MURUGAPPA CHETTY *v.* HORSFALL.*

1900.
February 1.

D.C., Colombo, 13,248.

Civil Procedure Code, s. 650—Liability of a member of the Ceylon Light Mounted Infantry volunteering for service in the South African war to be arrested for debt before judgment.

Per LAWRIE, J.—A resident of Ceylon, who is a member of the Ceylon Light Mounted Infantry, volunteering for service in the South African war, and who is about to leave the Island temporarily in obedience to the orders of his Commanding Officer, cannot be said to be "about to quit the Island" in the sense of the Civil Procedure Code, section 650.

For this reason, as also on the ground that the right of the plaintiff to enforce payment of his debt must give way to the right of the Sovereign and the country to the debtor's services in the field, the arrest of the debtor on a warrant of arrest in mesne process should not have been issued under section 650 of the Civil Procedure Code.

THIS was an action on a promissory note made by the defendant in favour of the plaintiff, and on which Rs. 1,191.37 was said to be due. On the 25th January, 1900, the plaintiff moved

* In this case, in which it has been held that a creditor can be deprived by the Crown of the security of his debt in the person of his debtor, if the services of the debtor are required in the field, the applicability of the well-established principle that, if the Crown requires the property of the subject for State purposes, it is bound to give compensation for it, was neither raised nor considered.—ED.

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the District Court for a warrant of arrest for securing the person of the defendant, under section 650 of the Civil Procedure Code, on the ground that the plaintiff had no security whatever to satisfy the claim on the promissory note, and that the defendant was about to quit the Island, having enlisted as a volunteer in the Ceylon Contingent proceeding to South Africa for service in the war against the Boers.

On the 30th of the same month defendant surrendered and contended that the warrant issued was void, in that he was a soldier in active service.

On the same day (30th January, 1900) the Acting Additional District Judge (Mr. F. R. Dias) held that the Army Act in force, as revived by *62 Vict. c. 3*, was applicable to Ceylon, but that it nowhere gave immunity to a soldier or other military officer as contended; that section 144 expressly enacted that such a person may be taken in execution on account of a debt when the amount exceeds £30, over and above all costs of suit; that the present case involved a larger amount; that section 177 of the Army Act provides that, when a force of volunteers or of militia or any other force is raised in India or in a colony, any law of India or the colony may extend to the officers and men belonging to such force; that the Civil Procedure Code of Ceylon should govern the case as to the manner of obtaining the warrant of arrest; that the decision of Berwick, D.J., in *Truscott's case* * to the effect that, as the interest of the State must be considered paramount, a soldier in active service in defence of the Empire cannot be arrested for a private debt, was not binding on him; and that there was nothing in the English Army Act or the Ceylon Procedure Code to exempt from liability to arrest a military officer. He therefore ordered the committal of the defendant, unless he gave bail in Rs. 1,350 with one surety, to abide by and perform the judgment of the District Court.

Layard, A.-G. (with him *Templer, C. C.*), after due notice to plaintiff, moved the Supreme Court on the 1st February, 1900, to revise the order of committal made, as above, by the Additional District Judge.

Layard, A.-G.—The object of the provisions relating to arrest in mesne process was to prevent a suitor from leaving the jurisdiction of the Court and so avoiding the course of justice. Neither the petition filed in the Court below, nor the affidavit filed in support of it, showed that the defendant was leaving the Island

*The case of *Abubaker v. Truscott* will be found reported at p. 10 of this volume. It was not carried in appeal to the Supreme Court.—ED.

permanently, or leaving it in order to evade payment. The warrant had been issued without due inquiry. Section 507 of the Civil Procedure Code provides,—" if, in the execution of a decree, " a warrant of arrest is to be executed within the limits of a " military station, the officer charged with the execution of such " warrant shall deliver the same to the commanding officer, who " shall, if the person named therein is by law liable to arrest, back " the warrant. " The words "if the person is by law liable to arrest" conserved the privileges of military men. Under the Roman-Dutch Law it has been clearly established in *Truscott's Case** that a soldier in active service cannot be arrested for a private debt. The Additional District Judge ought to have followed that judgment. It was as binding on him as a judgment of the Supreme Court was binding on one of its judges. If the District Judge believed that the defendant came under the Army Act, he should have shown reasons for that opinion. The District Judge speaks of the defendant as a soldier, but defendant was not a soldier, being only a member of the Ceylon Light Mounted Infantry, who had volunteered for service in South Africa. The warrant of arrest was improperly issued. If the warrant was good as against defendant, it would have been good as against Lord Roberts. Was it to be supposed that Lord Roberts would not be allowed to leave this country because he owed Rs. 1,300 when he was going to fight the nation's cause in South Africa? The interests of the State were paramount in such a case, and the remedy of arrest for the recovery of a private debt was in abeyance (*Voet, II. 4, 39*). If the District Judge held that the defendant came under the Army Act, there was no evidence that the debt in the present case was over £30, as required by that Act; nor could section 144 be taken to apply to this Colony, as our currency was rupees. If applicable, the procedure enjoined by that Act as to the giving of a memorandum of the affidavit to defendant without fee was not complied with. [BROWNE, A.J.—Was the warrant backed by the Commanding Officer?] No. Captain Rutherford, after conference with his superiors, refused to do so. Section 177 refers indeed to a force raised in India or any of the colonies, but the words " may extend " are permissive only. Whether the case be viewed in reference to the Army Act, or with regard to the rights of the Sovereign and the duties of the person who was sworn to leave—not quit for good—this country for the purpose of serving the Queen in another country, the order made by the District Judge was one that could not be upheld in revision.

