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possession had not been proved. The defendant appealed against the decision, and the Principal Sudder Ameen reverses this part of the Moonsiff's decision, but his finding is most indefinite. He merely says that "the evidence produced by the defendant in support of his possession is conclusive enough." But there was no dispute about the defendant's having been in possession, the dispute was as to how long he had been in possession, and the Principal Sudder Ameen ought, before reversing the decision of the Moonsiff, to find distinctly that the defendant had been 12 years in possession, and had been so under such circumstances as to give him a right of occupancy.

I think therefore that the case ought to be remanded for a retrial of the two questions which I have pointed out.

JACKSON, J.—I concur.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

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July 30.

BANDHU ROY AND OTHERS (PLAINTIFFS) *v.* HANUMAN SING AND OTHERS (DEFENDANTS)*

Act VIII. of 1859, *ss.* 236—243—*Prohibitory Order—Purchase of Property by Judgment-creditor.*

In execution of a decree the defendant caused a decree of the plaintiff awarding him rupees 925 to be attached, and under section 236, Act VIII of 1859 caused the prohibitory order to be fixed in a conspicuous part of the Court-house and copies thereof to be delivered to the judgment-debtors. The decree was subsequently sold by auction, and the defendant purchased it for rupees 20. On special appeal by the plaintiff, upon the ground that the sale was irregular as the prohibitory order had not been served upon him.

Held, that the prohibitory order having been in accordance with the provisions of section 236, Act VIII of 1859 was legal and regular.

Held, that the Court executing the defendant's decree ought not to have sold the plaintiff's decree, but should have under section 243 appointed a manager to enforce the plaintiff's decree.

That a decree-holder ought not to be allowed to bid and purchase at a sale in execution of his decree without an order of Court previously obtained upon notice to the judgment-debtor.

Practice of English Courts regarding sale in execution of decrees discussed.

* Special Appeal, No. 2620 of 1869, from a decree of the Additional Judge of Bhagulpore, dated 20th July 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 9th April 1867.

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BANDHU ROY v. HANUMAN SING

Baboos *Ananda Chandra Ghosal* and *Chandra Madhab Ghose* for appellants.

Baboo *Kalikrishna Sen* for respondent.

NORMAN, J.—Hanuman Sing, having obtained a decree against the plaintiff, applied to the Court for execution by attachment of a decree in a suit of Bandhu and others against Karu Mahanto and others for rupees 948. The Court made an order upon this application, and under section 236 of Act VIII. of 1859 issued a written order prohibiting the now plaintiff Bandhu Roy from receiving, and Karu Mahanto from making payment of the amount decreed until the further order of the Court.

This order was served as prescribed by section 239, by fixing up the order in some conspicuous part of the Court-house and by delivering copies of the written order to the judgment-debtor. The attached decree was sold by public auction after the usual proclamation, and realized rupees 20 only. The plaintiff's contention is that the sale was irregular, inasmuch as the prohibitory order under section 236 was not served on him. But the Judge, I think, rightly holds that the service of the prohibitory order having been in accordance with the provision of section 236 was legal and regular, and therefore dismisses the suit. The plaintiff is not entitled to the particular relief which he seeks in this suit, and we must therefore dismiss the present appeal. There seems however strong reason to suppose that the sale of this decree has worked a great oppression on the plaintiff.

The facts are not clearly stated in the judgment of either of the Courts, but I am led to infer that the defendant having caused the decree to be put up for sale, bought it for rupees 20, and shortly afterwards realized by sale of the property of Karu Mahanto rupees 975. Upon that I desire to observe; first, unless there was some very good reason of which nothing appears, the Court in executing the defendants' decree ought not to have sold the plaintiff's decree against Karu Mahanto, but ought to have required the defendants to proceed to enforce that decree by its own process, appointing a manager under section 243 if necessary. By so doing the Court would have worked out the plaintiff's lien under

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the attachment and secured the rights of all parties. The object of allowing a decree-holder to attach and sell his debtor's property is to ensure that the property may be realized or turned into cash in order to satisfy the decree.

If a money-decree is attached, unless it be shown that there are no means of realizing the amount of the decree or no prospect of doing so within a reasonable time, or except at an expense to which the attaching creditor ought not to be put, to sell the decree is not to realize the debtor's property but to sacrifice it by selling the chance of realizing it. The whole spirit of Act VIII. shews that in executing decrees the Court is not to lose sight of the interest of the judgment-debtor. In securing payment to the decree-holder, it is the duty of the Court to do so without any unnecessary injury to, or sacrifice of, the property of the debtor. A very large discretion for that purpose is reposed in the Court particularly by section 243.

It certainly never was intended that decree-holders should be encouraged or even enabled to speculate in purchases of the property of distressed men at an under value. In any case in which property is brought to sale and the price offered is wholly inadequate, it seems to me that the Judge ought to hesitate before he allows the sale to proceed.

Secondly; it appears to me to be a matter of grave doubt whether a decree-holder causing property of his debtor other than mere chattels such as house-hold furniture, cattle, grain or the like, to be put up for sale, can bid at the sale without having first obtained the leave of the Court for that purpose. According to the practice on the Original Side of the High Court, wherever a decree-holder desires to buy land or other like property at a sale in execution of the decree against his debtor, he obtains express leave from the Court to bid. For myself I make it an inflexible rule not to make an order empowering the decree-holder to bid, unless notice of the application for leave to bid at the sale, has been given to the debtor or his agent, except in cases where the debtor cannot be found, and has gone away leaving no agent to represent him. If such an order is made on notice, and the sale is fairly conducted, the debtor has the benefit of the competition of the decree-holder as an additional bidder

at the sale, and the price is likely to be enhanced. If the decree-holder who is bringing the property to sale, does not himself intend to buy, his interest is the same as that of the debtor, namely, that the property should be sold at the best price that can be got. But if the decree-holder is allowed to buy, as an intending purchaser, he acquires an interest adverse to that of the debtor,—adverse to that of the only character in which the decree-holder is recognized by the Court, to buy the property at the lowest possible price. And therefore the debtor has a right to be placed in a condition to know what is going on, and to watch the conduct of the sale officers of the Court who in lotting and describing the property, stating its advantages and disadvantages, act and cannot but act under the instructions of the decree-holder.

