MOHIDIN *v.* NALLE TAMBY.

1896.
March 27 and April 1.

D. C., Kandy, 9,256.

Warrant of arrest—"Court," meaning of, as used in s. 298, Civil Procedure Code—Committal and discharge of judgment-debtor—Order made in his absence, and not in Court—"Chambers," what it includes—Power of District Judge to re-issue warrant of arrest or issue fresh warrant.

Under section 298 of the Civil Procedure Code a judgment-debtor when arrested on a warrant of arrest should be brought before the Court—

Held by BONSER, C.J., and WITHERS, J., that the word "court" there meant the place where the Judge was empowered to act judicially, and was in fact so acting.

Held further, that a District Judge had no power to order the committal or release of a judgment-debtor arrested on a warrant when he had not the debtor before him.

Per BONSER, C.J.—A District Judge cannot ordinarily exercise his judicial functions elsewhere than in open Court.

Per LAWRIE, J.—(1) An order of commitment or release of a civil prisoner is a judicial act which can competently be done in chambers, and "chambers" includes the Judge's own house, if it is situated in the town where his Court is.

(2) Where a Judge finds that he was in error in discharging a judgment-debtor arrested on a warrant of arrest, and that the creditor had used due diligence in the conduct of the warrant, he may issue a fresh warrant or re-issue the old one.

THE facts of the case sufficiently appear in the judgments of their Lordships.

Dornhorst, for appellant.

1st April, 1896. WITHERS, J.—

The facts of this case appear to be as follows :—

On the 19th August, 1895, the District Judge, on the application of the proctor for the execution-creditor, ordered a warrant for the arrest of the judgment-debtor, on condition of a sum of Rs. 40 being deposited for the subsistence of the debtor from the time of his arrest till he could be brought before the Court.

That condition was fulfilled, and on the 23rd of September following the warrant of arrest was issued.

According to a journal entry in the record, dated the 23rd November (following), the Deputy Fiscal of Trincomalee produced the body of the judgment-debtor arrested under the warrant, and the Judge made and signed an order committing the debtor to prison.

1896.
March 27 and April 1.
WITHERS, J.

The same day the District Judge made and signed an order discharging the judgment-debtor, the reason for his doing so being that the stamp for commitment was not supplied.

On the 29th January, 1896, the execution-creditor's proctor repeated, after notice to the judgment-debtor, an application which he had made on the preceding 25th of November without such notice, for an order vacating the aforesaid order of discharge.

This application was discussed on the 10th of February following, and after hearing Mr Beven for the execution-creditor the District Judge refused to vacate his previous order of discharge.

An appeal has been taken from the order refusing Mr. Beven's motion.

The judgment-debtor was brought under the warrant of arrest to the court-house at Kandy. The Judge was not holding Court at the time. He was in his house. The debtor was not brought before him there. Being informed by the Secretary of his Court that the judgment-debtor had been brought up, and that he had no cause to show against his committal, the District Judge made his order of commitment. It afterwards transpired that no stamp had been supplied by the execution-creditor for the warrant of committal. Thereupon (on the same day) the Judge ordered the discharge from arrest of the judgment-debtor. This was something more than vacating his order of committal.

In my opinion, the proper way to deal with this matter is to quash all the orders. The order which the District Judge refused to vacate is obviously irregular. So is the order of committal.

A judgment-debtor when arrested under a civil warrant has to be brought before the Court (*i.e.*, of issue) with all convenient speed if the judgment-debt and costs are not fully paid. What is meant by the Court? It surely means the place where the Judge is acting judicially, and is empowered to act judicially. See sections 3 and 5 of 1 of 1889.

If the J udge was acting judicially when he made these orders, the debtor was not before him. If he was not before him, the Ju dge had no power to order either his committal or discharge.

For this reason I propose that we should quash the two orders of the 23rd November, 1895, and of the 10th February, 1896.

LAWRIE, J.—

The District Judge of Kandy ordered the release from custody of a civil debtor arrested under a warrant against person.

The order was obeyed, the man went away.

Assuming that the order was wrong, what was the remedy?

1896.

March 27 and April 1.

LAWRIE, J.

Relying on the analogous case of discharge in criminal cases, I am inclined to the opinion that an appeal was competent: if no appeal lay, this Court had power to revise. In either case (appeal or revision) if this Court had set aside the order of release, it would have instructed the District Judge in what way he should cause the debtor to be again brought before him, so that the parties might be placed in the same position in which they stood at the moment before the order of release was made. Instead of appealing or of asking that the order be revised, the decree-holder moved the District Court to recall its order, and this, after some delay, the Court refused to do.

It is from that refusal that this appeal is taken.

I am of the opinion that the District Judge had no power to recall the order of release: it had been acted on. Granted that the Judge had made a mistake, it was a mistake which was beyond his power to rectify, except by the issue of a warrant of arrest—and that he was not asked to do. He was only asked to cry *peccavi*. That was I think an inapt motion, one which was rightly refused. As I have just said, the plaintiff might have asked the District Judge to re-issue the warrant of arrest, and if the Judge had been satisfied that the error was his, and that the plaintiff had shown due diligence in the conduct of the former warrant, he had power to issue a new warrant or to re-issue the old one.

It seems to me that the remedy which the plaintiff sought was not a remedy, and that the order of refusal now appealed against was right.

On these grounds I was of the opinion that the appeal must be dismissed without expressing an opinion on the order of release, leaving that to be decided when the plaintiff applied for a warrant.

I was, and I am still, very unwilling to differ from the rest of the Court on the question whether the order of the release was right.

But as I am forced to give a judgment on that point I must express my opinion fully.

I understand the first objection to the order of release to be, that it was made by the Judge when he was at home, not in Court.

