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and consider that no evidence of the acts of a single family repugnant or antagonistic to the general law, will establish a valid custom or usage which can be enforced by a Court of Justice, and we hold consequently that the court of first instance decided correctly in refusing to inquire into the existence of such special family custom. We, therefore, affirm the decree of the lower courts: costs on the special appellants.

Decrees affirmed.

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Special Appeal No. 46 *of* 1867.

DHONDU' MATHURA'DA'S NA'IK.....*Appellant.*
RA'MJI valad HANMANTA' KA'KDA'.....*Respondent.*

Sale—Sheriff's Sale — Immoveable Property — Warranty — Caveat Emptor.

In a sale of immoveable property made by a Civil Court in execution of a decree, there is no implied warranty by the execution creditor of the title of the judgment debtor—the maxim "*caveat emptor*" applying.

THIS was a Special Appeal from the decision of A. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 359 of 1866, confirming the decree of the Munsif of Sinnar.

The case was argued before TUCKER and GIBBS, JJ.

Shántárám Náráyan and *Pándurang Balibhadra* for the special appellant.

Ganesh Hari Patvardhan for the special respondent.

The facts of the case, so far as material, appear from the following judgments, delivered this day:—

GIBBS, J.:—This is a suit brought by Rámji against Dhondú to recover damages which, he alleged, had accrued by Dhondú having attached, and the Court having sold, certain land as the property of Dhondú's judgment debtor, Ráma, but which was subsequently decided by decree of the Court, in a suit, "*Rámji* v. *Ráma*," not to belong to that person.

The Munsif held that it was incumbent on Dhondú to prove that the land belonged to his judgment debtor, and

found for Rámji accordingly; but the District Judge reversed this decree, and returned the case for re-trial, whereat the Munsif again found in favour of Rámji, and this latter decree the District Judge confirmed on appeal.

A special appeal was admitted against this judgment of the District Judge, and, on the case coming on for hearing, the pleader for the special respondent took the objection that it was a Small Cause Court case, and therefore that no special appeal would lie.

We held this objection to be untenable, as on perusing the proceedings in the lower courts, we found that they had decided a question of title to immoveable property, and that in consequence, under the ruling of *W. D. Díkshít* v. *B. V. Díkshít* (*a*), a special appeal would lie.

The pleader for the special respondent objected to the decree as being contrary to law, because there was no warranty, either expressed or implied, and that to such sales the maxim *caveat emptor* applied. It was attempted to be shown on the other side that the maxim did not apply, and that the purchaser at a Court's sale purchased, at all events, under an implied warranty.

The case was adjourned for examination of precedents, but none have been cited save *Sambhulál* v. *The Collector of Súrat* (*b*), in which the application of the maxim *caveat emptor* is incidentally mentioned; but upon examining the report, it appears that the Judicial Committee of the Privy Council disposed of the case on an entirely different point, and abstained from expressing any opinion as to the applicability of the maxim. It therefore becomes necessary to look elsewhere for precedents to guide the Court in its decision.

Among the leading cases in England are *Morley* v. *Attenborough* (*c*) and *Chapman* v. *Spiller* (*d*). The latter in particular meets the question of Sheriffs' sales and the title acquired thereat.

A review of these cases shows that under the Roman Law (Domat, Vol. I., Book 1, Tit. 28: 2 Strahan's Translation,

(*a*) 2 Bom. H. C. Rep. 4.
(*b*) 8 Moor. P. C. Rep. 22. (*c*) 3 Ex. 500 (*d*) 14 Q. B. 621.

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Vol. I., p. 60) "the seller ought to warrant, that is, secure, the buyer in the peaceful possession of the thing sold;" but against this there is a note which corresponds with Coke Littleton 102 *a*: "although, by the civil law, every man is bound to warrant the thing he selleth or conveyeth, albeit there is no express warranty; but the Common Law bindeth him not, unless there be a warranty, either in deed or in law, for *caveat emptor*:" and this is the rule of law of English Courts, "except fraud be proved against the vendor," as is laid down by *Littledale*, J., in *Eardly* v. *Garrett* (*e*): "the scienter or fraud is the gist of the action where there is no warranty." In *Morley* v. *Attenborough* it was held that at a public auction of unredeemed pledges, the purchaser could not recover against the vendor when the chattel sold subsequently turned out to belong to a third party who recovered it from the purchaser, as in such a case no warranty was given.

