1872

C. SETON v. A. S. BIJOHN

proceed against. The limit is that the creditor cannot have both at the same time, but if one fails, he can have the other—*Davis* v. *Middleton* (1). The Court is to issue execution according to the nature of the application—see section 212, Act VIII of 1859, and section 15 of Act XXIII of 1861. The *onus* is on the debtor to show that he has no other property, and not on the creditor to show, that he has—see section 273. Under that section the creditor is entitled to the oath of the defendant, that he has no property whatever, not only that he has none that can be taken in execution. The creditor here may be entitled to keep the debtor in prison on other grounds—see section 281. If the judgment appealed from is correct, execution against the person would never be obtainable after execution had once been had against the property—see section 280. [COUCH, C. J.—What is the practice of the Bombay and Agra High Courts alluded to by Mr. Justice Phear?] I have been unable to find any such practice in reported cases. The cases of *Byjnath Pundit* v. *Kunhya Lall Pundit* (2), and *Nittai Chandra Pal* v. *Thakur Das Biswas* (3) were also referred to.

(1) 8 W. R., 282.

(2) 9 W. R., 527.

(3) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.*

The 5th August 1869.

NITTAI CHANDRA PAL (PLAINTIFF) *v.* THAKOORDAS BISWAS AND OTHERS (DEFENDANTS).

THIS was an appeal from an order of Mr. Justice Phear, refusing an application for the attachment of the person of a judgment-debtor in execution of a decree.

The facts are sufficiently stated in the judgments on appeal.

PEACOCK, C.J.—It appears to me that in this case a writ ought to be issued. The first writ was issued on the 19th June 1867, and the Sheriff was commanded to execute it on or before the 19th July. The Sheriff returned that writ on the 11th September, stating that he had made diligent search after Thakurdas Biswas, Nakur Chandra Mitter, and Ramlal Kundu, but that they were not nor was any or either of them, found within the town of Calcutta. Another writ was issued on the 18th June 1868, returnable on the 18th July 1868, and that writ was returned by the Sheriff in the same manner, stating that he had made diligent search after Thakurdas Biswas; but that he was not found within the town of Calcutta.

I don't know why the second writ was issued only against one of the defendants and not against the whole of them. It would have been more regular if the writ had been issued against all. The plaintiff swears that on the 8th January 1867, a decree was obtained by him against the defendants, under the provisions of the Bills of Exchange Act. He then says:—"The defendants have not "nor hath any of them property within "the local jurisdiction of this Hon'ble "Court, whereupon the said decree could "be satisfied during the respective period

1872

C. SETON v. A. G. BIJOHN.

The judgment of the Court was delivered by

COUCH, C. J.—This was an appeal from a decision of Mr. Justice Phear, refusing to grant an application which was made

"the said writs remained in force. I "made diligent search and enquiry for "the said defendants for the purpose of "executing the same, but the same could "not be executed owing to the said "defendants purposely concealing them- "selves and keeping out of the way of "the process of this Hon'ble Court, and "also owing to the short time within "which the said writs were made return- "able.

"I believe that, if a period of one year "be allowed for the return of a writ of "attachment, I may be able to execute "the same against the defendants."

In England, formerly, if a writ of execution were returned *non est inventus*, the plaintiff, as a matter of course, without applying to the Court, had a right to obtain an *alias*, and after that a *pluries*. Afterwards writs of execution were made returnable immediately after execution, and the writ, if not returned, continued in force until the Sheriff could execute it.

By the Common Law Procedure Act, 1852, s. 124, it is enacted as follows:—"A "writ of execution issued after the com- "mencement of this Act, if unexecuted, "shall not remain in force for more "than one year from the Teste of such "writ, unless renewed in the manner "hereinafter provided; but such writ "may, at any time before its expiration, "be renewed by the party issuing it for "one year from the date of such renewal, "and so on from time to time, during "the continuance of the renewed writ, "either by being marked with a seal "bearing the date of the day, month, "and year of such renewal, or by such "party giving a written notice of renew- "al to such Sheriff."