The order was made on a Saturday, when a Judge usually is, and certainly in my opinion ought to be, in chambers, and not in Court.

By chambers I do not mean only the stuffy little room which is all the accommodation usually given to our Judges in this hot country—I include in chambers the judge's own house, if it be situated in the town where his Court is.

1896.
March 27 and April 1.
LAWRIE, J.

Much judicial work is properly and legally done in chambers, and in my opinion making an order of commitment or of release of a civil prisoner is a judicial act which can competently be done in chambers, and need not necessarily be done in open Court.

So that I think the fact that the order was made on a Saturday in chambers did not invalidate it.

The next objection taken was that the parties to the action were not present before the Judge.

It was not necessary that the plaintiff should be present. When I was District Judge, it was the practice for the decree-holder to move the Court to commit, and I think some Judges used to refuse to commit a civil debtor unless such a motion was made; but the Code does not contemplate the presence of the plaintiff decree-holder; the duty is laid on the Judge to commit, unless the debtor shows sufficient cause to the contrary. The absence of the plaintiff —and he was in fact absent—would not have vitiated an order of commitment, and cannot vitiate an order of release.

The debtor was also not before the Judge. This would have been a fatal error had the Judge made an order in the debtor's favour. Against the order the debtor had nothing to say, doubtless he thought it admirable.

The decree-holder, the appellant, maintains that the Judge ought to have committed the debtor; but the Judge has shown that was impossible. The Judge could not sign a commitment which was unstamped—the plaintiff had not supplied a stamp. The jailer could not receive a prisoner for debt on an unstamped commitment. It is plain that the Judge could not have committed, and in fact he did not commit.

It is said he ought to have fallen into the old evil course of doing nothing, of delay, of postponement, against which we have been struggling and protesting for years; that the Judge ought to have postponed further consideration of the debtor's position until the following Monday, in order to give time to the plaintiff or his proctor to furnish the required stamp. Against that proposition I ventured to protest (perhaps with undue vehemency). My opinion is that the Fiscal was *functus officio* when he fulfilled the order contained in the warrant, viz., when he arrested the debtor and brought him before the Court—then the Court had to decide *quam primum* whether the man should go to prison or be let at liberty.

This was a matter affecting personal liberty, which the law greatly favours. In my opinion it would have been *ultra vires* had the District Judge ordered the Fiscal to detain the debtor. The alternative before the Judge was to commit or to release. He could not lawfully commit, because there was no stamp: he

had no choice; he could not lawfully make any other order than that which he did make, the order of release.

For these reasons I would dismiss this appeal.

BONSER, C.J.—

The facts in this case are simple. The appellant, a judgment-creditor, obtained a warrant of execution from the Kandy Court against the person of his debtor. The warrant was executed by the Deputy Fiscal of Trincomalee, who arrested the debtor and, as required by section 298 of the Civil Procedure Code, brought him to Kandy, in order that he might, "as soon as practicable, be brought before the Court." The Deputy Fiscal with his prisoner arrived in Kandy on a Saturday afternoon when the Court was not sitting. The Judge, who was at his own house some distance away, was informed by the Secretary of the Court that the debtor had been brought to the court-house, and that he had admitted that he had no cause to show against being committed to jail. Thereupon, without having the debtor before him, he made and recorded an order committing him to jail under section 305 of the Civil Procedure Code.

At a later period of the same day the District Judge made and recorded an order discharging the debtor from custody. That order was also made in his own house, and without having the execution-debtor before him. The ground of this latter order is stated to be that the appellant had not supplied the stamp required by the Stamp Ordinance for the warrant of committal.

The execution-creditor, as soon as he came to hear of these proceedings, applied to the District Judge to cancel his order of discharge. This he refused to do. From that refusal this appeal is brought.

In my opinion the appeal should be allowed. The District Judge, not having the debtor before him, had no jurisdiction to make either an order of committal or of discharge. The Deputy Fiscal did not comply with section 298, for the debtor was never "brought before the Court." True it is that he was taken to the court-house, but that is not what is meant by the words, which mean that he must be brought before the District Judge acting judicially. Assuming for the moment that a District Judge can exercise his judicial functions in his private house, it is clear that he cannot exercise them with respect to a person who is not before him. The Cases in which the court can release a judgment debtor are specified in section 305; but they are all subject to the condition that the debtor is brought before the Court. The

1896. *March 27 and April 1.*

BONSER, C.J.

debtor was not brought before the Court, and therefore the order was without jurisdiction.

The proper order will be that both orders be quashed.

It is said that this will be of no use to the appellant. But in my opinion any person who is prejudiced by an order improperly made by a District Court is entitled to come to this Court to have that order set aside. It cannot be said that the appellant was not prejudiced by this order, for he thereby lost the security of the person of the debtor. Moreover, so long as this order stands he may be seriously embarrassed by it in any subsequent proceedings which he might be advised to take to recover his debt.

Everything which falls from my brother Lawrie is deserving of the greatest respect, but I am not sure that I understand the expression "chambers" used in connection with a District Court. It does not occur, so far as I know, in the Civil Procedure Code, and the fact that all applications are to be made either by way of action or petition would seem to imply that they must be made in open Court. The appropriate form that applications made in chambers should take is that of summons. But it is unnecessary now to decide whether a District Judge can exercise any. and which, of his judicial functions elsewhere, than in the building appropriated by law or usage as a District Court. It was stated that Judges of the Court of Chancery in England had granted temporary injunctions at their homes and elsewhere, but the office of District Judge is not analogous to that of a Judge of a Superior Court in England. It may be that in a case of urgency amounting to necessity a District Judge might so act, but I am clearly of opinion that this was not such a case.

I wish it to be understood that my decision implies no reflection on the District Judge for being absent from Court at the day and hour in question.