Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mahomed Kala Mea v. *A. V. Harperink and others, from the Chief Court of Lower Burma; delivered the* 15*th December,* 1908.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

Their Lordships regret to say that in their opinion there has been a lamentable miscarriage of justice in this case. It is an Appeal from the Chief Court of Lower Burma. It was heard *ex parte*. But the facts are not open to dispute.

At an auction sale in execution held under the direction of the Court the Appellant, who had dropped in quite casually, was tempted to bid and was declared the purchaser. The thing put up for sale was knocked down to him for Rs. 38,000. The sale was conducted by two officers of the Court—a Mr. Spencer, who was chief clerk and officiating bailiff, and a Mr. Innes, his deputy, who was the auctioneer. Mr. Innes read the proclamation in English, a language which no native present seems to have understood. It stated clearly enough that only the interest of the judgment debtor was for sale. Then, in answer to a native who asked what the proclamation said, Mr. Innes made a

i (22)57474. [70.] 100.—12/08. Wt. 243. E. & S. A

statement in the vernacular to the effect that the land was being sold at the instance of the mortgagees. The Appellant was thus led to believe that the invitation was an invitation to bid for a substantial property freed and discharged from all incumbrances. In the result he found himself the purchaser of a shadowy equity of redemption not worth one farthing. The value of the lot unencumbered was not more than Rs. 45,000. The charges upon it were over Rs. 64,000.

As soon as the Appellant realised his position he explained to Mr. Spencer that he had bid for the property under a misapprehension. Mr. Spencer reported to the Court that the Appellant's statement was supported by Mr. I. Sofaer and Mr. Hadji Shah Mahomed, the other two bidders at the sale, whom he had sent for and questioned. They too, it seems, were under the same misapprehension. He added that, as their statements appeared to be perfectly genuine, and as the property in his opinion was not worth more than from Rs. 40,000 to Rs. 45,000 at the most, he thought it his duty to refer the matter to the Chief Court for orders whether, under the circumstances, the sale should be set aside and the property put up again.

The learned Judge to whom the matter was referred declined to interfere.

The Appellant then applied to the Court to be discharged from his purchase, submitting affidavits which showed that the misapprehension on his part was caused by a misrepresentation on the part of the auctioneer. Owing, however, to the opposition of the judgment debtor—though there was no opposition on the part of anyone else—it was thought advisable to proceed by a regular suit.

The learned Judge of first instance dismissed the suit. Then there was an appeal to the Chief Court.

The two learned Judges who formed the Court of Appeal were both satisfied that the Appellant did bid for the property under a misapprehension, and that the misapprehension was caused by a misrepresentation made by the auctioneer. But they both held that the Appellant's claim to relief failed for a reason which was not even suggested in argument either before the Court of Appeal, or before the Court of first instance. They held that, although there was a misrepresentation as defined by Section 18, Clause 3, of the Indian Contract Act, the case fell within the exception in Section 19, which provides that in case of "consent caused by misrepresentation" the contract is not voidable if the party whose consent is so caused had the means of discovering the truth with ordinary diligence. "To my mind," says one of the learned Judges, "the Appellant had such "means. He could have gone to the Court "and could have ascertained the exact con-"ditions of the sale. He could have read the "advertisement in the newspaper. Further, "the conditions were read out in English at "the sale." No doubt the conditions were read out at the sale, and in English. But the Appellant speaks and understands nothing but Hindustani. English is an unknown tongue to him. The other learned Judge takes the same view. He finds that the Appellant was "culpably "careless in failing to ascertain the truth in "the obvious way, namely, by having the "proclamation read and carefully translated for "him." It is plain from these remarks that the negligence for which the learned Judges

condemn the Appellant is want of prudence in embarking so rashly on a transaction so important. The Appellant had no means of discovering the truth when the auction was going on. He was perfectly justified in relying on what was said by the auctioneer in the presence and hearing of the chief clerk who had charge of the sale. The exception in Section 19 of the Contract Act has no application to the case. And there is no defence to the suit.

So the matter would have stood if the question had arisen between outsiders, and the Court had had no concern in the matter beyond the duty of exercising its judicial functions. But over and above all this there is involved in this case a principle of supreme importance which the learned judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more surprised at the moral lesson which the

presiding Judge draws from the story of this auction. He points out that the Appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the Appellant "richly deserved to lose heavily over the transaction."

Mr. Spencer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But that course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present Appellant would have been both dishonest and futile.

Their Lordships think that the Appeal should be allowed, the Order of the Court of Appeal and the Judgment of the Lower Court discharged with costs, to be paid by the judgment debtor, and a Decree made setting aside the sale with costs against the judgment debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

The judgment debtor must pay the costs of the Appeal.
