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law of the parties' domicile in 1855. As at present advised, it appears to me that a marriage *per verba de presenti in facie ecclesiæ* that is, in the presence of an episcopally ordained priest (which was good by the common law) would have been sufficient according to the law of the domicile in the year 1855. Indeed, there is authority for this position in the case of *Lautour* v. *Teesdale* (1).

So that even if I considered that I had jurisdiction to entertain this suit, I should hesitate very long before I would make a decree, in an undefended suit, which would disturb a marriage acquiesced in by the parties for a period of twelve years, and which, in the words of the first marriage Statute of Henry VIII, was "a marriage contract, and solemnized in the face of the church, and consummate with bodily konwledge and fruit of children" (2).

Suit dismissed.

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January 13.

Attorney for the plaintiff: Mr. *Garruthers*.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

KHERODA MAYI DASI (DECREE-HOLDER) *v.* GOLAM ABARDARI (JUDGMENT-DEBTOR).*

Execution-sale—Defaulting Purchaser—Resale—Act VIII of 1859, *s.* 254.

In execution of a decree certain property of the judgment-debtor was attached and put up for sale and a portion thereof was knocked down to a purchaser for a sum sufficient to satisfy the decree. The purchaser, however, having made default in payment of the purchase-money, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it at the former sale *Held* that the decree-holder was not debarred by what took place at the former sale from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold.

* Miscellaneous Special Appeal, No. 278 of 1873, against the order of the Judge of East Burdwan, dated the 17th May 1873, reversing the decree of the Munsif of Chowki Jehanabad, dated the 5th April 1873.

(1) 8 Taunt., 830. (2) 32 Hen. VIII, c. 38.

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IN execution of a decree for Rs. 148 obtained by Kheroda Mayi Dasi, several properties belonging to the judgment-debtor were attached and put up for sale. At the sale the first of these properties was knocked down to a bidder for Rs. 154, and that being sufficient to satisfy the debt, the sale proceeded no further. The purchaser however having failed to pay the puschase-money within the time prescribed by law, the sale was not completed, and the decree-holder subsequently applied that this and other properties of the judgment which had been attached should be put up for sale. In his petition he alleged that the purchaser at the first sale was, in fact, a mere creature of the judgment-debtor and that he bid this sum only in order to prevent the sale of the property. The judgment-debtor opposed this application on the ground that only the property which had previously been put up for sale could be the subject of the second sale. The Munsif ordered the sale to proceed, and also directed the debtor to proceed against the former purchaser, if the property fetched a less price than it did at the former sale. The judgment-debtor appealed, but before the hearing of the appeal, the second sale had taken place and the property, which at the drevious sale had fetched Rs. 154, was knocked down to the decree-holder for Rs. 74, and other property of the judgment-debtor was sold. On appeal the learned Judge, after obseving that "there is, no doubt, very good ground for supposing the bid of Rs 154 for one and a half bigas to have been very much beyond the value, and possibly the transaction was not a *bonâ fide* one," went on to say:—"The law is explicit that the difference between the first and second sale is leviable from the defaulting purchaser, and the decision in *Joobraj Singh* v. *Gour Buksh Lal* (1) lays down that the debtor is entitled to credit for the amount bid at the first sale. It is obvious that there is a door for fraud here; for if a debtor can get a nominal bidder to bid a sum which will cover the decree, the sale will stop. The earnest-money will be lost it is true, but the property will be saved, the debt wiped off, and the creditor left to realize his money from the bidder who has

(1) 7 W. R., 110.

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nothing in the world." The learned Judge set aside that part of the Munsif's order which directed the debtor to realize the difference from the defaulting purchaser, and directed the Munsif not to confirm the sale of the properties other than the property originally sold.

From this order the decree-holder appealed.

Baboo *Bipro Doss Mookerjee*, for the appellant, proceeded to contend that there was nothing to prevent a decree-holder from proceeding against the properties of the judgment-debtor until his decree is satisfied ; but the Court called on the pleader for the respondent to support the decision of the lower Appellate Court.

Munshee *Abdool Bari*, for the respondent, contended that in the case of a resale the judgment-debtor is entitled to be credited with full the amount bid for his property at the time of the first sale, and that as the amount bid at the former sale was more than sufficient to meet the decree, the Judge's order was correct. The decree-holder has his remedy against the defaulting purchaser ; *Joobraj Singh* v. *Gour Buksh Lal* (1).

