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ties to Mrs. Dick. On the other hand the defendant should have the opportunity of showing from any other evidence that he could produce that the money used was not Mrs. Hurst's. The defendant indeed should have had evidence ready on this point, as it was in issue on the day fixed for trial. I do not understand why it was not produced if at hand, and if this suit were dismissed now the defendant would have himself to blame. But I would prefer, having regard to the fact that there are some suspicious circumstances in the case, that there should be further inquiry, and would remand the case to the Subordinate Judge in order that he should try and determine whether the purchase of Mohkampur was made by Charlotte Hurst on her own account, and with money advanced by Hurst as a loan, which she subsequently repaid to him, or whether Hurst was the real purchaser and owner, and the money paid was his own.

The determination of this issue in a satisfactory way would I think dispose of the case. The remand might be under s. 354, Act VIII of 1859. On return of the finding a week might be allowed for objections, and on the expiration thereof the appeal would be disposed of.

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## APPELLATE CIVIL.

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1878

July 22.

*Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.*

BERESFORD (PLAINTIFF) v. CHARLOTTE HURST AND ANOTHER (DEFENDANTS).\*

*Real Property—Legacy—Husband and Wife.*

*C*, a married woman, was entitled, under her father's will to certain money "absolutely, for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C* but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase money of the property purchased. *C* and her husband were married before Act X of

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\* First Appeal, No. 43 of 1878, from a decree of F. Bull & k, Esq., Subordinate Judge of Dehra Dún, dated the 3rd December, 1877. Reported under a special order of the Hon'ble the Chief Justice.

1865 came into force, and had acquired an Indian domicile. *Held* that, even if English law were applicable in the case, and any interest in the property purchased passed to *C's* husband, it passed, in view of the agreement between her and her husband, on an implied contract that he would hold the property in trust for her, and that, where such property was purchased at a sale in the execution of a decree against *J* as his property, with notice that such property was claimed by *C* as her separate property, such purchase did not defeat the title of *C*.

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THIS suit arose out of the execution of the decree obtained by Charlotte Hurst against the Mussoorie Bank, on the 3rd May, 1877, in the High Court, in the suit brought by her against the Bank the circumstances of which are fully reported at p. 762 of this volume. The report of that case and of the case of *Vaughan v. Heseltine* reported at p. 753 of this volume should be read together with this report. Before Charlotte Hurst obtained that decree, *viz.*, on the 20th September, 1876, the property in suit was sold in the execution of the decree in the suit registered as No. 185 of 1874, which was a decree in favour of the Mussoorie Bank and against Hurst and Heseltine. It was purchased by Charles Edward Beresford, the plaintiff in the present suit. Having been dispossessed by Charlotte Hurst in the execution of her decree Charles Edward Beresford eventually brought the present suit against Charlotte Hurst and Joseph Hurst for possession of Mohkampur. The plaintiff stated that he had acquired the right, title, and interest of Charlotte Hurst in Mohkampur in virtue of his auction-purchase, and that if he did not acquire any such right, title, and interest by such purchase, but acquired only the right, title, and interest in the property of Joseph Hurst, then Joseph Hurst was the sole owner of the property, and the plaintiff was entitled to it in virtue of his auction-purchase. The plaintiff alleged in support of his statement that Mohkampur belonged to Joseph Hurst as follows :

“ Mohkampur was in November, 1868, the property of Mrs. Mary Wood, widow, of Dehra. Joseph Hurst heard it was for sale, and wrote to the lady's son making an offer for the same which was accepted in writing. He afterwards delivered a cheque for the price to Mr. Wood, and asked him to make the conveyance in the name of his wife, Mrs. Charlotte Hurst. Mr. Wood agreed to make the conveyance as requested, thinking the object of it was the protection of Mohkampur from the grasp of Mr. Hurst's creditors.

“ The cheque was for Rs. 6,350, and was not against Joseph Hurst's own money, but against money borrowed from the Mussoorie Bank, Limited. At the same time he was in debt to the extent of about Rs. 30,000, without any

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particular means of meeting his debts, and shortly afterwards he embarked in a risky timber business which involved him in additional liabilities ..... The conveyance of Mohkampur was not made to Mrs. Charlotte Hurst's separate use or independent of her husband. Therefore its operation is to vest the property in the husband, Joseph Hurst.

" If it were otherwise the transaction would stand as a voluntary post-nuptial settlement of Rs. 6,350 by Joseph Hurst upon his wife. As he was in debt at the time it was made, and actually borrowed the money at a high rate of interest for the occasion, and it is still in one form or another due to his creditors, it was a fraudulent settlement, and void under the Act 13 Eliz. c. 5, made perpetual by the Act 29 Eliz. c. 5, the property so acquired legally vesting in the settlor, Joseph Hurst, and remaining available to his creditors.

