SILVA *v.* ABAYAGUNAWARDANA *et al.*

D. C., Galle, 4,099.

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March 17 and 24.

Seizure in execution—Mortgage of property seized—Return to writ—Prohibitory order under s. 37 of Ordinance No. 4 of 1867—Title of purchaser in execution.

Where property is duly seized in execution under Ordinance No. 4 of 1867, a mortgage of the same by the judgment-debtor is null and void as against the title of the purchaser at the sale on such seizure.

Where it was necessary to prove a seizure in execution eight or nine years after the event, and it appeared that the Fiscal had made return that the seizure had been duly made, and a list of the property seized appeared at the foot of such return, in terms of section 45 of Ordinance No. 6 of 1867—*held, per* WITHERS, J., that, in the circumstances, the fact that a prohibitory order under section 37 was duly affixed might well be presumed.

THE first defendant in this case had by bond dated September 11, 1889, mortgaged certain lands to one Adrian, who by his deed of 27th April, 1894, assigned the mortgage bond to plaintiff. Plaintiff put the bond in suit in case No. 3,115 of the District Court of Galle against the first defendant, and obtained a mortgage decree and caused to be seized in execution the property mortgaged, when the second defendant claimed the same as his property. The District Judge upheld the claim and ordered a release under section 244 of the Civil Procedure Code. The plaintiff now sued

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the first and second defendants for a decree declaring the said property liable to be sold in satisfaction of plaintiff's debt.

The issues agreed upon were, (1) Was the bond of September 11, 1889, executed for valid consideration? (2) Is the property liable to be sold in satisfaction of the mortgage decree? (3) Is the present action maintainable against the first defendant and the second defendant?

The District Judge (Mr. F. J. de Livera) delivered judgment as follows :—

"This action is maintainable against the first defendant (see "*8 S. C. C. 97* and *7 S. C. C. 105*).

"Plaintiff has proved that the mortgage to Adrian was executed "for valid consideration..... The property was undoubtedly "under seizure in D. C., 53,850, when mortgaged to Adrian. The "sale report by the Fiscal shows the property was sequestered on "30th August, 1887, and sold, after due publication at the spot, "on 5th October, 1889. But there is no proof that an order was "affixed prohibiting the debtor from alienating the property "(Ordinance No. 4 of 1867, sections 37, 42), nor is there any proof "that the seizure was registered.

"As first defendant's bond was registered on 11th September, "1889, before second defendant's vendor's transfer was registered, "plaintiff, I hold, is entitled to a decree declaring the property "liable to be sold in satisfaction of the mortgage debt.

"Let a decree be entered against the first defendant for the amount "claimed, and let it be further decreed that the property mort-"gaged by the first defendant by his bond of 11th September, 1889, "is liable and executable in satisfaction of plaintiff's mortgage "debt (*7 S. C. C. 106*)."

The defendants appealed.

De Vos, for first defendant, appellant, and *Sampayo*, for second defendant, appellant.

Dornhorst, for respondent.

24th March, 1898. LAWRIE, J.—

I agree that there is here sufficient proof of the seizure. Not only is there the return of the Fiscal, but the first defendant said in evidence, "Under writ in that case the property now forming "subject of suit was seized in execution, and while the property "was under seizure I mortgaged it to Manikpurage Adrian."

By section 42 of Ordinance No. 4 of 1867 that mortgage was null and void as regards the interests acquired by the purchaser in execution, and I agree to dismiss the action against the second defendant, whose predecessor in title purchased at the Fiscal's sale.

The sale was free of the mortgage, which was null and void by reason of its having been executed after the land was seized in execution.

Whether the first defendant (the mortgagor) could avail himself of section 42, I need not inquire; a mortgage decree has been passed against him in another action, and he has not pleaded in this action that the mortgage is void. The first defendant's appeal abated. We may dismiss the action against him on the ground that it was unnecessary to sue him again.

I think it right to notice that section 44 of Ordinance No. 5 of 1877, was not founded on by the respondent. By that section it was enacted that no seizure shall be operative unless notice be given to the Registrars, and that was followed by sections 237 and 238 of the Civil Procedure Code.