It appears to me to be very reasonable, and quite in accordance with the practice in England, that we should allow a period of one year for execution of the writ. No injury will be done to the defendant, except that he will be liable to be caught and compelled to satisfy the judgment by imprisonment. One can scarcely suppose that a plaintiff who obtains judgment would let it lie unexecuted, in order to get interest at the rate of 6 per cent. from a man from whom he cannot get payment of his debt. One would imagine that he would use every diligence in executing his decree. Even if the plaintiff should fail to satisfy the Court that he has used all diligence, that, as it appears to me, would be no ground for refusing another writ of execution. In this particular case, if the affidavit is correct, execution should not be obtained against the defendant's goods, because the plaintiff swears that the defendant has no property within the local jurisdiction of the Court. Under these circumstances, I am of opinion, that, although the Judge has a discretion, yet the fact that the plaintiff has not used the utmost possible diligence, is not a sufficient ground upon which a fresh writ for one year should be refused. At any rate, in this particular case in which each of the two writs issued were returnable in on month, a longer period ought to be allowed, and a fresh writ issued against all the defendants, returnable in twelve calendar months. The plaintiff will be entitled to his costs of the application and of the appeal.

MACPHERSON, J.—While I incline to agree in thinking that, in this particular case, a warrant to attach the persons of the defendants should issue, I desire to add that in my opinion the learned Judge was right in the principle on which he considered himself to be acting when he refused to order that a warrant should issue. I think that the Court clearly had

1872

C. SETON v. A. S. BIJOHN

by the appellants for execution of the decree obtained by them on the 2nd of June 1871, by attachment of the defendant's person.

The learned Judge in his judgment thus stated the ground on which he proceeded when he refused to grant the application (*reads*) :—

There have been several decisions of this Court upon the question of the Court granting execution of its decrees, to which it is desirable that we should refer. The earliest case which I am aware of his *Davis* v. *Middleton* (1). The learned Judges in that case were the late Chief Justice Sir Barnes Peacock and Mr. Justice Markby. The Chief Justice said :—"It appears to us that, upon these sections, the judgment-creditor has an uncontrolled option whether he will proceed, in the first instance, against the person or the property of the judgment-debtor. That option is clearly given by section 201 ; and by section 15, Act XXIII of 1861, it appears that the Court is bound, if the application be in due form, to admit it, and, when it is admitted to order execution 'according to the nature of the application.' The only words which can give any apparent discretion to the Court are in section 221 of Act VIII of 1859, which relate to a discretion in the matter, such discretion being expressly given by section 221 of Act VIII of 1859.

In the exercise of the discretion given by that section, if the Court is not satisfied that the judgment-creditor has been using his best endeavors to execute the former warrant, a fresh writ ought not to be granted. In the present instance while Mr. Piffard was addressing the Court, I was under the impression that each of the two former warrants had run for a year. Being under that impression, I thought, looking to the very meagre affidavit in support of the application, that a third warrant ought not to issue, and that it was unreasonable on the part of the judgment-creditor to ask for it. I find, however, that the two former warrants each ran for one month only. This alters the features of the case considerably : and seeing that the time during which they ran was so short, I doubt whether I myself (if I had been acting in the exercise of our original jurisdiction) should have refused the application. I desire to repeat, however, that in my opinion the Courts of this country have, under section 221 and the other section of the Code of Civil Procedure relating to the execution of decrees, a discretion in the matter, and ought to refuse fresh warrants when they are not satisfied that the parties have used every reasonable endeavor to execute those which have expired. When parties do not really proceed actively, fresh warrants should not be issued merely to keep alive the decrees, and enable the judgment-creditors to put them in execution at such future time as may please them.

(1) 8 W. R., 282.

the issue of the warrant which the Court is to issue 'unless it see cause to the contrary.' Looking to the previous sections, we do not think it was the intention of the Legislature to control by those words the option of the judgment-creditor. It would be very inconsistent if the Court, under section 15, Act XXIII of 1861, were bound to order the execution, and were not bound under section 221, Act VIII of 1859, to issue the warrant." In a subsequent paragraph the learned Chief Justice says:—" We are of opinion that the Court may in its discretion refuse execution against the person and property at the same time, and may also refuse execution against the person when under section 13, Act XXIII of 1861, or under section 19, Act XI of 1865, application for immediate execution is made verbally at the time of passing the decree; but that when application is made after the passing of the decree by written application under section 207, Act VIII of 1859, the Court is bound to issue execution according to the nature of the application."

