1899.
August 28.

CARPEN CHETTY *v.* LOUIS SIEDLE.

D. C., Colombo, 11,884.

Practice—Judgment by default—Application of defendant to stay execution pending order on judgment-creditor to sell security left with him—Duty of court to suspend execution for purposes of inquiry.

A judgment-debtor who avers that his creditor holds movable property belonging to him as security for the debt is entitled to the protection of the court. It is the duty of the court to inquire into the matter, and for that purpose to suspend execution.

If the judgment-debtor cannot point out any other property for execution, the plaintiff may be called upon to surrender for execution the property left with him. If he has no such property, or if the judgment-debtor has other available assets for execution, the court should dismiss his application to suspend execution.

PLAINTIFF obtained a decree *nisi* for defendant's default of appearance and answer, and it was made absolute on 8th December, 1898. On the 15th of that month execution was applied for, and on the 20th writ was issued returnable 20th August, 1899. On the 23rd June the defendant applied to the Court to stay execution proceedings and for an order on the plaintiff to sell so much of the gems of the defendant which the plaintiff held in his hands as would satisfy the decree in the present action.

The defendant's application was made by way of summary procedure. Plaintiff denied that he held any security, and the District Judge declined to stay writ, pointing out that, if plaintiff had any gems belonging to the defendant, the defendant could point them out to the Fiscal for seizure.

Defendant appealed against the order of the Court below refusing to grant his application.

Dornhorst, for appellant.

Morgan, for respondent.

Cur. adv. vult.

28th August, 1899. WITHERS, J.—

This is a curious case, and without precedent, so far as I know. The defendant applied by way of summary procedure, and in support of his petition put in an affidavit, in which he swore that he had deposited with the plaintiff, to secure this very debt, precious stones worth three times as much as the amount of the decree. His object was to have those stones sold in execution of the decree. Mr. Dornhorst, who appeared for the appellant, was not prepared to contend that the plaintiff was bound to realize this asset in execution in preference to any other available asset,

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which his client might have. But he did contend that he was entitled to a stay of proceedings until those gems were produced, so that the appellant might surrender them to the Fiscal. The appellant succeeded in obtaining an interlocutory order appointing a day for the determination of the matter of the petition. The matter was discussed on the 18th July, and the Acting District Judge declined to stay execution. He dismissed the application in these terms: "If plaintiff has any gems of the "defendant in his possession, let the defendant point them out "to the Fiscal."

The defendant naturally asks, How can I point them out when they are locked up in the plaintiff's safe or placed somewhere where I cannot find them? The plaintiff put in a counter-affidavit, in which he denied that the defendant had deposited any precious stones with him to secure the debt decreed, or for any other purpose whatever. I think this matter ought to be more fully investigated, and I propose to return the record with that intimation. If the defendant satisfies the Court that the plaintiff holds precious stones of his in pledge for this debt, then I think that the Court ought to protect the judgment-debtor by such order as he may be advised to make. If the defendant cannot point out any other property for execution, then the plaintiff should, I think, be called upon to surrender those gems or some of them for execution if he has them. If the Court decides he has them not, or if the Court is satisfied that the defendant has other assets available for execution, he will dismiss the application. What the Fiscal has been doing with the writ in the meantime we do not know. I have no doubt the Court will find out in the course of the inquiry. We discharge the order appealed from and remit the matter for further inquiry.

It was urged by the respondent's counsel that the Civil Procedure Code did not authorize such proceedings as these. It seems to me that the provisions of the 343rd section pointed out by my brother during the argument embraces a case of the kind.

BROWNE, A.J.—

I agree, and add only that the writ-holder having by his affidavit of denial raised an issue whether jewels had been hypothecated with him, the Court can, in my judgment, dispose of that issue under section 344.

I am glad we are able to make this order and give the debtor a procedure correlative in a measure to that given to writ-holder by section 219. It may not be the only case in which it will be necessary.

The absence of the not uncommon answer that plaintiff holds securities, &c., and the period of eight months given for the execution of this writ, is suggestive of further inquiries possible for the decision of this very issue. The alleged hypothec to secure a debt of Rs. 2,000 principal and legal interest was of jewel's value Rs. 8,300. If there was no hypothec, why was such time given ? If there was, was this originally a friendly action ?