" Immediately after the purchase Joseph Hurst, the husband, entered upon Mohkampur, and took and enjoyed the assets and profits of it as sole owner, publicly asserting himself to be the sole owner of it, and as such his name has appeared for many years in the records of the Collector of the District, and he continued to fill the character of sole owner, without let or hindrance of any one, until this litigation began. On the 7th November, 1872, Joseph Hurst borrowed Rs. 16,000 from Mrs. Louisa Dick of Dehra. Part of the security for this was a mortgage upon Mohkampur. As a nominal party to the conveyance of that estate Mrs. Charlotte Hurst signed the mortgage, which in effect sets out that the property is her husband's; if the property had not been in fact her husband's, then Mrs. Charlotte Hurst committed the grossest fraud upon Mrs. Dick, in aiding her husband to procure the Rs. 16,000 by virtue of a deed she knew was totally inoperative.

" On the 24th and 25th February, 1875, under circumstances the most solemn in which any European claiming to be respectable could be placed, namely, under cross-examination conducted with the utmost deliberation, extending over two whole days, in a suit brought against him to recover a large sum of money, Joseph Hurst swore as follows :

' I have purchased landed property in India

' I bought Mohkampur from Mr. C. Wood

' I hold Mohkampur as zamindar \* \*. I am zamindar of Mohkampur. I don't know the exact amount of revenue I pay; my assistant pays in the revenue, and receives the receipts; I did not ask what the revenue was when I was purchasing it; I don't remember if I made any inquiries as to the income of the village; did not inquire how much land there was in Mohkampur, but was told how much there was; I had no reason for not inquiring \* \*. \*; it was not the custom for a native lessee to describe himself as zamindar.'

" As it cannot be asserted that Mr. Hurst committed perjury, or that he and his wife deliberately cheated the mortgagee of Mohkampur, or that the Collector's records are wrong, it follows that Mohkampur was Joseph Hurst's,

and if it was his interest alone the plaintiff succeeded to, that interest covered the whole property."

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The defence to this suit rested on the allegations on which the claim in the suit by Charlotte Hurst against the Mussoorie Bank above referred to rested, and on the establishment of which the High Court had given Charlotte Hurst a decree in that suit.

The Subordinate Judge fixed the following among other issues :

" (i) Did the sale of the 20th September, 1876, operate to transfer to the plaintiff the rights and interests of all the defendants in suits No. 155 of 1874, No. 56 of 1876, and No. 185 of 1874, in which attachment of Mohkampur had been made ; if not, whose rights and interests passed to plaintiff by that sale ? (ii) Does the High Court's decree set aside the sale made to plaintiff on the 20th September, 1876 ? (iii) If only Joseph Hurst's interest in Mohkampur passed to plaintiff by the sale, what was his interest in the property ? (iv) Is the plaintiff entitled to recover the property as a *bonâ fide* purchaser for valuable consideration ? "

On the first issue the Judge found that Mohkampur was sold in the execution of the decree in suit No. 185 of 1874, and that the sale only operated to transfer the rights and interests of the defendants in that suit, and that consequently only the rights and interests of Joseph Hurst in Mohkampur passed to the plaintiff by the sale. On the second issue the Judge found that the sale of Mohkampur was set aside by the decree of the High Court. On the third issue the Judge found that Joseph Hurst had no interest in Mohkampur. On the fourth issue the Judge held that the plaintiff was not entitled to recover the property because he was a *bonâ fide* purchaser of it for valuable consideration. The Judge in accordance with the determination of these issues dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. The facts of the case and the arguments are stated in the judgment of the Court.

Mr. Quarry, for the appellant.

Mr. Spankie, for the respondent.

The Court delivered the following

JUDGMENT.—In 1876 the respondents, Mr. J. and Mrs. C. Hurst, were in pecuniary difficulties. In suit No. 155 of 1874 the

