Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Macpherson, and Mr. Justice Mitter.

1868 Sept. 12.

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See also Sec. 279 Act XIV of 1882.

Claim—Attachment—Onus Probandi—Act VIII. of 1859, *ss.* 234 *&* 246.

Where a claim was made under section 246 of Act VIII. of 1859, by a third party, to some timber, which had been attached by a prohibitory order under section 234, *held*, (per PEACOCK, C J., L. S. JACKSON, PHEAR, and MACPHERSON, J. J.;—MITTER, J., *dissenting*), the claimant must begin. The onus is on him to prove that the goods attached were his property, or in his possession, and therefore not in the possession of the judgment-debtor. His evidence must be confined to proving his own claim, and he cannot be allowed to show a title in a third person with whom he has no connection.

Held (per MITTER, J.), that, on the proper construction of the words "proceed to investigate the same with like powers as if the claimant had "been originally made a defendant," the onus of proof as against the claimant is on the decree-holder.

Nito Kalee Debee v. *Kripanath Roy* (1) overruled.

THIS was a reference to the High Court, from the Recorder of Moulmein, under the circumstances appearing in the order of reference, the material portion of which was as follows:

"An application was made, on the 18th November 1867, to the Recorder of Moulmein, to discharge an order under section 234, Act VIII. of 1859, prohibiting the applicant from alienating 114 logs of teak timber, bearing the mark Ko Yan (2). The timber was alleged in the applicant's petition to be in his possession. It appeared, however, that it was in the possession of the Government Officers at the Revenue Station, Kadoe. The applicant's title was that of purchaser from the son of the judgment-debtor.

"It was contended, on behalf of the applicant, that the onus of proving property in the goods attached, lay on the judgment-creditor, and that he should begin. Reference was made to a case which has been very recently decided by SETON-KARR and DWARKANATH MITTER, J. J., in the High Court of Calcutta, namely, *Nito Kalee Debee* v. *Kripanath Roy* (1)."

* Reference from the Recorder of Moulmein, dated the 18th of Nov. 1867.

(1) 8 W. R., 358. (2) Burmese mark.

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The Recorder referred the case to the High Court for its opinion on four points, of which the three following came under the consideration of the Full Bench:

Second.—Which party, in a proceeding under section 246, is to begin?

Third.—If the claimant is to begin, is the evidence given by him to be confined to his own claim, or may he set up that of an entirely different party?

Fourth.—If the judgment-creditor is to begin, is his evidence to have reference to his judgment-debtor's title only, or is he to make out such a case, as will, by necessary consequences, shut out the claimant without reference to the merits of his claim at all?

On the 1st February 1868, a Division Bench, consisting of PEACOCK, C. J., and BAYLEY, J., referred the case to a Full Bench under the following order:

"Having reference to the case cited, we are of opinion that "this case ought to be referred to a Full Bench, on the 2nd, 3rd, "and 4th questions, and it is referred accordingly."

The following are the judgments of the Full Bench:—

MITTER, J.—I am extremely sorry to differ from my learned colleagues in this case. I think, that according to the provisions of section 246, Act VIII. of 1859, the onus of proof is primarily upon the decree-holder, and not upon the claimant (1).

(1) *Act VIII. of* 1859, *sec.* 246.—"In "the event of any claim being preferred "to, or objection offered against, the sale "of lands or any other immovable or "movable property which may have "been attached in execution of a decree, "or under any order for attachment pas- "sed before judgment, as not liable to be "sold in execution of a decree against "the defendant, the Court shall, subject "to the proviso contained in the next "succeeding section proceed to inves- "tigate the same with the like powers, "as if the claimant had been original- "ly made a defendant to the suit, and "also with such powers as regards the "summoning of the original defend- "ant as are contained in section 220. "And if it shall appear to the satisfac- "tion of the Court, that the land or "other immovable or movable pro- "perty was not in the possession of the "party against whom execution is "sought or of some other person in "trust for him, or in the occupancy of "ryots or cultivators or other persons "paying rent to him at the time "when the property was attached, or "that, being in the possession of the "party himself at such time, it was "so in his possession, not on his own "account or as his own property, but on

