahiry obtained possession of certain properties which had been allotted to him under certain butwara proceedings arising out of a suit brought by his late father against one Romanath Lahiry. Romanath Lahiry died in 1854, leaving two sons, Shib Nath Lahiry, the husband of one Bhubunesshuree Dabia, and Nil Comul Lahiry.

Subsequently to the death of Kali Chundra, which took place some time between 1854 and 1862, his widows, Goonomonee Dabia and Burroda Sundary Dabia, with Sotish Chundra Lahiry and Wipendra Chundra Lahiry on the 28th January 1862 instituted a suit for mesne profits, on account of the lands which had been allotted to Kali Chundra, against the heirs of Romanath Lahiry who were then in existence, *viz.*, Nil Comul Lahiry, Bhubunesshuree Dabia widow of Shibnath Lahiry, and her two minor sons. This suit was dismissed by the Court of first instance. On appeal, the High Court remanded the case to determine the amount of mesne profits recoverable by the plaintiffs, and the Privy Council subsequently upheld this latter decree. On the 6th September 1875 wasilat was decreed. During the pendency of this suit the two infant sons of Bhubunesshuree died, and the latter was made a defendant as representing the estate of her deceased sons, as well as the estate of her deceased husband, being described in the decree as "Bhu-

(1) Marsh., 614.

bunesshuree Dabia, widow of Shib Nath Lahiry, son of Romanath Lahiry."

Against this decree of 1875 an appeal was preferred by the defendants other than Bhubunesshuree, and the High Court on the 4th September 1880 modified the decree. This decree, as drawn up, made the appealing defendants liable for the amount of wasilat and costs; it was, however, amended by making all the defendants in the suit liable for wasilat and costs.

The plaintiffs applied to execute this decree, but Bhubunesshuree objected on the ground that she was not liable under it, and that 5-16th of the properties, against which execution was sought, belonged to her adopted son, Jotendro Mohan Lahiry, whom she alleged she had adopted some time before the decree was passed, but during the pendency of the suit, *viz.*, in 1874. This objection was overruled. Thereupon Jotendro Mohan Lahiry, through his natural father one Aukhoy Chundra Singh, applied under s. 278 of the Civil Procedure Code for the release of 5-16th of the properties attached, on the ground that they belonged to him as the adopted infant son, stating that he was not a party to the suit in which the decree of 1875 had been passed. On the 3rd December 1883 the Deputy Commissioner of Goalpara allowed this objection, and released 5-16th of the property from attachment. Against this order (the decree-holders) Burroda Sundary Dabia and her two minor sons preferred an appeal to the High Court, but previous to the hearing Sotish Chundra Lahiry, one of the plaintiffs in the suit, applied to the High Court under s. 622 of the Code to set aside the order of the 31st December 1883, and for the amendment of the decree by adding the name of Jotendro Mohan Lahiry as a party defendant to the suit.

Upon this application a rule was granted calling upon the judgment-debtor, and Jotendro Mohan Lahiry, through his father Aukhoy Chundra Singh, to show cause why the order of the 31st December 1883 should not be set aside, and why, if necessary, the decree of the High Court, dated 4th September 1880, should not be amended by adding therein the name of Jotendro Mohan Lahiry through a properly constituted guardian.

Mr. *Phillips*, Mr. *W. K. Dass* and Baboo *Upendra Chunder Mittra* appeared to show cause against the rule.

1884

SOTISH CHUNDER LAHIRY v. NIL COMUL LAHIRY.

Mr. *Phillips*.—The question is, whether this order of December 1883 is a proper order, and whether the Court will interfere with it under s. 622. The order is one of a competent Court exercising jurisdiction, and determining that the claim ought to be allowed. The order is not now up on appeal, and it is no question whether the Court has passed a correct order on the facts; it is not a question as to whether the Deputy Commissioner has decided on erroneous principles.

[GARTH, CJ.—Although we may not be able to interfere under s. 622, there is no reason why we should not explain to the Court below what is the law on the subject.]

