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and went on to try the case on the merits. He gave a decree for the plaintiff. The defendant appealed to the Judge who, on the 28th September 1869, passed the following judgment:

"Before this, on the grounds mentioned in a proceeding of the 9th "instant an order was passed to the effect that appellant should make up "the deficiency of the stamp duties of the petition of appeal in proportion to "the amount under claim, rupees 666, up to the 25th idem; and that then "the appeal should be tried. But as he has not complied with that order "up to this date, the petition of appeal is rejected; and it is, accordingly, "ordered that the appeal be dismissed with costs; and that the respondent's "costs with interest up to date of realization, be borne by the appellant."

The defendant appealed specially to the High Court

Baboo *Bama Charan Banerjee* for the appellant.

Baboo *Debender Narayan Bose* for the respondent.

HOBHOUSE, J.—The Judge is quite wrong in this case. If the plaint was under valued, objection should have been taken in the first instance, and then the Court could have proceeded on the matter of under valuation in the mode prescribed by law. But the plaintiff was allowed to put in his suit on a certain valuation, the suit was determined by the first Court on that valuation, and it is not until the defendant comes up in appeal that the Court curiously enough rules that the defendants must suffer for the laches committed by the plaintiff. It is quite clear that the Court was wrong in rejecting the defendant's appeal on the ground of under valuation, and we direct that his judgment and his decree be set aside, and the case be remanded to be tried on the merits.

The costs to follow the final result of the case.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

BHINJI GOVINDJI *v.* MONOHAR DAS,

Pledge—Possession—Seizure—Interpleader Suit—Costs.

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June 22.

A. obtained a decree in the Small Cause Court against B. In execution of the decree, goods belonging to B., but in the possession of a pledgee, were seized by a bailiff of the Small Cause Court. The pledgee brought an interpleader suit under section 88 of Act IX of 1850 to recover the goods. *Held*, the pledgee was entitled to have the goods released to him, and have the costs of his suit paid by the execution-creditor.

THIS was a case referred for the opinion of the High Court by the first Judge of the Calcutta Court of Small Causes, under section 7 of Act XXVI of 1864. The case was referred at the request of the plaintiff, and was thus stated by the Judge referring it:—

"In this suit, which was an interpleader suit under section 88 of Act IX of 1850, the plaintiffs claimed as pledgees, to recover three bales, Nos. 869, 875,

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and 867, marked J. A, M., of long cloth, seized under a writ of execution of this Court, dated 11th May 1870, or the value thereof, rupees 1,000.

"In my judgment I declared that the plaintiffs had a *bonâ fide* pledge on the property attached by the defendants, and ordered that their claim should be dismissed, but that the right, title, and interest of the judgment-debtor should alone be sold.

"I delivered judgment subject to the opinion of the High Court on the following question, viz.: 'It having been found that the money was advanced, and that the pawn was a *bonâ fide* one, and that the goods were in the possession of the pawnee at the time of the seizure, and that the time of the pawn had not then expired, whether the learned Judge was not wrong in point of law in not ordering the property to be released to the plaintiffs (pawnees) and whether he ought not to have ordered the defendants (the execution-creditors) to pay the plaintiffs their costs."

The Judge in his judgment says: "The only case I can find directly in point is that of *Rogers* v. *Kennay* (1), and that is certainly in favor of the plaintiff's contention. But it appears to me that that case went astray on a point of pleading, and the judgment appears to have been based on *Legg* v. *Evans* (2) which is stated by Lord Denman to have been directly in point. This it clearly was not, the intention in that case having been to sell the special property of the judgment-debtor in the general property of an unconcerned person, while in *Rogers* v. *Kennay* (1), as in the present case, the object is to sell goods which are the general property of the judgment-debtor, but to sell them subject to the special property of a third person in them with which special property it is not desired at all to interfere. But whatever may be thought of the doctrine of the interpleader claimant's special property in cases of trover and detinue as applied in *Rogers* v. *Kennay* (1), it appears to me that there is a peculiarity in the case before me which renders the bearing of those forms of action entirely inapplicable. The bailiff of this Court has seized the goods, but has not removed them, and will not do so. The goods are now, and have all along been, and will be up to and after the sale, in the possession and custody of the interpleader claimant, the pawnee, though no doubt they are also in the custody of the law. Under these circumstances it appears to me that neither trover nor detinue would lie, it being impossible to allege conversion. Until the expiry of the period for which the goods were pawned, the interpleader claimant has no other right over the attached goods, and that right has not been and will not be disturbed."

Mr. *Hyde* (for the plaintiffs) contended that the goods were not liable to be taken in execution, as long as the bailment lasted. Story on Bailments, section 353, page 290. The authorities there cited are all American cases, with the exception of *Coggs* v. *Bernard* (3), which is not in point. Property held in right of a lien cannot be attached—*Legg* v, *Evans* (2). The interest of the

(1) 9 Q., B 592. (2) 6 M. & W., 36. (3) 2 Ld., Raymd, 909

pawnee does not cease by reason of sale or repledge by him—*Halliday* v. *Holgate* (1), *Donald* v. *Suckling* (2), and *Rogers* v. *Kennay* (3). The right of sale is a right which all pawnees have, but it would be impossible to exercise that power while the goods were under seizure.

