

1884.

August 30.

BERWICK,
D.J.

ABUBAKER v. TRUSCOTT.*

D.C., Colombo, 92,164.

Action for debt—Warrant of arrest after judgment—Liability of an officer of the British army to such arrest, when war is imminent. Ordinance No. 4 of 1867, s. 32—R and O, 1833, s. 1, clause 35.

Per BERWICK, D.J.—When the military forces of the Sovereign are engaged in operations suitable to a state of war existing or imminent, an officer of the British army in actual service in a garrison of a fortified place, like Colombo, is not liable to be taken from his regimental duties under a warrant of arrest in an action for debt.

MR. T. Berwick, D.J., disallowed the motion of the plaintiff for a writ of execution against the person of the defendant (who had failed to surrender unclaimed property to satisfy the writ of execution issued against his property) by the following judgment pronounced on the 30th August, 1884.

The defendant is an officer holding Her Majesty's Commission in the Regiment of the Royal Dublin Fusileers, and is now serving with the regiment in the garrison of Colombo. It seems that several writs against his person have already issued from this Court in the ordinary routine business without the attention of the Court having been drawn either to the names of the parties or to the special occupation of the defendant. Lately, however, another motion of the same nature being made against the same defendant, plaintiff's advocate in that case with great and characteristic propriety had it treated as a "special" motion and drew my attention to the position of the defendant, referring me at the same time to arguments and authorities *pro* and *con*. Ultimately that motion was not pressed, and it became unnecessary for me to give a judicial opinion on the question raised. It is under these circumstances that the present motion has been brought forward in this suit, in which my attention has been expressly called to the fact that the defendant is described in the libel as a "Lieutenant, Royal Dublin Fusileers, Fort, Colombo". The fact that he is now serving with his regiment in the garrison of the Fort has been acknowledged by Mr. Keith. I take judicial notice

*Cited in the argument of *Horsfall's Case* (*supra* p 5) and acquiesced in by LAWRIE, J. and BROWNE, A.J.—ED.

of the fact that Her Majesty's military forces are now engaged in military operations suitable to a state of war existing or imminent, but not in this Colony. The question I have to decide is whether under these circumstances an officer of Her Majesty's army in actual service in a garrison of a fortified place is liable to be taken by the civil power from his regimental and garrison duties under a warrant of arrest in an action for debt.

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The plaintiff's proctor relies on section 32 of the Fiscal's Ordinance, No. 4 of 1867, which provides that "in every case of execution against property a Fiscal shall enforce writs of execution against property," in the manner therein directed; "in default of such property being pointed out, or there being no property which the Fiscal could seize, the debtor may be arrested by process of execution against the person." And the General Rules and Orders of 1833, section 1, clause 35, provide that "if judgment be pronounced for any sum certain, execution may issue..... against the property movable or immovable of the party against whom the writ shall issue, or against his person, or against both, as the judge shall consider the case may require."

These provisions, which indeed are more of a "directory" nature than otherwise, must be taken as intended to apply to ordinary cases only with which the Courts have to deal, and to those cases only in which the Courts have a competent jurisdiction and power to arrest, and so as being subject to any provisions, whether created by Common Law or by Legislative Enactments, which either restrict the jurisdiction and power of the Courts or the liability to arrest. They provide general rules for those cases where that jurisdiction or that liability to arrest exists, but neither expressly nor, I think, by implication affect those exceptions in cases in which the "substantive" law governing the Colony has excepted anything from the general powers and jurisdiction of the Courts, or created special privileges either in behalf of individuals or in behalf of the State. For example, it would be impossible to contend that Ambassadors on a mission from one State to another were not inviolable from civil arrest, however general and wide might be the terms used in defining the jurisdiction of the Court or laying down its procedure, and this on grounds entirely independent of extra territorial questions. Again, our practice is replete with instances in which witnesses and others who are judgment-debtors having business in our Courts of Justice have been held not liable to civil arrest in execution, *eundo, morando et redeundo*, to, at, and from these Courts, although there is nothing in our local legislation or general rules creating any special exceptions in their favour. So also those who plead

1884. minority, coverture, &c., would undoubtedly be exempt from
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 BERWICK, nothing said about minors, married women, &c., in the provisions
 D.J. above quoted. The Supreme Court has expressly decided that a
 married woman is not liable to arrest in execution of a judgment
 against her. It is therefore very plain that the provisions above
 quoted, although expressed in general terms, do not exhaust nor
 narrow the law on the subject, and that they are controlled by the
 overriding substantive law of the country.