The practice on the Original Side of this Court follows that of English Courts of Equity. See Sydney Smith's Chancery Practice, volume 2, page 185; *Owen* v. *Foulkes* (1) and the cases on the subject collected in Fisher on Mortgages, 502.

In English Courts of Common Law the security of the debtor is of a different kind. The English Sheriff is held personally responsible for any abuse by his officers. It is laid down that on a seizure of goods in execution the Sheriff should not sell for a price which is grossly inadequate, but should return, that the goods remain in his hands for want of buyers. On this the plaintiff usually sues out another writ namely of *venditioni exponas* commanding the Sheriff absolutely to sell, and he is then justified in selling at any price he can get. It is the duty as well as the interest of the Sheriff to sell at the best price he can. The Sheriff is not responsible for selling at an under value unless he is guilty of some fraud or malpractice. But in *Phillips* v. *Bacon* (2), a party recovered £500 damages against a Sheriff on a declaration alleging that he had fraudulently and negligently sold the plaintiff's goods very much below their value.

The old practice in Courts of Common Law in England was that the Sheriff might either appraise and sell the goods without any enquiry, or else he might appraise the goods by a Jury, and then sell them. See Dalton on Sheriffs, page 147.

(1) 6 Ves, 630. (2) 9 East, 298.

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In Sayre's case, the under-sheriff of the county of Buckingham, persuaded the Jury to appraise the goods of a poor man which were well worth £30 at £22-13-4 and delivered them to the plaintiff for the same sum. The Court of Kings Bench held that it was oppression, punishable at the assizes by indictment, and ordered the under-sheriff, who was an attorney, to be brought before them.

The facts are not fully before us. But I have a strong impression that it may turn out that the plaintiff in this case has an equity to have the amount realized by the defendants under the purchased decree, applied in satisfaction of the money due from him to the defendants.

The case may stand over for three weeks in order that the plaintiff's vakeel may consider whether any remedy is open to the plaintiff on the plaint as it stands; if not, the present suit must be dismissed without costs and without prejudice to such proceedings as the plaintiff may be advised to take in accordance with the suggestions I have thrown out.

JACKSON, J.—I also think that this appeal on the points on which it has been preferred must be dismissed. The procedure in execution and attachment as respects the written order, service of which is taken exception to, seems to have been strictly regular. The written order was proclaimed in Court and a copy of it was served on the judgment-debtor. The decree which the present respondent had in this manner attached was subsequently brought to sale, and it is not contended that the sale was unfairly or improperly conducted. The result of it was that a decree worth nearly 1,000 rupees was sold for 20 rupees. It would have been better with the light now thrown upon the facts, had the Court exercised its power under section 243, stopped the sale, and appointed a manager to execute the decree instead of selling it. The Court however would at the time of sale have no knowledge whether the decree was worth 10 rupees or 1,000 rupees. In such cases the usual practice in the Moffussil Courts is that the judgment-debtor whose property is being sacrificed, should move the Court to exercise its powers under section 243. There is nothing stated before us to show

(1) Croke James, 426.

that the judgment-debtor in this case was vigilant over his own interest, or took any action in the matter. It may be that he had no notice of what was going on. I have no objection to the case standing over for three weeks as proposed by my learned colleague.

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BANDHU ROY v. HANUMAN SING

Before Mr. Justices Kemp and Mr. Justice Markby.

RUPCHANDRA GHOSE (PLAINTIFF) *v.* RUPMANJARI DASI (DEFENDANT).*

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User—Prescriptive Right—Period of Time to create.

No period has been definitively fixed to create a right by prescription. There is no decision to the effect that a finding that the user has lasted for at least 12 years is necessary, or that such a finding of a user for 12 years would be conclusive. *See Kartic Chandra Sirkar* v. *Kartic Chandra Dey* (1) *Krishna Mohan Mookerjee* v. *Jagannath Roy Jugi* (2) explained

THE plaintiff sued on the allegation that the defendant had without her consent opened a water passage on the southern side of her tank, and irrigated her lands: that the defendant had no prescriptive right thereto; and prayed that the defendant might be restrained from so doing, and that the passage opened by her may be closed, as well as for recovery of damages and the value of water taken. The defence set up was that the defendant had a prescriptive right to irrigate her lands by water from the defendant's tank, and that the water passage was opened in the exercise of that right.

The defendant called three witnesses. Witness No. 1 deposed that he had seen the land of the defendant being all along irrigated from the tank of the plaintiff. Witness No. 2 deposed that he was a laborer and had once, ten or fifteen years ago, irrigated the land of the defendant with the water of the plaintiff's tank. Witness No. 3, who was 60 years old, deposed that he had seen for 10 or 12 times the land of the defendant being

* Special Appeal, No. 324 of 1869 from a decree of the Judge of Beerbhoom, dated the 5th November 1868, reversing a decree of the Moonsiff of that district, dated the 12th June 1868.

(1) 3 B. L. R., A. C., 166. (2) 2 B. L. R. A. C., 322.