1906. June 20.

Present : The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Wendt.

MUTAPPA CHETTY *v.* FERNANDO.

D. C., Negombo, 4,750.

Writ, reissue of—Stamp duty—Validity—Failure to mention payment on account of decree—Returnable date—Irregularity—Nullity.

A sale, which is altogether void by reason of some irregularity, may be set aside without any proof of any injury to the party complaining.

The reissue of writ is not *ipso facto* illegal, provided the stamp duty has been paid afresh, as required by The Stamp Ordinance, 1890.

Where the stamps were affixed to the copy decree annexed to the writ and not the writ itself.

Held, that the writ was properly stamped, the copy decree forming part of the writ.

Where a writ on the face of it was returnable on a particular date but the journal entry showed a different date as the returnable date,—

Held, that the date on the writ must be taken to be the correct date, the journal entry being merely a diary of the steps in the action.

A reissue of a writ is not vitiated by the fact that the judgment-creditor has failed to mention to the Court a payment made by the judgment-debtor before such reissue; and an innocent purchaser under such writ is not affected by such failure.

WENDT, J.—If a writ is irregularly issued it is the duty of the judgment-debtor to have it recalled. If he does not do so, but stands by and lets the sale proceed without protest or objection, his conduct estops him from taking any objection thereafter to the issue the writ to the prejudice of the purchaser.

WENDT, J.—It would be well if practitioners make it a rule never to reissue an old writ.

THIS was an application by the judgment-debtor to set aside a Fiscal's sale of property sold under a mortgage decree. The application, to which the judgment-debtor, the purchaser, and the Fiscal were made parties, was made on the following grounds: (1) that the writ when reissued was not stamped; (2) that a payment of Rs. 1,500 was not mentioned to Court before the writ was re-issued; and (3) that the writ was made returnable on the 1st December, 1905, and could not therefore justify a sale on 6th January, 1906.

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The District Judge (A. de A. Seneviratne, Esq.) disallowed the application on the ground that the applicant had failed to prove that he suffered any loss by reason of the irregularities complained of.

The defendant appealed.

Walter Pereira, K.C. (*Dornhorst, K.C.*, with him), for the appellant. —The writ is not stamped. The stamps are on the copy decree, and the endorsement reissuing the writ is also on the copy decree. This is not a sufficient compliance with the provisions of the Stamp Ordinance. The proceedings are absolutely null, and no damage need be proved: *Palaniappa v. Samsadeen* (1). When the sale took place the returnable date given in the journal entry had expired and the Fiscal had no authority to sell. The Secretary had no authority to alter the date in the writ. The sale is also vitiated by the fact that the judgment-creditor failed to mention in the application for writ a payment of Rs. 1,500 made by the debtor. The Civil Procedure Code does not recognize the reissue of a writ at all. The Stamp Ordinance, however, allows a reissue under certain circumstances; and no reissue could therefore be allowed except under those circumstances. To say that when a new stamp is supplied there is no objection to the same paper being sent to the Fiscal is to say that when the stamp is supplied the writ may be reissued, which is in direct contravention of the Ordinance.

H. Jayewardene, for the purchaser, respondent.—The stamp duty having been paid, the affixing of the stamps on the wrong document is an irregularity; and there must be evidence of substantial loss. The failure on the part of the creditor to mention the payment cannot affect a *bona fide* purchaser, especially where the Fiscal is informed of such payment before the sale. The date on the writ is the proper date that should guide the Fiscal. Even assuming that these irregularities exist, they do not vitiate the sale: *Khairaj Mal v. Daim* (2).

Wadsworth, for the judgment-creditor, respondent.

E. W. Jayewardene, for the Fiscal, respondent.

Cur. adv. vult.

20th June, 1906. WENDT J.—

This is an appeal by the judgment-debtor, defendant in the action against the refusal of the District Judge to set aside a sale in execution. The judgment-debtor's petition was presented under section 282 of the Civil Procedure Code, and the irregularities

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alleged were as follows:—(1) That the judgment-creditor's application for reissue of the writ, and the reissue thereon of the writ, were bad because a payment of Rs. 1,500 which had been made by the defendant was not mentioned to the Court and the writ therefore went out for a sum in excess of what was due; (2) that the writ, when reissued, was not stamped afresh; (3) that it was made returnable on the 1st December, 1905, and could not therefore justify a sale on 6th January, 1906. Petitioner alleged that in consequence of these irregularities the land sold (which was worth Rs. 45,000) realized only Rs. 23,705, and he thereby sustained material injury.

The following facts appear from the documents and the evidence taken by the Court on the petition. The decree, dated 20th November, 1902, directed the defendant to pay to plaintiff the sum of Rs. 20,000 with certain interest and costs on or before 20th December, 1902, and that in default the property in question, mortgaged by defendant to plaintiff, be sold and the proceeds applied in satisfaction of the decree, and that if such proceeds proved insufficient the defendant do pay to plaintiff the amount of the deficiency. On 3rd April, 1903, the plaintiff took out a writ of execution, substantially in the Form No. 43 attached to the Code, requiring the Fiscal to levy the sum of Rs. 20,272.50 with further interest and have that money before the Court on 6th July, 1903. In accordance with the practice which obtained before the enactment of the Code, and which has been generally followed since, this writ was accompanied by a certified copy of the decree. (The foundation of this practice appears to be provision of the Stamp Ordinance, schedule A, Pt. II., that "no party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof"). Usually this copy decree is attached to the writ and treated as a necessary part of it, and there is no reason to doubt that that is what occurred in this case. It appears to have been sent to the Court with the writ when that was returned by the Fiscal, and to have accompanied it when it was reissued. In this manner the Fiscal returned the writ on 17th June, 1903. It was reissued on the 29th September, returnable on 8th December, 1903. On 8th December the writ was returned to the Court and reissued again on 15th December, returnable 16th March, 1904. On 7th March it was returned, and on 15th June reissued returnable 15th December, 1904. On 13th September it was returned, and on 1st December, 1904, reissued returnable 8th March, 1905. It was returned on 23rd February (execution having been stayed by the Court for three months on defendant's application),