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I think that the Legislature must have had some object in view when it assigned to the claimant the position of a defendant. This object was, as far as I can make it out, to confer upon him the ordinary privilege of a defendant, by requiring his adversary to start his case in the first instance, nor do I think that there is anything unreasonable in such a construction. The decree-holder has attached the property, alleging it to be the property of his judgment-debtor; but he has done so without satisfying the Court in any manner that it really belongs to him, or even that it was in his possession, or in that of some other person in trust for him, at the time when the attachment was made. It was he who took the initiative; and if, in consequence thereof, a dispute has arisen between him and a third party, it is but fair and just that he should be called upon first to substantiate his right to make the attachment.

This view appears to me to be strongly corroborated by the succeeding part of the section. The very nature of the question with reference to which the Court must satisfy itself, and which it must therefore enquire into before it passes any order one way or the other, seems to me to point out clearly as to which of the two contending parties ought to bear the burden of proof. If the Court is satisfied that the property attached was not in the possession of the judgment-debtor on his own account, or in that of some other person paying rent to him, or holding it in trust for him, the Court is directed to release it from attachment. If, on the other hand, the Court is satisfied that the property was in the possession of the judgment-debtor on his own account, or in that of some other person holding it in trust for him, the Court is then required to disallow the claim. So that it is clear,

"account of, or in trust for, some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court, that the land or other immovable or movable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots, or cultivators, or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

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(at least, so it appears to me) that the point to be enquired into by the Court is, whether the judgment-debtor is in beneficial possession or not, and the onus of proof is therefore upon the decree-holder, the affirmative of that proposition having been advanced by him.

Then again, the words used in the last sentence confirm this view still more. If the burden of proof were cast upon the claimant, his failure to discharge it would be sufficient for the rejection of his claim. But the law expressly declares that the claim is to be disallowed when the Court is satisfied that the judgment-debtor is in possession,—a conclusion which the Court cannot reasonably arrive at, merely because the claimant has not succeeded in proving the truth of his claim.

The learned Recorder of Moulmein, who has referred this question for the opinion of this Court, appears to have laid great stress upon the words "shall proceed to investigate the same," as showing that what is to be investigated is the claim preferred by the claimant. But it must be borne in mind, in the first place, that those words must be read in connection with others, which follow immediately next to them in the same sentence; or in other words that the whole of the sentence "shall proceed to investigate the same with the like powers as if the claimant had been originally made a defendant in the suit," must be read together. But all doubt on this point appears to be removed when we refer to the provisions of section 229 of the Act. The very identical words "shall preceed to investigate the same" are used in that section, although it has never yet been disputed that the burden of proof, in cases arising out of that section, is not primarily upon the decree-holder. It may be said that the words used in section 229, are—"the Court shall proceed to investigate the same *in the same manner* and with the like powers as if a suit for the property had been brought by the decree-holder against the claimant under the provisions of this Act;" whereas the words "in the same manner," are altogether omitted in section 246. But I apprehend that this omission can be satisfactorily accounted for when we bear in mind that the manner of investigation is not the same in the cases respectively arising out of those two sections. In a case under section 229, the investigation is to be precisely the same

as in a regular suit instituted under the Act; whereas the enquiry to be made in a case under section 246, is of a more limited nature, the only point to be ascertained being as to whether or not the judgment-debtor is in the beneficial enjoyment of the property attached. It might be further said that before any investigation is made by the Court, about a claim preferred under section 229, there is a sort of preliminary inquiry which the Court must go through, for the purpose of satisfying itself that the claimant is *bona fide* claiming to be in possession of the property decreed to the decree-holder. But there is no such provision in section 246, and it does not necessarily follow that a claimant under that section should go through the same preliminary process of proof as that laid down in section 229. It appears to me, that there is a very good reason for this distinction. In a case under section 229, the decree-holder has already established, in the presence of the judgment-debtor, at least his right and title to the property he is seeking to recover in execution. The claimant makes his appearance for the first time when the decree is sought to be executed, and in order to guard against any fraud on the part of the judjment-debtor, the Legislature thought it proper to enjoin upon the Court the necessity of seeing, not that the claimant is in *bona fide* possession of the property, for that would be anticipating to a certain extent the investigation to be subsequently made, but that he is a person other than the judgment-debtor claiming *bona fide* to be in possession. In a case under section 246, there is no such presumption in favor of the decree-holders' right to sell the property attached. There is but a mere allegation on his side that it belongs to his debtor, exactly in the same way as there is an allegation on the side of the claimant that it belongs to himself. If neither party is able to give any evidence, the decree-holder must lose; for he stands substantially in the position of a plaintiff seeking the assistance of the Court to sell the property for his benefit.

