Judgment of the Lords of the Judicial Committee of Her Majesty's Privy Council on the Appeal of Dorab Ally Khan v. *Abdool Azeez and Ahmedoollah, the Executors of Khajah Moheeooddeen, deceased, from the High Court of Judicature at Fort William, in Bengal; delivered* 13*th April,* 1878.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal against a Decree of the High Court of Calcutta, sitting as a Court of Appeal, which, on the 23rd August, 1875, affirmed the Judgment of Mr. Justice Phear, who, in the exercise of the original civil jurisdiction of the same Court had, on the 22nd April, 1875, dismissed the Appellant's suit with costs.

The suit was instituted in December 1872, by the Appellant suing as Executor of one Dianut-ut-Dowlah against Khajah Moheeooddeen, who died after leave to appeal had been given in India, and is represented by the present Respondents. The case was tried in India upon only the first and preliminary issue, viz., whether or not a good cause of action was disclosed in the Plaint. It is, however, conceded that the statements in the Plaint may be taken to be supplemented by, and to include any fact stated, or to be inferred by necessary implication from the written statement of the Plaintiff, or the documents annexed to and filed with either that or the Plaint itself. These are the Sheriff's bill of sale of the 9th October, 1866; a petition of Dianut-ut-Dowlah to the Judicial Commissioner of

Oudh and the order thereon; the will of Dianut-ut-Dowlah and the certificate granted to the Plaintiff as the executor named therein; the writ of *Fi. Fa.*, dated the 18th June, 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows:—In 1856, under the before-mentioned warrant of attorney, Judgment was entered up in the late Supreme Court of Judicature at Fort William, at the suit of Khajah Moheeooddeen (the Defendant in this action), and one Robert O'Dowda, who was only joined with him as Co-plaintiff in order to give the Court jurisdiction, against Wazeer Khan and Khajah Abdoos Samut, for the purpose of securing the repayment of Company's Rs. 70,000, with interest, on the 23rd July, 1856. In order to enforce this Judgment against Khajah Abdoos Samut, and the representatives of Wazeer Khan, who was then dead, a writ of *Fi. Fa.* was, on the 18th June, 1866, directed to the Sheriff of Calcutta, commanding him to cause "to be levied and made of the houses, lands, debts, and other effects, movable and immovable, of the said Defendants, within the provinces, districts, or countries of Bengal, Behar, and Orissa, or in the province or district of Benares, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of Frot William in Bengal, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The Plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immovable properties in Oudh, but that nevertheless the Sheriff, "by the authority of Khajah Moheeooddeen, the execution creditor, and on the express instructions of his Attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August, 1866, seized the right, title, and interest of Abdoos Samut and of Wazeer Khan, then in the hands of his heirs and representatives in a Talook and premises within the Province of Oudh, and put the property so seized up for sale on the

4th October in the same year; that Dianut-ut-Dowlah became the purchaser of it for the sum of 26,000 rupees; and that the Sheriff afterwards executed to him the bill of sale of the 9th October, 1866, which is annexed to the Plaint. He further alleged that before the execution of the bill of sale, Dianut-ut-Dowlah paid the purchase money to the Sheriff who, about the 12th October, 1866, paid 5,000 rupees, part thereof, to the Attorney of the Plaintiffs in the suit; and on the 25th October, 1867, paid the balance of the purchase money, less his poundage and charges, to Moheeooddeen himself; that the Sheriff, by his officer, put Dianut-ut-Dowlah into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in Oudh, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment debtors or of any other person to Dianut-ut-Dowlah; that afterwards and under some proceedings which took place in the Courts in Oudh (the nature whereof, except that they began with a proceeding instituted by Dianut-ut-Dowlah himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon and in the month of August 1868, Dianut-ut-Dowlah was removed from possession of the Talook and premises. The Plaintiff then admitted that Dianut-ut-Dowlah, whilst in possession, had made collections to the amount of 10,937 rupees, but alleged that after payment of the Government revenue, collection and law charges, and other necessary outgoings, a balance of only rupees 446 : 6 : 9 remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase, and then, after stating the death of Dianut-ut-Dowlah on the 23rd June, 1868, the title of the Plaintiff as his executor, a demand by the Plaintiff and a refusal by the Defendant, the Plaint goes on to say—"The Plaintiff sues the Defendant for the sum of 26,000 rupees for moneys had and received by the Defendant for the use of the said Dianut-ut-Dowlah."

