gagee for a small sum which is carried to the mortgagor's account, in part satisfaction of the decree, and the property vests absolutely in the mortgagee, who then at his leisure proceeds to further execution of his decree, in order to realise the balance remaining due under it.

One view of the matter is that, when the mortgagee purchases, the mortgage debt is satisfied. But I think that the more correct view is that the mortgagee purchasing is a trustee for the mortgagor who still has the right to redeem. Mr. Justice Phear has lately expressed a similar opinion, in the case of *Bolanauth Koondoo Chowdry* v. *Govindomoye Dossee* (1); and although he did not actually decide the question, Mr Justice Norman took the same view of it, when the application for an injunction was argued before him, and his observations on the point in his judgment of the 26th September 1867 are very pertinent (2).

(1) 3 B. L. R., O. C.,83 or I Suppl. Vol., p. 334.

(2) The 26th September 1867.

Before Mr. Justice Norman.

RAMLOCHAN SIRKAR,

versus

SRIMATI KAMINI DEBI.

THIS was an application by the defendant, for an injunction to restrain the plaintiff from proceeding to sell certain property, under an order of Court dated July 4th, 1867. The plaintiff was mortgagee of the property in question, which had been mortgaged to him by the defendant.

Mr. Kennedy for the Defendant.

The Advocate-General *contra.*

Norman, J. (after stating the facts).—The Advocate-General contends that a mortgagee, having obtained judgment on the covenant in a mortgage deed, can, in execution of that decree, put up for sale the equity of redemption of the mortgagor, and he referred to a case of *Toyluckomohun Tagore* v. *Gobind Chunder Sen* (a), decided by Mr. Justice Wells. I may observe that the case referred to was reversed on appeal. Mr. Hyde in a note says that the judgment, as regards the construction of Act VI of 1855, was not disturbed. But my own recollection of the matter is that the judgment of the Court of Appeal rested on the narrow ground, which was sufficient to enable the Court to reverse the judgment of the Court below, and so to prevent the injustice which, as Mr. Justice Wells himself points out, resulted from his decision.

The Court did not find it necessary to go into other and more difficult questions, which it would have been necessary to consider before they could have upheld the judgment in favor of the defendant. I do not mean to say that an equity of redemption in a chattel may not be liable to sale under Section 205, or that it may not be attached under Section 234, or that a person who is under no special obligations to the debtor, in respect of such property, may not sell it, as he would any ordinary chattel.

(a) 1 Hyde, 289.

As to the case of *Toyluckmohun Tagore* v. *Govind Chunder Sen* (1), it contains no

In the case before the Court, the plaintiff is a mortgagee. He holds the property as a pledge for the payment of the debts due to him. Courts of Equity will watch closely to prevent a mortgagee from making any unfair use of his position to the prejudice of his debtor; they will not allow a person, standing in the relation of mortgagee, to take advantage of the necessities of the debtor to obtain any collateral advantages beyond the payment of the principal, interest, and costs. They will even let a man loose from an express agreement made by him to render a mortgage irredeemable.

Mortgage deeds often contain powers of sale. Lord St. Leonards says:—"This power of sale in a mortgage is of the nature of a trust; the mortgagee, like any other trustee, is bound to use all the means in his power to get the fairest and best price for the property." Lord Eldon, in *Downes* v. *Grazebrook* (a), says:—"He is bound to bring the estate to the hammer under every possible advantage to his *cestui qui* trust." Vice-Chancellor Knight Bruce, in *Matthie* v. *Edwards* (b) says:—"A mortgagee, having a power of sale, cannot exercise it in a manner purely arbitrary, but is bound to exercise it with discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may, fairly and reasonably, with due diligence and attention, be under the circumstances obtainable." In the same case on appeal (c), Lord Cottenham said:—"If the power is exercised for exorbitant purposes, without a due regard for the interest of the parties, the Court will interfere." Vice-Chancellor Kindersley, in *Faulkner* v. *The Equitable Reversionary Interest Society* (d) says:—"A mortgagee has his rights; he has a beneficial interest, and that interest is the realizing of his security; in other words, getting paid his mortgage money, principal, interest, and any costs he may incur,—that is his right; but this Court will not allow him to exercise that right, without a due consideration of the interest of the mortgagor, and undoubtedly the interest of the mortgagor to which, in my opinion, the mortgagee is bound to attend, requires that the sale shall take place as beneficially to the mortgagor, as if the mortgagor were himself selling the property." A similar opinion was expressed by Lord Justice Turner in *Marriott* v. *The Anchor Reversionary Company* (e).