I am, therefore, of opinion that the decree-holder is bound to start his case in such a manner as would be sufficient to shift the burden of proof upon the claimant, who is required to be treated as a defendant under the express wording of the section in question.

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PEACOCK, C. J.—This case was referred for the opinion of the Court by the learned Recorder of Moulmein. A number of logs of teak timber in the possession of the Government officers at the revenue station at Kadoe were attached in execution of a judgment as property belonging to the judgment-debtor. The petitioner came in under section 246 of Act VIII. of 1859, and claimed that the property was his. Four questions were raised by the learned Recorder for the opinion of the High Court; and the 1st Division Bench, in consequence of the case of *Nito Kalee Debee* v. *Kripanath Roy* (1), thought it necessary to refer the case on the last three questions to the Full Bench.

The second question is, which party, in a proceeding under section 246, is to begin?

The third question is, if the claimant is to begin, is the evidence given by him to be confined to his own claim or may he set up that of an entirely different party?

The fourth question is, if the judgment-creditor is to begin, is his evidence to have reference to his judgment-debtor's title only, or is he to make out such a case as will, by necessary consequences, shut out the claimant without reference to the merits of his claim at all?

With reference to the first of the questions, *viz.*, the second question above stated, it is necessary to refer to section 246 of the Act. In the case to which I have referred, it was held by a division Bench of this Court, that the execution-creditor was to begin, and that the onus lay upon him. The learned Recorder took a different view, and thought that the claimant was entitled to begin, and that the onus lay upon him; and my opinion is in accordance with the view expressed by the learned Recorder.

In the case to which I have referred, my honorable colleague, Mr. Justice Dwarkanath Mitter, made the following remarks:—

"The proceedings of the Moonsiff was clearly illegal from the "beginning to the end. He had attached a certain mehal for "sale. A third party came forward with a claim relating to a

(1) 8 W. R., 358.

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" portion of the mehal, without stating whether the judgment-
" debtor had or had not any interest in the remainder. Under such
" circumstances, the Moonsiff, if he had attended to the provi-
" sions of section 246, might have at once perceived that it was
" not necessary for him to hold any enquiry into the matter.
" Instead of doing this, he proceeded to hold an investigation
" which is clearly opposed to the express wording of the law.
" If any investigation was necessary, the matter which he ought
" to have enquired into was, whether the judgmedt-debtor was
" directly or indirectly in the enjoyment of the rents and profits
" of the mehal advertised for sale. Whether the claim prefer-
" red by the third party was a good one or a bad one, was not
" the matter directly in issue before him."

I confess that, when I read section 246, and saw it stated that the Court was to investigate the claim, I could not understand how it was that my honorable colleague held that it was not necessary for the Court to hold any enquiry in the matter. I have spoken to my honorable colleague on the subject, and it appears that in the particular case, all that had been attached was not the whole or any specific part of the mehal, but only the right and title of the judgment-debtor therein. That I understand was the reason why my honorable colleague stated that the investigation was not necessary. An attachment in general terms of the rights and interests of the judgment-debtor would be no attachment. An attachment must specify what is attached. An attachment is very different from a sale which is merely of the rights and interests of the judgment-debtor in the thing attached. Section 213 says :—" When the application is for the attach-
" ment of any land or other immovable property belonging to
" the defendant, it hall be accompanied with an inventory or
" list of such property, containing such a description of the pro-
" perty as may be sufficient to identify it, together with a speci-
" fication of the defendant's share or interest therein, to the best
" of the applicant's belief, and so far as he has been able to
" ascertain the same." After the attachment, the defendant's rights and inrerests in the subject-matter of the attachment are to be sold. For instance, it would not do to stick up

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in the Zilla that the creditor attaches all the rights and interests which the debtor possesses in any property in the entire Zilla.