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Mussoorie Bank Limited held a decree against both respondents. In suit No. 185 of 1874 the same Bank held a decree against Mr. J. Hurst and his brother-in-law Mr. Heseltine, and in a third suit brought by Khushal Rai and another a decree had been passed against Mr. J. and Mrs C. Hurst. In execution of the decree in suit No 155 of 1874 the village Mohkampur was attached on the 31st March, 1876, and an order for sale issued on the 4th April, 1876, fixing the 20th May, 1876, for the sale, but on the application of the respondents and on payment of Rs. 3,747-15-0, and on the execution of an agreement for the satisfaction of the balance, the sale was postponed *sine die*. Mohkampur was again attached on the 9th June, 1876, in execution of the decree obtained by Khushal Rai, but no further proceedings were taken till October 6th. Finally Mohkampur was attached on the 13th July, 1876, in execution of the decree obtained by the Mussoorie Bank against J. Hurst and Heseltine, and on the 17th July an order was made for the sale of the property on the 20th September. The respondent Mrs. C. Hurst at once filed an objection claiming that Mohkampur, as her separate property, should be released from attachment. Her objection was disallowed on the 9th August, 1876. On the 18th August, 1876, the respondent Mrs. C. Hurst filed a suit claiming that her right might be declared to Mohkampur, that she might be put in possession of it, and the order for sale declared void. Her suit was dismissed by the Court of first instance on the 15th September, 1876, and on the 20th September, 1876, the property was put up to sale in execution of the decree obtained by the Bank against Hurst and Heseltine as the property of J. Hurst. It was purchased by the appellant with notice of the claim asserted by Mrs. Hurst, and notwithstanding Mrs. Hurst's opposition the appellant obtained possession on the 22nd November, 1876. Meanwhile Mrs. C. Hurst appealed to the High Court, and on the 3rd May, 1877, obtained a decree declaring her right to Mohkampur and to possession of the estate, and at the same time the order of the 9th August, 1876, was declared null and void, and all subsequent acts and orders under the said order were also declared null and void. The appellant was not made a party, nor did he apply to be made a party, to the appeal brought by Mrs. Hurst, but on the 11th July, 1877, in execution of Mrs. Hurst's decree, possession of Mohkampur was delivered to her and the ap-

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pellant's servants were turned out of possession. The appellant instituted a possessory suit which was dismissed, and he then instituted the suit out of which the appeal arises. The Court below found that the sale of Mohkampur operated to transfer only what rights were possessed by Joseph Hurst in that estate, that the order in pursuance of which the sale was made was in fact set aside by the decree obtained by Mrs. Hurst, that Mohkampur was the sole property of Mrs. Hurst, that the appellant purchased with full knowledge of Mrs. Hurst's claim and was not on any ground entitled to be protected against it, and that Mrs. Hurst was entitled in execution of her decree to oust the appellant. The Court of first instance consequently dismissed the suit with costs.

In appeal it is contended that Mohkampur was in fact purchased by Joseph Hurst for himself and not for his wife, and that, if it was not purchased for himself but for his wife, when it was conveyed to the wife Joseph Hurst acquired her estate by *curtesy*, which will pass to the purchaser of his right and interests, and that, if Mrs. Hurst had an equitable title to the property, she is not entitled to protection against the purchaser, inasmuch as, as the equity was so doubtful, he was not bound to take notice of it. The last objection in appeal is expressed in such general terms that it is not clear what is the particular ruling to which this plea is directed. At the hearing the pleader who appeared for the appellant advanced, though he did not seriously press, the objection that the sale was made in execution of all the decrees in which the property had been attached, but it is clear that this was not so. We have the order for attachment, and though there is no application on the file there is the order for sale. Then there is the objection of Mrs. C. Hurst which would have been frivolous if at the time an order existed for the sale of her rights also, and then there are sale-proceedings and a certificate all made in the one cause in which Hurst and Heseltine were defendants, and to which Mrs. Hurst was no party.

The pleader for the appellant more strenuously urged that the property was in fact purchased by Hurst on his own account, and that the conveyance was merely taken in the name of his wife as his *ismfarzi*. On the other hand the respondents allege that Mrs.

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Hurst, being entitled under her father's will to a legacy of Rs. 12,000, which was to be paid to her separate use in instalments of Rs. 3,000 per annum, was desirous of investing the legacy in land, and as it was not immediately payable she borrowed the purchase-moneys of Mohkampur and two other properties from her husband and received conveyances in her own name, her husband consenting that the property so purchased should be held by her to her separate use. It is not denied that Joseph Nelson Heseltine by his will, dated February 16th, 1864, and a codicil, dated the 24th February, 1865, devised an estate known as the Ellenborough Hotel estate to his son Robert Henry Heseltine, subject to the condition that Robert Henry Heseltine should, when requested so to do by the trustees, execute a mortgage of the estate to secure the payment of Rs. 16,000 by instalments of Rs. 3,000 per annum, without interest, the first instalment to be paid on the expiration of one year from the testator's decease; and the testator bequeathed to his daughter Mrs. C. Hurst, the respondent, the sum of Rs. 12,000 to be paid out of the instalments provided by the mortgage, commencing with the second instalment, for her sole use and benefit, free from the control of her husband then living or of any future husband. Joseph Nelson Heseltine died on March 8th, 1865, and on March 2nd, 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and Charles Frederick Vaughan to secure the sum of Rs. 16,000, with the intention of giving effect to the condition imposed on him by his father's will. There had then accrued due to Mrs. Hurst in November, 1868, when the purchase was negotiated, Rs. 6000; in March, 1869, she would be entitled to a further sum of Rs. 3,000. It is said that in 1868 Hurst was in debt, and it is suggested he might have desired to place any property he might acquire beyond the reach of his creditors. It is, however, admitted, he had a large cash credit with the Mussoorie Bank. He negotiated the purchase of Mohkampur without informing the seller that the purchaser was Mrs. Hurst, but when the terms of purchase had been settled he directed the seller to convey the property to Mrs. Hurst. The sale-deed does not state that the property was conveyed to Mrs. Hurst's separate use, but in this country deeds are ordinarily prepared by persons who have little, if any, acquaintance with English Law, and therefore