Baboo *Bipro Doss Mookerjee* was not called upon to reply.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts as above, continued) :—Now so far as the judgment of the Judge set aside that part of the Munsif's order which relates to the defaulting purchaser, we think he was right, because he is not before the Court, and we have really nothing whatever to do with the defaulting purchaser in this case. The question is entirely between the judgment-debtor and the judgment-creditor, and the point which we have to decide is whether in consequence of what took place on the former sale, the judgment-creditor is debarred from proceeding upon his decree against any other property of the judgment-debtor than that originally sold. The District Judge says that " the law is explicit that the difference

(1) 7 W. R., 110.

between the first and the second sales is leviable from the defaulting purchaser." So far the judgment of the District Judge is correct. Under s. 254 of the Civil Procedure Code it is quite true that the difference between the first and second sales is leviable from the defaulting purchaser, but, as I have already pointed out, this is a matter with which we have nothing to do in this case. But the District Judge then goes on to say that "the decision in *Joobraj Singh* v. *Gour Buksh Lal* (1) lays down that the debtor is entitled to credit for the amount bid at the first sale." It is on that point that the District Judge has mistaken the law. The law itself nowhere says what the District Judge there states, and if that decision is looked at, it lays down nothing of that kind. In that particular case no doubt the fact was that the whole amount bid at the first sale was set off against the judgment debt, but that was only because the bidder at the first sale was found to have been in fact the judgment-creditor himself, and that being the case he was, under the provisions of s. 254, liable to make good the difference between the first and the second sales. Therefore it was almost a matter of course to set off against his judgment debt the liability which he was under of making good the deficiency. If that decision be looked at, it will be seen that in that very same case the Judges distinctly pointed out that what is to be forfeited under s. 254 is not any right which the decree-holder may have under his decree, but only the deposit which has been made by the defaulting purchaser. That clearly shows that the Judges there did not treat the mere default of the purchaser in completing the sale as in any way affecting the right of the decree-holder. It is possible that the District Judge has been misled by a statement of the effect of that decision contained in a work which, although not a work of authority, is yet generally referred to, and is generally correct. The effect of the decision in *Joobraj Singh* v. *Gour Buksh Lal* (1) is stated at p. 302 of Macpherson's Civil Procedure Code as the District Judge has here stated it. But on a closer examination of that case it really appears that it has no bearing whatever upon this question. The decree-holder here has a decree

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against the judgment-debtor which is still unsatisfied, and th ere is nothing in the law or in that decision which prevents him from proceeding as far as he likes, until that decree is satisfied, against the property of the judgment-debtor. The result is that the order of the Judge, in so far as it orders the Munsif not to confirm the sale of the properties other than the property originally sold, will be set aside, and the execution proceedings will be brought to a termination according to law.

The appellant is entitled to the costs of this appeal and of the lower Appellate Court.

Appeal allowed.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.

1874
March 16.

MAHOMED ISRAILE (PLAINTIFF) *v.* WISE (DEFENDANT).*

Suit to set aside Settlement—Right of Action—Parties.

In a suit by a person claiming certain lands which have been resumed by the Government, the plaintiff is entitled on the allegation that he is the rightful owner of the lands, and that the defendant obtained a settlement by false allegations of ownership and of possession, to an adjudication of his right to a settlement. It is not discretionary with the Collector under such circumstances to settle with any person he pleases for the land, nor is such settlement, if made, final as regards all claims.

Semble.—To such a suit the Government should be made a party.

THE plaintiff brought this suit to obtain an adjudication of his right to a settlement of Mauzas Merandy, Kochooah, and an eight-anna share in Mauza Rosoolpore, and to be put in possession thereof. He stated that these mauzas belonged to him, and that he had been previously in possession of them as *lakhirajdar* ; that Government having brought a resumption suit against him and his cosharers in respect of these lands, and having obtained a decree for resumption, settled with the plaintiff for the said lands, but that on appeal by the defendant,

* Special Appeal, No. 882 of 1873, from a decision passed by the Officiating Judge of Dacca, dated the 28th December 1872, affirming a decree of the Subordinate Judge of that district, dated the 1st April 1872.