Proceeding from this point, the question is whether the Court was right in stating that "the matter to be enquired into was whether the judgment-debtor was directly or indirectly in the enjoyment of the rents and profits of the mehal advertised for sale. Whether the claim preferred by the third party was a good one or bad one, was not the matter directly in issue before it."

Speaking with great deference to the opinion of my honorable colleague, it appears to me that that is not the right view of the case, and that the real question to be tried was, whether the claim preferred by the third party was a good one or bad one. The goods in this case, being movable property, could not be actually attached because they were in the possession of the Government officers, and the Government had a lien upon them for the revenue. If they had been in the actual possession of the judgment-debtor, they would have been seized under section 233; but, being in the possession of Government, they were merely attached under section 234 (1). There was, therefore, merely a symbolical, instead of an actual seizure of the goods. But that, as it appears to me, would make no real difference as to the question to be decided. If the Nazir were to seize goods, believing them to be in the actual possession of a defendant, the claimant would have to prove that the Nazir had seized the goods of the claimant as the goods of the judgment-debtor. In an ordinary case, if the sheriff wrongly seizes goods, the real owner brings an action against the sheriff for seizing goods belonging to him. In such a case the claimant would have to begin and prove that the goods belonged to him. If he could show that the goods were in his actual possession, that would be *prima facie* evidence that they were his property, and not the

(1) *Act VIII of* 1859, *sec.* 234.—"When the property shall consist of goods, chattels or other movable property to which the defendant is entitled, subject to a lien right of some other person to the immediate possession thereof, the attachment shall be made by a written order prohibiting the person in possession from giving over the property to the defendant"

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property of the judgment-debtor. So, if he could prove that the judgment-debtor was his servant, and had the goods in his possession, as his servant, that would prove his case. But no one would contend that the sheriff would have to begin, and prove that the goods belonged to the debtor. Even if they were not the debtor's, the claimant would not have a right to interfere, unless he proved that they belonged to him or were in his possession.

The goods in the present case, being in the possession of Government, were merely attached, that attachment did not prove that they were in the possession of the claimant or of the judgment-debtor, but still they were attached and taken possession of symbolically by the officer of the Court; and it was for the claimant to give such evidence as to justify the Court in removing the attachment. The claimant was the actor, and wanted something to be done, and it was for him to prove that that which he wished to be done, ought to be done. If A were to attach the property of B, under a decree against him, C would have no right to come in and ask that the attachment should be removed on the ground that the goods belonged to D. If C should come in and claim to have the attachment removed, on the ground that they belonged to him, he would not support the claim by proving that they belonged to D. If the law were otherwise, anybody might come in and set up a *jus tertii*. It would not matter whether the goods belonged to the claimant or not, if the question simply was whether the goods belonged to the judgment-debtor. If they did not belong to the claimant, he had no right to come in and make the claim.

Now the section says, that when the claim is made, the Court shall investigate the same, and if the Court shall be satisfied that the land or other immovable or movable property was not in the possession of the party against whom the execution is sought, &c., the Court shall pass an order for releasing the property from attachment. The meaning of this is, that, if upon the investigation of the claim, the Court shall be satisfied that the property was not in the possession of the judgment-debtor for the

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reason stated in the claim, *viz.*, that it was the property of, or in the possession of the claimant, the Court should pass an order for releasing it.

At first sight, it may look as if the claimant had the onus of proving a negative, but the Act merely throws upon him, substantially, the proof of an affirmative, *viz.*, that the goods were his property or in his possession, and therefore not in the possession of the judgment-debtor; and I think that the view which the learned Recorder took was correct; that under this section a claimant could not prove that the goods were not in the possession of the judgment-debtor by showing that they were in the possession of a third person with whom the claimant was wholly unconnected; and that he could do so only by proving that they were in his own possession or his own property, or in in the possession of the judgment-debtor on his behalf.