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* See *infra* p. 10.

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Walter Pereira, for the plaintiff, respondent.—The order of the District Judge was appealable, and the motion for revision should not be entertained. But the defendant was clearly liable to be arrested. The District Judge rested almost entirely upon the Army Act. [LAWRIE, J.—Has it anything to do with a warrant in mesne process?] The Army Act applies to Ceylon. By *62 Vict. c. 3*, that Act was extended to Ceylon from the 31st January last year to the 30th January this year. *28 & 29, Vict. c. 63*, § *2*, also bore on this question. The Common Law of the Island, which is the Roman-Dutch, was subject to the provisions of the Army Act. The reasons of State referred to by the Attorney-General were no doubt known to the Legislature when it considered and passed the Act, which says that a soldier is liable to arrest. Whether the procedure for arrest is to be under section 144 of that Act, or section 650 of the Ceylon Code, all that is essentially required is an affidavit, which has been duly served on defendant.

LAWRIE, J.—

In my opinion, a resident of Ceylon who is about to leave the Island temporarily in obedience to the orders of his Commanding Officer cannot be said to be "about to quit the Island" in the sense of section 650 of the Civil Procedure Code. But I rest my judgment on higher grounds.

In time of war the claims of individuals must give way to the paramount right of the Queen to the services of her subjects. Mr. Horsfall, who is now before the Court, is a volunteer, whose services have been accepted by the Governor. He has sworn to serve the Queen in South Africa, and he is now under orders to sail to-day on active service in the war. It would be against public policy to prevent him from obeying the orders to embark. He may be comparatively an unimportant member of the army, but every man is needed. The country expects that Mr. Horsfall will do his best and will do good service in the field. To my mind it is plain that the rule *Salus populi suprema lex* applies. It is obvious to me that it would be illegal to permit the arrest on a judgment for a civil debt, still less an arrest before judgment, of a General ordered by the Queen to command an army, or the arrest of the officers in command of a contingent under orders for the war. It follows, I think, that if the officer cannot be arrested, the private soldiers cannot be. Their arrest and detention would lessen the safety of the country and imperil grave public interests.

The right of the plaintiff to enforce payment of a debt due to him must give way to the right of the Queen and the country to the debtor's services in the field.

In revision, I would set aside the order and discharge the defendant.

BROWNE, A.J.—

I agree in the remarks of my brother, and would say that it is possibly open to question whether the procedure of arrest before judgment under section 144 would apply in this case, since there is no reference thereto in chapter 36, which regards action by and against military men.

The judgment of Mr. Berwick was one which was pronounced in regard to the arrest of a debtor, when there was no necessity for his services in the field; and I think his arguments apply *multo magis* in the present case, when a Volunteer Contingent has been specially enrolled for military service.

I am not certain whether the member that has been arrested comes under the provision or not of Ordinance No. 16 of 1890, section 12. I believe each of the members has a number as in all regiments, and the numbers are over 300—so my cousin, who is serving, has told me—which, as the number of their body is 150, points out to me they are members of some other larger force, either the Ceylon Light Infantry Volunteers themselves, or the original Ceylon Mounted Infantry. If he so comes under the Volunteer Reserve, the law seems to make it absolutely necessary that he shall, when called upon, be under the unlimited control of the Senior Officer in Command in the Colony.

I hesitate for a moment to depart from the strict rules of procedure, such as I sought to enforce myself as District Judge in suit No. 11,719, by accepting the appearance before the Court of the subject of arrest, when the formality of the signature of the Commanding Officer is not attached.

I think that the provision of section 599 ought to be taken to apply to all cases, that it was meant that the Civil and Military authorities should be always found to be acting in unanimity with each other, and that the Court ought not to deal with the matter except when the warrant had been endorsed by the Commanding Officer, and there could be no question as to the strict correctness of the procedure. I understand that it was not so endorsed here, and therefore, at the present minute, Mr. Horsfall is not liable to arrest.

There has been, in fact, by this section of the Act provision made for a dual control in procedure, and both the Army and the Civil

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Court must co-operate in giving effect to the process of law, which would take a military man from his duty and deliver him to his civil creditor.

I therefore concur in my brother's opinion.