Mr. *Evans*, Baboo *Annoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Mohini Mohun Rai* and Baboo *Iswara Chundra Chuckrabarti* in support of the rule.

Mr. *Evans*.—The order is a misconception of jurisdiction; the suit was instituted in 1862 against the widow and her two minor sons as representatives of the estate of her husband. It may turn out that the adopted son is the person entitled, yet, as we obtained a decree against the estate of the husband, we were entitled to execute our decree notwithstanding the adoption. See *Ishan Chundra Mitter* v. *Baksh Ali Soudagar* (1); *Court of Wards* v. *Maharajah Coomar Ramaput Sing* (2); *Jotendro Mohun Tagore* v. *Jogul Kishore* (3).

Is it not a material irregularity if Jotendra Mohan comes in and asks for the release of the estate? The answer is, it ought not to have been tried as a claim at all. It is an abuse of the claim sections to try and prevent us from executing our decree.

The order of the Court was delivered by

GARTH, CJ. (PRINSEP, J., concurring).—This was a rule obtained by Mr. *Evans* calling upon the claimant in the execution proceedings in this case to show cause why the order which had been made by the Deputy Commissioner, releasing certain property from attachment (which property is now supposed to belong to the claimant) should not be set aside, upon the ground that it was made with material irregularity.

(1) Marsh, 614.
(2) 10 B. L. R., 294.
(3) I. L. R., 7 Calc., 357.

1884

SOTISH CHUNDER LAHIRY v. NIL COMUL LAHIRY.

The circumstances are these: The suit was brought, so far back as the year 1862, by the present plaintiff against the widow and the two minor sons of Shib Nath Lahiry for mesne profits, and that suit eventually came before the Privy Council, and the Privy Council made a decree in favor of the plaintiff and sent the case back, in order that the amount of the wasilat should be ascertained.

Subsequently, in the year 1874, the widow professed to adopt, and is said to have adopted, the person whom I call the claimant. The ultimate decree that was obtained was obtained in the year 1880. Certain property was then attached as liable to satisfy the decree, and an application was afterwards made by the claimant to have the property released from attachment, upon the ground that he was in possession of it; or rather, that the widow was in possession of it for him, and that he was in point of fact in possession of it and not the widow; and the Deputy Commissioner made an order that the property should be released from attachment.

This is the order against which this rule was obtained; it is said that the Judge acted with material irregularity in making that order.

We cannot see that he acted with any irregularity. He might have made a mistake in making such an order; but it was for him to determine whether the attachment should, or should not, be set aside, and under different circumstances the order which he made might have been a proper one. But he probably was not aware of the difficulty which often attends the solution of questions of this kind in point of law.

If the decree which was obtained was virtually a decree against the husband's property, it would bind that property, whether the person sued was the widow, or the adopted son.

It is not for us to determine here what was the legal effect of the decree; but so far as we can understand, the decree was in the first instance obtained against the widow as representing her husband's estate; and it also appears to have been obtained for a debt of the husband. Therefore, whether the widow now properly represents the estate, or the adopted son properly represents the estate, the

1884

SOTISH CHUNDER LAHIRY v. NIL COMUL LAHIRY.

estate would nevertheless be answerable for this debt, supposing the decree to have been properly obtained.

This case would seem to come within the principle of a case decided some years ago in this Court, and which was afterwards approved of by the Privy Council—the case of *Ishan Chunder Mitter* v. *Baksh Ali Soudagur* (1).

The circumstances of that case were these: A widow was there sued upon a bond, which had been given by her deceased husband, and at a time when she was not the heir of her husband; because the heir of the husband was her son, of whom she was only the guardian.

The suit, nevertheless, proceeded against the widow, and a decree was obtained against her; and under that decree the husband's property was sold.