But the case of *Chapman* v. *Spiller* more particularly applies to the special appeal before us, as in that the question was whether at a Sheriff's sale in England any warranty was given or implied; and the Judges of the Queen's Bench held, chiefly on the authority of *Morley* v. *Attenborough*, that there was none. And that such had been the rule for many years is shown by the following observation of *Parke*, B., quoted in that case (from 18 L. J., N. S. Ex., 150): "I recollect contending before Sir James Mansfield, that in a sale by the Sheriff a warranty of title was implied, and my position was received with much contempt and astonishment, and I was asked to produce an authority for it."

This seems decisive. If fraud had been shown, it would, as above noticed, have altered the case; but in the present suit fraud is not asserted, much less established, although the District Judge, by a method of reasoning peculiar to himself, and which the Court cannot follow, holds that because, in a suit *subsequently brought*, the land in dispute was held not to belong to Rámа, "therefore the attaching credi-

(*e*) 9 B. & C. 928.

tor, Dhondú, cheated within the terms of the Penal Code ;" "as," the District Judge adds, "he by attaching and obtaining the sale intentionally induced some person, *i.e.*, Ráma, the original plaintiff, to do that which he would not have done if he were not so deceived—purchase at auction and pay for the field which had not been delivered to him, and for which Rs. 151 were made over to the judgment creditor, Dhondú, who should therefore be held liable for the pecuniary injury which plaintiff suffered."

An examination of the papers shows that, so far from fraud being alleged on the first trial in appeal, the District Judge found the land belonged to the family of Ráma, the person in whose name it was attached, and further held that there was no evidence of separation between Ráma's father and uncle, showing at all events a *primâ facie* title therein.

There is one matter, however, which needs notice. It may be said that Sheriffs' sales in England never include immoveable property, only chattels; and that therefore a different rule should be applied to Courts' sales in this country at which immoveable property is sold; but I see no good reason for this. The Code of Civil Procedure contains clauses by which every person may defend his right to immoveable property improperly attached, while what is sold is merely "the right, title, and interest" of the judgment debtor, and that without any warranty : so that the purchaser is left to his own resources, and, with the registration records at hand, he cannot be permitted to sit still and then plead that he has taken nothing by his bargain, when the right, title, and interest of the judgment debtor subsequently prove to be nothing at all.

Although no precedents have been produced, I cannot help being of opinion that the doctrine of the English courts, as laid down in *Chapman* v. *Spiller*, must be the practice of the courts here, as otherwise cases would certainly have arisen in which purchasers would have sought to recover against the vendors, as in the present case. We have heard of none, although, both on the Original side of this court and also in the Mofussil, such sales are of frequent occurrence.

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I am of opinion that we must reverse the decrees of the Munsif and District Judge, and throw out Rámji's claim with all costs.

TUCKER, J.:—I concur in the conclusion at which my brother Gibbs has arrived, and consider that in sales of immoveable property made by a civil court in execution of a decree there is no implied warranty, by the execution creditor who has caused the sale, of the title of the judgment debtor. The proclamation declares that the sale extends only to the right, title, and interest of the judgment debtor in the property put up at auction; and a purchaser is bound to satisfy himself of the character and extent of this interest before he bids; and in case it should turn out that the judgment debtor has no interest whatever in the land or other real estate put up for sale, the purchaser has no remedy against the execution creditor, unless he can establish fraud or wilful misrepresentation on the part of that person.

It has been held in S. A. No. 417 of 1861, and Cases 2 and 3 of 1866, that a person whose property has been wrongfully sold in execution of a decree passed against some other person, can recover damages against the execution creditor for any loss which he may have suffered in consequence of the act of the latter in attaching and selling property which did not belong to his judgment debtor: and I think there can be no question of the soundness of these decisions. But the positions of the purchaser and of the person whose property has been wrongfully sold are different. In the latter case the injury is entirely the result of a wrongful act by another person, while in the former it is mainly attributable to a want of care and caution on the part of the injured individual himself. So that a person may be justly entitled to compensation in the one instance when he would not be in the other. The decrees of the District Judge and Munsif must be reversed, and the plaintiff's claim rejected, who must bear all the costs in all courts.

Decrees reversed.