That judgment does not apply to the question whether the Court is bound to issue execution according to the nature of the application, when execution has been already issued either against the person or property of the judgment-debtor.

The next case is *Byjnath Pundit* v. *Kunhya Lall Pundit* (1), and is a decision of Mr. Justice Phear, and there the learned Judge said:—" It seems to me that, under the Procedure Act (VIII of 1859), although the Court is bound to issue process of execution of one sort or the other, when first the execution-creditor makes application in due from for execution, and shows that every thing has occurred to entitle him to it in the mode prescribed by the Act, still I do not think that, when the Court has once granted an application of this kind, it is bound, upon the second application of the same judgment-creditor, to grant the second application as a matter of course. I think it is specially incumbent upon all Courts charged with the execution of decrees to take care that their proceedings and processes are not abused, and there is probably no process or proceeding of Court in regard to which it is necessary to be more attentive, in order to prevent

(1) 9 W. R., 527.

1872

C. SETON v. A. S. BIJOEN

abuse than the process of execution. I think that, except in the first instance, when no doubt the Court is obliged to grant the application of the judgment-creditor, in other cases it ought always to require of him to show why the steps previously taken by him in execution had not led to a full discharge of the debt. And unless the judgment-creditor should satisfy the Court that the failure of these proceedings to bring about execution of the decree was not attributable to his own fault, the Court ought not, I think, to grant its process a second time." Sir Charles Hobhouse, who sat with him, does not appear to have concurred in that view, and says in the short judgment which he gave:—"I am not prepared to give any opinion upon the subject discussed in the second part of my brother Phear's judgment. I do not think that that subject necessarily arises in this particular case."

This subject again came before Sir Barnes Peacock and Mr. Justice Macpherson in the case of *Nittai Chandra Pal* v. *Thakur Das Biswas*(1). There the question was whether the decree-holder who had obtained to successive writs for execution, both of which had been returned unexecuted by the Sheriff, was entitled to a writ of attachment returnable at the end of a year. Sir Barnes Peacock said, after mentioning the circumstances of the case :—"Under these circumstances, I am of opinion that, although the Judge has a discretion, yet the fact that the plaintiff has not used the utmost possible diligence is not a sufficient ground upon which a fresh writ for one year should be refused. At any rate, in this particular case in which each of the two writs issued was returnable in one month, a longer period ought to be allowed, and a fresh writ issued against all the defendants, returnable in twelve calendar months." Mr. Justice Macpherson said:—"While I incline to agree in thinking that, in this particular case, a warrant to attach the persons of the defendants should issue, I desire to add that in my opinion the learned Judge was right in the principal on which he considered himself to be acting when he refused to order that a warrant should issue. I think the Court clearly had a discretion in the matter, such discretion being expressly

(1) *Ante*, p. 258.

given by section 221 of Act VIII of 1859. In the exercise of the discretion given by that section, if the Court is not satisfied that the judgment-creditor has been using his best endeavours to execute the former warrant, a fresh writ ought not to be granted."

Now the judgment of the learned Judge, which is appealed against, goes beyond either of the decisions to which Sir Barnes Peacock was a party. It appears to me also to go beyond the opinion which Mr. Justice Phear had himself expressed, although I can see the view which he has expressed in this case was foreshadowed in his judgment in the former. I think when we look at the provisions of Act VIII of 1859, that the principle upon which this refusal proceeded cannot be supported, and that the order of the learned Judge must be reversed, and an order made that the attachment applied for shall issue.