The son then brought a suit to recover this property, upon the ground that at the time when the decree was obtained against the widow, and the property sold, she did not properly represent the estate; but it was held, that as in point of fact she was the registered owner of the property, and as the suit was brought against her in respect of her husband's debt, and as by the terms of the decree the estate was rendered liable for the debt, the sale under the decree against her bound the property, although her son was no party to the suit. The principle of that decision has been adhered to in several other cases, and has been confirmed by the Privy Council. In the case of the *General Manager of Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* (2), the suit had been brought by *A* against *B* for arrears of rent, and (*B* having died pending the suit) a decree was obtained by *A* against *B's* widow, who had been made a defendant in his stead. Under that decree an execution was issued and "*the interest of the widow*" was sold under that decree. The widow in fact did not represent the estate of her husband, because there was a son who was the husband's heir. The sale was subsequently called in question by a creditor; and it was held by the Privy Council that, although the son was never made a party to the proceedings, and although the widow did not properly represent the estate, still as the decree was obtained against the estate the sale

(1) 7 Marsh., 614. (2) 14 Moo. I. A., 605.

under the decree passed the husband's property. In that case their Lordships say: The whole proceeding, if fairly looked at, amounts to this—that the estate of Gourpershad (the father) was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietrix and ostensible owner of the estate, and also the interest of the son, if he had any interest, was bound by that decree. If that be so, the question arises, whether the respondent, the plaintiff in the suit below, has any ground upon which he can come in and impeach the sale. It appears to their Lordships, that he can claim only what interest remained in Gourpershad, and that substantially the proceedings would be a bar to any claim on the part of Hurpershad." And further on their Lordships say: "Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that of *Ishan Chunder Mitter* v. *Baksh Ali Soudagur* (1). They entirely agree in the principles expressed by Chief Justice Peacock in that case, and think that they govern the present case."

There is also another authority in I. L. R., 7 Calc., 357, in which the cases on this subject are reviewed, and in which this same doctrine was acted upon.

Therefore, if, as would appear to be the fact, the decree in this case was a decree against the husband's estate, and it was obtained against the widow as representing the husband's estate, it seems, according to the principle of these cases, that it would bind that estate whether the widow or the adopted son was the proper representative.

Under these circumstances apparently, this property was attached, and the adopted son comes in and makes an application to the Court to have the property released from attachment. Probably, if the Judge had been aware of the authorities that I have quoted, instead of making the order which he did, he would have suggested, what I am about to suggest now, that the adopted son should be made a party to the proceedings (which would be, of course, perfectly fair), but that the attachment should continue, unless the adopted son were able to show some good cause why the sale should not take place.

If the decree were against the estate, it would seem, so far

1884

SOTISH CHUNDER LAHIRY v. NIL COMUL LAHIRY.

as we can see, to matter very little whether the widow or the adopted son was the proper representative. But it is quite right that the adopted son should be made a party to the proceedings, in order that, if there was any good reason against the sale, he might be able to show it.

After the observations that we have made, the plaintiff will see that his proper course will be to make an application to the Court below, to have the adopted son made a party to the proceedings.

What we are asked to do now, is to set aside the order made by the Deputy Commissioner, releasing the property from attachment or to make the adopted son a party to the proceedings. We have no power to do either one or the other. We have no materials before us, which would justify us in setting aside the order; nor have we any power in this Court to order that the adopted son be made a party to the proceedings. That, of course must be the subject of an application to the Court below.

If the adopted son is made a party to the proceedings, and another attachment is then issued, the order which has been made will be no bar to the execution.

We therefore think that the rule should be discharged, but, under the circumstances, we make no order as to costs.

Rule discharged.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884
October 9.

IN THE MATTER OF HARI MOHUN THAKUR AND ANOTHER (PETITIONERS) *v.* KISSEN SUNDARI AND ANOTHER (OPPOSITE PARTIES.)*

Burden of proof—Easement—Act X of 1882, *s.* 147.

The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would, therefore, lie upon the party alleging such rights.

THIS was a proceeding under s. 147 of the Criminal Procedure Code. The parties were zemindars of Chunderpore and Amkhuria respectively in the district of Bhagulpore. The dispute arose owing to the Amkhuria zemindars having used the water of a certain reservoir by cutting the spur of an old *bund*. It was

* Criminal Revision No. 352 of 1884, against the order of Baboo Ram Narain Banerji, Deputy Magistrate of Bhagulpore, dated the 15th September 1884.