No one appeared for the defendants.

The opinion of the High Court was delivered by

COUCH, C. J.—The Judge of the Small Cause Court does not not appear to doubt that the plaintiffs have a special property in these goods which entitles them to possession, but he says that the goods not having been removed from their possession and not going to be removed, they are still in possession of the property, although at the same time the goods are in possession of bailiffs of the Court, and in the custody of the law. But these two possessions cannot be reconciled. The possession of the bailiffs in execution of the decree of the Small Cause Court is of such a character that it cannot exist at the same time as the possession of the plaintiffs, who are pledgees. By section 69 of Act IX of 1850 "the bailiff executing any process of execution against the "goods of any person, may, by virtue thereof, seize and take any of the goods "of such person (excepting the necessary wearing apparel and bedding of "such person or his family, and the tools and implements of his trade);" and by section 73, the goods are to "be deposited by the bailiff in some fit place "or to remain in the custody of a fit person, approved by the Judges to be put "in possession by the bailiff." All this is inconsistent with the goods being still in the possession of the plaintiffs, and in our opinion the Judge of the Small Cause Court is clearly wrong in saying that the possession of the plaintiffs has not been interfered with. Then he appears to have considered that there was no conversion, and that the plaintiffs had no cause of action until the expiry of the period for which the goods were pawned. The seizure of the goods while they were in the possession of the plaintiffs, was sufficient to entitle the plaintiffs to maintain this suit. It is true the bailiff did not seize the goods for his own use; still it was dealing with the goods in a way which was inconsistent with the right of the plaintiffs. The case of *Rogers* v. *Kennay* (3) is quite in point, and did not proceed on the ground of the form of action, but was really on the principle of the law. The seizure by the bailiff in this case was a seizure out of the possession of the plaintiffs.

The question which is put to us is "whether the learned Judge was not wrong in point of law in not ordering the property to be released to the plaintiffs (pawnees), and whether he ought not to have ordered the defendants (the execution creditors) to pay the plaintiffs their costs." We think we must answer the first question by saying that the learned Judge was wrong in point of law in not ordering the goods to be delivered to the plaintiffs; and if he

(1) 3 L. R. Ex., 299. (2) 1 L. R., Q. B., 585. (3) 9 Q. B., 592.

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should have ordered that, we think that he should also have ordered the execution creditors to pay the plaintiffs' costs. We, therefore, answer the whole question in the affirmative, and order that the judgment be entered for the plaintiffs, as prayed for in the plaint, with costs of suit. The plaintiffs will also have the costs of reversing the question and stating the same for the opinion of this same Court, and otherwise arising thereout or connected therewith, to be taxed by the Taxing Officer of this Court.

Before Mr. Justice Norman.

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June 6.

ORD *v.* ORD.

Alimony, Permanent.

Principle on which the Court will grant permanent alimony.

THIS was an application for permanent alimony. Mr. Justice Phear had upon an application for alimony *pendente lite*, estimated the respondent's income at rupees 600 per month, and ordered rupees 200 a month as alimony *pendente lite*. The wife had brought the suit against her husband for judicial separation on account of his adultery, and obtained an order for judicial separation. The affidavit put in, in support of the application, showed that the marriage took place in October 1860, the husband at the time being an assistant in the petitioner's late husband's business which he had left to his wife; that from his marriage up to the end of 1868, the profits of the business were estimated at rupees 2000 per month, but after that time, they had decreased to about one-half that amount; that from June 1867 to March 1869, the respondent did not afford the petitioner any adequate means of support; that in March 1869, she accordingly obtained an order from the Police Magistrate that her husband should pay her rupees 50 a month as maintenance; that he failed to pay this sum after the first three months, and had only made payment on her taking out a summons to compel him to do so; and that he was living in adultery at the time of the application. The income of the respondent at the time of application was stated to be rupees 1,000 per month, and an advertisement in one of the daily papers was referred to in which the respondent stated that he wanted a partner in his business, guaranteed him rupees 700 per month.

The respondent filed an affidavit in opposition to the application, in which he stated that the petitioner had left his protection, taking away with her property amounting to about rupees 4,000; that he had incurred liabilities in consequence of a suit by his wife with respect to property she alleged to be her separate property, but which suit had been dismissed by the Appeal Court; that these liabilities, together with others incurred by reason of litigation in respect of his wife, amounted to rupees 13,000, in respect of which he was paying interest at the rate of rupees 125 a month; that he had paid rupees 1,500 into Court to cover his wife's costs in the present suit; and that he had sup-