I understand that the Ordinance No. 5 of 1877 was never proclaimed, and hence never came into force in the Galle District.

CLARENCE, J., in the Diklande case (*8 S. C. C. 126*), took for granted that, if the fact of seizure had been proved, the conveyance by Nanni Tambi would have been null and void under section 42.

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The reception of the Fiscal's return to the writ of execution in case 53,850 was not objected to by the other side.

Is it evidence of the fact of seizure? It runs as follows :—

"By virtue of the hereunto annexed writ of execution, No. "53,850, from the District Court of Galle, I have caused to be "sequestered on the 30th day of August, 1889, and sold, after due "publication at the spot, on the 5th day of October, 1889, the property "enumerated in the annexed list."

[Here follows a description of the premises which the plaintiff, as assignee of the mortgage bond to first defendant by the judgment-debtor in the said action 53,580 on the 11th September, 1889, now seeks to have declared executable for his mortgage debt and judgment against the first defendant.]

If the premises were under seizure on the day the mortgage bond in question was executed by the first defendant, the mortgage was null and void. Section 42 of Ordinance No. 4 of 1867, which was in force at the time, enacted : "After any property shall "have been duly seized in execution and, in the case of a seizure "by written order, after it shall have been duly intimated and "made known as in manner aforesaid, any alienation or encum-"brance of the property seized (excepting by the Fiscal or Deputy "Fiscal, or under their order as hereinafter provided), whether by "sale, gift, mortgage, or otherwise, and any payment of the debt or "debts or dividends or shares to the party condemned during "the continuance of the seizure, shall be null and void."

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Section 37 of the same Ordinance enacts : " Where the property " (*i.e.*, levied in execution) shall consist of lands, the Fiscal shall " at the time of the seizure affix an order prohibiting the party " condemned from alienating the property by sale, gift, or in any " other way, and all persons from receiving the same by purchase, " gift, or otherwise."

What is meant by " at the time of seizure."?

Under the chapter in Ordinance No. 4 of 1867 intituled " Mode of Seizure," I can find no other mode of seizing lands in execution than the one above referred to.

Section 45 enacts that, " as soon as any property shall be seized " by the Fiscal, Deputy Fiscal, or other officer, a list of such property " shall forthwith be made and signed by himself or the person " seizing the same, and shall be delivered to the person in whose " possession the property seized shall be, or, if no person be in " possession thereto, the headman or constable of the division, " and copies thereof shall be also deposited in the Fiscal's Office " and annexed to the return of the writ."

A copy is at the foot of the return put in evidence. I think in the circumstances we might presume that a written order of prohibition was duly affixed to the premises at the time of seizure. The principle of the maxim *omnia præsumuntur rite esse acta* applies to this case.

When a relevant fact may be easily proved, it would be perhaps dangerous to apply this maxim, but the seizure referred to was an event which took place between eight and nine years ago.

This is analogous to the case of *Waddington v. Roberts* (*L. R. 3 Q. B. 579*). A statute of the time required a public officer to make an entry of registration of a composition deed under the Bankruptcy Act, 1861, when brought to him with an affidavit of certain particulars. From such entry having been made, it was presumed that the affidavit was left with the deed as the statute required.

The District Judge has given judgment against the second defendant, because it has not been proved that a written order of the kind required by Ordinance No. 4 of 1867 was affixed to the land, because it has not been proved that the seizure was registered.

For the reasons given, I think he ought to have held that the order was duly affixed.

As to the necessity for registration of the seizure, I can find no requirements of the kind either in the Fiscals' Ordinance or in the Ordinance No. 8 of 1863 relating to registration. In the result I

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adjudge that the second defendant's land is not available for execution of the judgment against the first defendant.

As to the first defendant, he has been unnecessarily joined in this action. The plaintiff has already obtained judgment against him for this very mortgage debt.

I would set aside the judgment of the Court below, and would dismiss the plaintiff's action with costs.