The section then goes on.—"If it shall appear to the satisfac- "tion of the Court, that the land or other immovable or mova- "ble property was in possession of the party against whom exe- "cution is sought as his own property, &c., the Court shall dis- "allow the claim." But surely it was never intended that the Court, upon the investigation of the claim, should allow the claimant to prove his case by showing the right of possession of a third person, for the purpose of showing that the goods were not in the possession of the judgment-debtor.

In the early part of the section, the Court is directed to investigate the claim with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. It is said that the words are remarkable; they are not that the claim is to be investigated as if the claimant were a party to the suit, but "as if the claimant had been originally made a defendant to the suit," that is, the suit in which the execution issued. But I take it that the meaning really is, that the Court is to have the same powers of investigation as if the claimant was a party to a suit, which would give power to summon the claimant and to dispose of the case against him, if he should refuse to attend.

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It is important also to remark, that this section of the Act does not direct that the claim is to be investigated in the same manner as if the claimant had been originally made a defendant, but with the same powers as if the claimant had been originally made a defendant to the suit, but when we refer to section 220, upon which my honorable colleague has relied, we shall find that very different words are used. There it is said that the Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant. The words "in the same manner" are used in that section, but not in section 246, and I think rightly used, because that section applies to a different state of circumstances. It refers to resistance to the taking possession of the property attached; to obstruction offered to the officer of the Court in taking possession. The effect of that section is, that the Court without prejudice to any proceedings to which the claimant may be liable under the law for the time being in force for the punishment of such resistance or obstruction, shall "proceed to "investigate the claim in the same manner and with the like power "as if a suit had been instituted by the decree-holder against the "claimant." That would be right, the claimant comes in and obstructs, and the decree-holder complains. That is substantially a suit against the claimant for a wrongful obstruction, and the plaintiff in such a case must prove his charge. It may be that the property does not belong either to the judgment-debtor or the claimant, and the plaintiff must prove that he himself has a right to take it.

It is said in Best's book on Evidence, 3rd Edition, para 270, "in order to determine on which of the litigant parties the burden of proof lies, the following test was suggested, we believe for the first time, by Alderson, B., in the case of *Amos* v. *Hughes*; (1) in 1835, *i. e., which party would be successful if no evidence at all were given*; and he not only applied that test in that case, as also in some subsequent ones, but it has been adopted by other Judges at *nisi prius* and frequently recognized by the Courts in Banc." That I believe is a correct test as to who ought to begin, and on whom the burden of proof rests.

(1) Moody & Rob, 464.

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Now, let us apply that rule to the present case. Under section 229, the execution-creditor is the actor, he complains that he has been obstructed, and he asks that the claim as to the obstructor may be investigated. If no evidence is offered by either party, the application will drop, and the judgment-creditor must fail. But under section 246, the case is different, because if no evidence were offered, the claimant would fail. Without any evidence on either side, the claimant could not obtain an order for the release of the property from attachment. Without any evidence on either side, it cannot appear to the satisfaction of the Judge, that the property was not in the possession of the judgment-debtor. In the book to which I have already referred, the learned author points out that much mis-conception and embarrassment have been introduced into the subject that a negative is incapable of proof by the unfortunate language in which the above principle has been enunciated. In a case, like the present, the affirmative lies upon the claimant to prove that the property is not the judgment-debtor's. In form, it is a negative issue, but in substance it is affirmative, because the negative can only be proved by showing affirmatively that the property belonged to the claimant, or was in his possession. Under these circumstances, it appears that the second question ought to be answered by stating that the claimant is to begin, and that he must prove that the property belonged to him or was in his possession. He may prove his title by the *prima facie* evidence of possession.

The third question is, "If the claimant is to begin, is the evidence given by him to be confined to his own claim or may he set up that of an entirely different party." It appears to me, for the reasons already given that, that question ought to be answered by stating that he must show his own title, and not the title of any third party with whom he has no connection.

It is unnecessary to answer the 4th question, as we have held that the claimant, and not the judgment-creditor, has to begin. With the expression of this opinion, the case will be sent back to the Division Bench which referred it, for decision on the 1st question which has been raised by the learned Recorder.

JACKSON, PHEAR, and MACPHERSON, JJ., concurred.