There are those whose office and duties are such that any interference with the discharge of these could not occur without manifest injury to the interests of the State; and, if such a case could be conceived, I have no doubt that I should refuse to grant process of this Court against the representative of the Sovereign in this Colony. I make this observation merely to indicate by an obvious illustration that, where the clear and unquestionable interests of the State are involved, the Courts of the State must except those interests from legislative provisions couched in merely general terms. Although of course there are other, or rather connected considerations, concerning the dignity and respect due to Her Majesty which would affect such a case, and which probably did actuate the refusal to issue a subpoena as a witness by the High Court of Madras in the case of His Excellency Mr. Grant Duff.

Applying this principle of regard to the dominant State interest to the case before me, I conceive that there cannot be many things more obvious than the demand that every officer actually serving in Her Majesty's military and naval forces must be ready on the moment to go wherever Her Majesty may require his military service, and this could not be if he were liable to arrest on civil process. Plainly, the officer in question could not be arrested and imprisoned on a judgment debt in England, for the simple reason that imprisonment for debt does not exist in England, the only vestige of that barbarous institution now left there being imprisonment for contumacy in not satisfying a judgment which the debtor is able to pay; and that is quite a different thing from the absolute imprisonment for debt. I, of course, except imprisonment for fraud and the like. Neither could he be arrested and imprisoned on a judgment like the present one in the Continent of India. The Army Act contains special legislative provision for debts by officers in India. It is, however, silent as to debts in the Colonies.

Failing any express legislative enactment applicable to Ceylon in respect of officers actually serving in the army, I hold, for the

reasons already given, that the Fiscals' Ordinance is not exhaustive of the law, and does not exclude the exceptions stated by the general Common Law of the country, which is the Roman-Dutch Law. I am indebted to the learned Advocate, Mr. De Saram, for referring me to *Voet's Commentaries* (2, 4, 39), where that commentator cites a number of authorities in support of the statement that on the ground of privileges the soldiers "cannot be arrested" (he is treating of civil process and not of criminal) "while proceeding either to a fort or to garrison them," and that the same rule applies to those occupied in transporting military supplies and otherwise serving the public military interest. The reason he gives for the rule is the necessities of military discipline and the defence of the State. Of course these reasons apply *multo magis* to soldiers already out and doing military duty in the fort or garrison, and much more to officers than to men.

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I therefore think that the defendant is exempt from liability to arrest in Ceylon in execution of a judgment of the Civil Courts for debt, and the only point remaining is whether this exemption is one of the nature of a personal privilege which he is obliged to claim and can only get the benefit of by claiming, or one which is a matter of absolute law independent of an officer's own wish in the matter. It is undoubtedly true that in most cases of exemption of this nature it is a privilege which attaches to the individual, "though in his special capacity," and should be personally claimed. That has been determined in England by the rule in respect of Ambassadors and members of their households, &c., and manifestly holds where the Court would not otherwise be judicially informed of the individual's capacity and right to exemption. But I do not think that in all cases it is a matter of mere personal privilege to be claimed or waived as the individual may desire. In the case of military men, I apprehend that the exemption does not exist in the slightest degree for their interest, but solely for the public interest. One may conceive, though I trust the case is not a likely one, a military man contriving to be arrested for debt purposely in order to avoid proceeding on military duty; and looking to the reason given by Voet, military discipline and the defence of the State, I think that, where, as in the present instance, the Court has judicial knowledge of the position of the defendant, which it has both from the record and from the proctor of the party moving, it is its duty to refuse the motion for arrest. If it were merely a matter of the defendant's personal interest, I might allow the motion, plaintiff giving security for any damages the defendant might recover from him on account of the arrest; but there is no room for such a course

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when it is the public and not the private interest which is the reason for the exemption.

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I have only to add that I believe the point before me is an entirely new one in this country. There is no reported case, and so far as I know the question has never before been decided in any of our Courts.

The motion is disallowed.

[No appeal was taken by the execution creditor.]