Section 8, Act XXIII of 1861, provides that, "when a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in section 273 of Act VIII of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged." This is not a mere formal proceeding, and that it is one which the plaintiff is entitled to have adopted, appears to me to be shown by two decisions of Mr. Justice Phear himself. They are both quoted in Mr. Broughton's edition of the Code of Civil Procedure under the repealed section 274 of Act VIII of 1859. One of them is *Cheyt Ram* v. *Ram Chunder Dut* (1), where Mr. Justice Phear is reported to have said :—"The Legislature intended that if the prisoner was brought up on arrest at the instance of an execution-creditor, he should be committed to prison. If, however, he should be proved to have been perfectly honest, to have no present means of payment, and to have put no obstacle in the

(1) 1 Bourke's Rep., 101.

1872

C. SETON v. A. S. BIJOHN

way of his creditors taking possession of his property, but on the contrary, to be willing to give every facility for getting it, and that it should be apparent that his being kept in prison would be mere useless oppression, and could lead to no good result, the Legislature intended that he should be discharged." In the other case *Shamsoondery Dassee* v. *Nundcoomar* (1). The learned Judge held that, "where the defendant had endeavoured to retain possession of land, and set up an unwarrantable defence founded on the alleged unchastity of a widow under whom the plaintiff claimed, a defence utterly groundless, that was an act of bad faith sufficient to warrant his recommittal under section 275." So that, according to these opinions, the plaintiff has a right to have an enquiry made, when the defendant is brought up, as to various matters which are most material to be considered upon the question whether the defendant should be committed to prison and detained in execution of the decree. The learned Judge in the view he takes excludes the plaintiff from having any such enquiry, and takes upon himself to determine, as it appears to me, that, without any examination of the defendant, he can come to the conclusion that the plaintiff has no right to take him in execution. It seems to me that, instead of putting the burden of proof on the person who had been arrested to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, and ought not to be sent to prison, he has thrown upon the plaintiff the burden of proving to the satisfaction of the Court when applying for execution that, by sending the debtor to prison, some satisfaction of the debt would be obtained. I think that this is a wrong principle, and is not justified by previous decisions of the Court; and although there might not possibly be an appeal from the exercise of the learned Judge's discretion in any particular case, I think, when we find that he has proceeded on an erroneous principle, an appeal under clause 15 of the Letters Patent clearly lies. I am of opinion that his decision should be set aside, and an order made for the attachment of the person of the debtor.

(1) See Broughton's Civil Procedure Code, note to section 274.

As the debtor has not appeared, we cannot make any order as to costs. The appellants will bear their own costs of this appeal.

1872

C. SETON
v.
A. S. BIJOHN

Attorneys for the appellants: Messrs. *Robertson, Orr, Harris,* and *Francis.*—

Before Mr. Justice Paul.

ULLMAN AND OTHERS *v.* THE JUSTICES OF THE PEACE FOR THE TOWN OF CALCUTTA

Liability of Justices for Negligence of Contractors in repairing Drains—Cause of Action—Act VI of 1863 (*B. C.*), *s.* 263.

1871
August 1.

In a suit for alleged damage done to the plaintiff's premises by excavations for drainage purposes, which the Justices are authorized to make by Act VI of 1863 (B. C.), it being shown that the Justices had entrusted the execution of the work to skilled and competent contractors, *held* the justices were not liable.

In such a suit no cause of action will be allowed to be raised, except that disclosed in the notice of action required to be given to the Justices by section 226 of the Act.

THIS was a suit brought by the plaintiffs, who carried on business as merchants in Calcutta, against the Justices of the Peace for Rs. 3,028-4, being damages alleged to have been caused to the premises of the plaintiffs by the negligence and default of the defendants. The plaint stated that—

"The plaintiffs, since 1868, have been possessed of the land with the house and other buildings erected and standing thereon situated and being No. 135, Canning Street (formerly 32 Jackson'sGhat Street), in the town of Calcutta, and the plaintiffs were and are entitled to have the said land, house, and building supported by the land adjacent thereto and to the south thereof in the said Canning Street, and by the soil under the said land, house, and buildings of the plaintiffs, but the defendants in March 1871, whilst constructing and making a certain drain or sewer and excavation for the same on the south side of and adjoining and opposite to the said land, house, and buildings of the plaintiffs in Canning Street aforesaid, negligently and carelessly constructed and performed the work in and about the said drain and excavation for the same, by neglecting properly and efficiently to shore or prop up the sides of the