The principles laid down in these cases were acted upon in *Orme* v. *Wright* (f), *Ord* v. *Noel* (g), *Hobson* v. *Bell* (h); by the Lords Justices in *Davey*

(1) 1 Hyde, 289.

(a) 3 Mer, 208.
(b) 2 Col., 480.
(c) 16 L. J. Ch., 407.
(d) 28 L. J. Ch., 137.
(e) 30 L. J. Ch., 574.
(f) 3 Jur., 19.
(g) 5 Madd., 438.
(h) 2 Beav., 17.

well knowing that he was not a mooktear of the Court, that he was a relation of the Munsif, and that the inducement he held out to him to join in this exorbitant demand upon the Munsif, was that he would get large sum of Rs. 140 out of the amount which would be so taken from the Munsif, is highly reprehensible. We confirm the order of the Judge, and suspend the pleader Peary Mohun Gooho for a period of one year, to count from the date on which the Judge's order was passed.

Pontifex, J.—I am of the same opinion. In this case it seems to me from the whole conduct of the suspended pleader, if not for the reasons mentioned by the Judge, that it would be undesirable to interfere with the sentence of one year's suspension passed upon the pleader by the District Judge. If in these cases the mooktear is paid for his service by his employer, and in addition receive, without the knowledge of his employer, a percentage or commission from the pleader, it seems to me that the mooktear might be answerable, not only in the Civil Court, but also in the Criminal Court, on the action of his employer, to a charge of obtaining money from him improperly.

B. L. R. Vol. XI, p. 373.

(Original Civil.)

The 14th July 1873.

Before Mr. Justice Macpherson.

S. M. GOLAUPMONEE DOSSEE,

versus

S. M. PROSONOMOYE DOSSEE.

Suit in Forma Pauperis—Next Friend a Pauper—Infant.

A suit can be brought in *forma pauperis* by a next friend who is also a pauper.

THIS was a suit in *forma pauperis*, and was instituted by the father of the plaintiff as her next friend, she being an infant.

Mr. Bonnerjee, for the defendant, took a preliminary objection that a suit in *forma pauperis* could not be brought by a next friend. He referred to Macpherson on Infants, 377, and an *Anonymous case* (1). Such is the practice in England. By the practice of the Supreme Court, no suit could be brought on behalf of any infant without leave previously obtained from the Court on special affidavit stating the circumstances and reasons that it was for the benefit of the infant that the suit should be instituted; see Smoult and Ryan's Rules and Orders, vol. II, pp. 4 & 130. Act VIII of 1859 never intended that a pauper suit should be brought by a next friend.

Mr. Piffard, for the plaintiff, contended that, if that were so, it would create great hardship to infants desirous of suing in *forma pauperis*: it was never intended that a party should be in a worse position because he is an infant, than he would have been, if he had had been of full age. If the present plaintiff had not been an infant, she could have sued in *forma pauperis*, but if the present objection is good, she could not sue. The privilege to sue in *forma pauperis* is the privilege of the person entitled to sue. The plaintiff would not be liable to give security for costs, nor would the next friend, as he would not be liable for anything for which the plaintiff was not liable. [MACPHERSON, J.—That would be allowing him to sue in *forma pauperis*—see Daniell's Chancery Practice, 4th ed., p. 39; *Linsey* v. *Tyrrell* (2).] Then the infant could not sue at all. The Lord Chancellor in that case says there must be some means of enabling the infant to assert her rights. How can she do so except by her next friend?

Mr. Bonnerjee in reply.—By the authorities the rule seems to be that at any rate special circumstances must be shown for allowing such a suit to be brought.

Mr. Piffard asked to examine the father of the plaintiff. He was accordingly called and examined.

Mr. Bonnerjee submitted on the evidence that no special circumstances had been made out. The evidence that he was a pauper was not satisfactory. Unless it is shown that he is a pauper, and that he knows no person of substance whom he can get to

(1) 1 Ves., Jun., 409.
(2) 24 Beav., 124; S. C. on appeal, 2 DeGex & Jones, 7.