we do not attribute any weight to this circumstance. At the time of registration of the sale-deed a power of attorney executed by Mrs. Hurst was also registered appointing her husband manager of the estate on her behalf. Hurst paid the purchase-money, Rs. 6,350, out of his cash credit. He subsequently purchased two other properties, one for Rs. 2,000 and another for Rs. 2,500, and these also were conveyed to his wife. The total of these purchase moneys, Rs. 10,500, would not have exceeded with interest the sum which Mrs. Hurst was to receive under her father's will, if her legacy had been duly paid. For some cause or other its payment was not pressed, possibly because Hurst and R. H. Heseltine were connected in pecuniary affairs, and in 1870 the legacy was sold with Hurst's consent to a trustee, Mr. Vaughan, for the sum of Rs. 7,875, and it is not denied that Hurst received this sum and used it as his own. It is admitted that what cattle and implements of husbandry were used in the sîr cultivation of Mohkampur belonged to Hurst. Hurst was called upon to produce accounts showing the disposal of the profits of the estate; he failed to do so; and it may be assumed that the profits were used either in the ordinary course of business or in the maintenance of his household. It does not necessarily follow that the estate was not purchased on behalf of and held by Mrs. Hurst as her own; she was living with her husband, and may well have consented to allow him to cultivate her land and to receive the profits of the estate and appropriate them to the general expenditure. It has been shown that in February, 1875, Hurst swore he had purchased landed property in India, that he had bought Mohkampur, and was the zamindar of Mohkampur, and paid revenue for it. If these statements had been made when the question of the ownership of Mohkampur was in issue, of course they would have gone far to discredit any evidence now given by Hurst in support of his wife's case, but the question then raised was only as to Hurst's knowledge of zamindari matters. While then those statements are not to be altogether disregarded, too much weight is not to be given to them. It is also urged that Hurst obtained a loan from a Mrs. Dick on a mortgage of Mohkampur representing himself as the owner, but Mrs. Hurst was a party to the mortgage, and would be bound by it. Considering the evidence as a whole we are not satisfied that the conclusion at which the Court below

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arrived on this issue is incorrect. It is not shown that Hurst was pressed by his creditors in 1868 nor that he apprehended difficulties, and it is shown that Mrs. Hurst was entitled to funds which would have enabled her to repay the sum advanced to her by her husband, and that in fact she did pay over to her husband the sum she received, which was in excess of the purchase-money of Mohkampur. If a scheme had been devised to conceal Hurst's ownership of Mohkampur, it is improbable that Mrs. Hurst would have made over her legacy to her husband at a time when he had, as is alleged on the part of the appellant, become more involved, and there was every probability that the money would be applied to discharge his debts, or be seized by his creditors. The conveyance to Mrs. Hurst was in our judgment *bonâ fide*, and executed in pursuance of the agreement alleged by her. The pleader for the appellant insists principally on the plea that the conveyance to Mrs. Hurst operated to convey the legal estate in Mohkampur to her husband, and that the conversion of the legacy operated to set it free from the separate use of Mrs. Hurst, and that her husband is entitled to the rents and profits during her life and may obtain an estate by *curtesy* if he survives her. The parties were, we understand, born in this country; they married in this country before the Succession Act of 1865, and are domiciled here. We are not prepared to hold that the English law would regulate their interests in landed estate in this country acquired by the wife during coverture, but if it were applicable, and if any interest in the estate accrued to her husband, in view of the agreement which we have found proved it must be held that it came to his hands upon a contract between them that he would hold it in trust for her—*Ridout v. Lewis* (1); *Thrupp v. Harman* (2); *Newlands v. Paynter* (3); *Parker v. Brooke* (4).

The appellant purchased with full notice of the claim set up by Mrs. Hurst, and it must be held his purchase will not defeat her title. The appeal then fails and is dismissed with costs.

*Appeal dismissed.*

(1) 1 Atk. 269.  
(2) 3 M. and K. 512.

(3) 4 M. and C. 408.  
(4) 9 Ves. 583.