Mr. Justice Phear, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *Fi. Fa.* In their Lordships' opinion, the Decree under Appeal cannot be supported upon any such

ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the Plaint. The jurisdiction of the late Supreme Court, and of the Sheriff as its officer, was originally limited by the Charter of Justice of 1774, to the Provinces of Bengal, Behar, and Orissa, and though afterwards extended by the 39 and 40 Geo. III, cap. 79, sec. 20, was so extended only to the province or district of Benares, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of Fort William. The writ of *Fi. Fa.*, which was the Sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of Fort William, he was as much a trespasser as an English Sheriff who had seized property out of his bailiwick would be. That the Province of Oudh was not, when first annexed to British India, or at the date of the execution, annexed to the Presidency of Fort William, if not one of those historical facts of which the Courts in India are bound, under "The Indian Evidence Act, 1872," to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the Judgment of the High Court on the Appeal. After stating that they must assume it as established that the Sheriff had no right to execute the writ upon property in Oudh, and also, though that was not so clearly stated in the Plaint as it might be, that the result of the proceedings before the Commissioner of Oudh was that the sale was declared null and void, and that the Plaintiff's testator was thereupon evicted from the property; the learned Judges said: "The question then arises, can the purchaser, at a sale by the Sheriff under a writ of *Fi. Fa.*, upon being evicted by the execution debtor, recover the purchase money which he has paid from the execution creditor, if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so

execute it under the authority, and by the express direction of the judgment creditor." They understand, however, that modification to be implied in the next sentence of the Judgment, which is in these words:—"We are asked by the Appellant to consider and decide the case upon the assumption that the Sheriff in seizing, selling, and conveying the property, was the agent of the execution creditor; that the execution creditor was in fact the vendor and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the Plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the Plaintiff's written statement at page 16 of the record, and the letter therein set forth. The question thus stated is novel, and not without difficulty.

Their Lordships propose to consider, first, whether in the circumstances stated the evicted purchaser can have any remedy against the execution creditor.

There is no doubt that the authorities cited in the Judgment of the High Court, and relied upon at the Bar, establish the proposition which is thus stated by Lord St. Leonards at page 549 of the 14th edition of his work on Vendors and Purchasers: "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of England to govern all sales by private contract between the parties either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best very inadequate means of investi-

gating the title of the judgment debtor; all that is sold and bought is the right, title, and interest of the judgment debtor with all its defects; and the Sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the Sheriff, which are governed by rules peculiar to such sales.

Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment debtor, he has no remedy against either the Sheriff or the judgment creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

The Sheriff, however, if he acts *ultra vires* cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in India the difference between real and personal estate which obtains in England; and movable and immovable property are alike capable of being seized and sold under a writ of *Fi. Fa.*

The law of England as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on sales, 2nd edition, page 511 *et seq.* In Sims *v.* Marryat, 17 Q. B. 281, Lord Campbell, when commenting on Mr. Baron Parke's Judgment in Morley *v.* Attenborough, after saying that the law was not in a satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the Judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of Eichholz *v.* Banister, 34 "Law Journal," C. B. 105, and 17 C. B. N. S. 708, which was decided in 1864. In that case Ch. J. Erle is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the "Law Journal," is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise the buyer may recover back the price as money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the Sheriff under a *Fi. Fa.*, because what the Sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment debtor, and this was the express ground of the decision in Chapman *v.* Spiller, 14 Q. B. 621, where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in Morley *v.* Attenborough, 3 Exch. 500, which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the Sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawnbroker of an article pawned with him as an unredeemed pledge there is no implied warranty of the pawnor's title, the judgment of Mr. Baron Parke seems to assume that the pawnbroker does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a

pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So too it may be inferred from Hall *v.* Conder, 2 C. B. N. S., page 22, that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that Letters Patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that upon a similar principle the Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction; although when he has jurisdiction he does not in any way warrant that the judgment debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor.

In the present case the subject matter of the sale was the estate of the execution debtor, so that if the Sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative, and wholly ineffectual. The High Courts have assumed that if the Defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so tretaed), the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immovable property. This view does not appear to their Lordships to be correct. The Defendant directed the Sheriff to sell in his character of Sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff, as Sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opiniou that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the Record do not disclose a *primâ facie* case for some relief against the Defendant.

There is, no doubt, a further question whether the Plaintiff has shown a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon

a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his perception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in India will be competent to mould the relief according to the facts finally established at the hearing. Their Lordships, of course, offer no opinion whether the Plaintiff will ultimately succeed in establishing his right to any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his lifetime, bought with knowledge of the defect in the Sheriff's jurisdiction, or has, by acquiescence or in some other way, forfeited any right which he might otherwise have had to relief. They only decide that the Plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried upon the other issues that have been, or may be, raised in it. And they will accordingly advise Her Majesty to reverse the two Decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this Appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

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