and reissued on 1st August, 1905, returnable according to the journal entry on 1st December, 1905, but according to the endorsement itself on 5th February, 1906. The back of the half-sheet of paper constituting the writ proper is filled up with the Fiscal's returns and with the endorsements of the reissues in September, 1903, and December, 1903. The subsequent returns and endorsements are written on the blank fourth page of the sheet, three pages of which are occupied with the copy decree, and which in the record immediately follows the writ. The stamps proper to be affixed to the writ were, prior to the last reissue, affixed to the fourth page of the copy decree, alongside the endorsement of reissue, signed by the Secretary of the Court.

In February, 1905, presumably on the occasion of plaintiff's consenting to defendant's application to the Court for a stay of execution, the defendant paid him Rs. 1,500 on account of the judgment debt. In applying in June, 1905, for reissue of the writ plaintiff did not certify this payment to the Court, and the writ again went out in its original terms; but on the 20th December, 1905, he informed the Fiscal of the payment and required him to recover so much less from defendant, and the Fiscal demanded of defendant the judgment amount less that sum of Rs. 1,500. On 21st December plaintiff certified the payment to the Court. It was also proved by the officer who conducted the sale that defendant was present at the sale and raised no objection. The land was valued by the Fiscal at Rs. 15,000 and was put up at that sum, and after brisk bidding was sold to the respondent for Rs. 23,705, which was duly paid.

Before dealing with the objection to the sale put forward in the petition, I would notice a further objection which was urged for the first time in appeal, viz., that the sale cannot be supported because the writ was on the last occasion reissued without a formal petition for the purpose, but merely upon an application in the Form No. 42 of the Code, which until the decision of the case presently to be mentioned was regarded as sufficient, and which is still generally in use in that case, *Chellappah Chetty v. Kandiah* (1), the representatives of a deceased judgment-debtor appealed against an order made *inter partes*, allowing the judgment-creditor's application for execution, and it was held that the application should not have been allowed because it was irregular, being in the Form No. 42, and not in the form of a petition. That decision is no authority for holding that if the judgment-debtor had permitted the Fiscal to execute the writ, and had stood by and seen his

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property sold thereunder without making any objection, the sale would have been invalid. The objection would then have come too late, and I think it comes too late now.

Appellant's counsel conceded that their client's objections, stated in the petition, were not strictly based on irregularities " in the publishing or conducting of the sale," but they argued that those objections nevertheless vitiated the sale, while they were unaffected by the learned District Judge's finding that there had in fact been no injury whatever to appellant, inasmuch as the price realized was no less than the property would have fetched in the absence of any irregularity of any kind. Of course, if appellant is able to establish that the sale is void, that would entitle him to ask that the Court should refuse to confirm it, without his having to show substantial injury caused by the irregularity complained of, and this, if I understand them aright, is what appellant's counsel were prepared to establish.

To come now to the petition, I am of opinion that the first objection is not sustainable. It was doubtless irregular to have taken out the writ as though the full amount of the decree were still leviable, but that is purely a matter between creditor and debtor, and the objection was removed by the defendant being required to pay the true balance only, and the sale taking place to levy that balance only in default of defendant's compliance with the demand. I think the respondent's argument well founded that this is not a matter which can affect the purchaser who buys without notice of the alleged irregularity. Being satisfied of the jurisdiction of the Court and of the Fiscal's holding a writ of execution issued by it, he is entitled to rely on acquiring a good title to the debtor's interest in the property sold. If the writ was irregularly issued it was the defendant's duty, as it was his right, to have had it recalled. He did not do so; on the contrary, he stood by and let the sale proceed without protest or objection. His conduct estops him from taking the objection now to the prejudice of the purchaser.

As to the second objection, it is not denied that the necessary stamps were upon the copy decree, and the latter was in the Fiscal's hands with the writ. For the reasons already given I hold that the copy decree was for this purpose part of the writ, and that by affixing the stamps to the copy decree the writ was duly stamped. Appellant's counsel further argued that the writ should not be " reissued " under any circumstances, because the Code while contemplating a second or subsequent issue of a writ of execution, contained no provision recognizing the validity of a " reissue. " I cannot help thinking that in substance the objection involves a

mere question of names. If, after writ was once issued, the judgment-creditor makes another application for execution, he is no doubt entitled to issue an altogether new writ. If he takes the old writ and alters it as to the present balance of the debt, returnable date, &c., and stamps it as a new writ, and issues it, that is called a " reissue," although in substance, in all but the bare paper, it is a new writ, and not properly a " reissue." " The Stamp Ordinance, 1890 " (re-enacting a provision which has appeared in the Stamp Ordinances from No. 2 of 1848 downwards), provides that no writ whatsoever which has once been issued shall on any pretext whatever be reissued, except in certain cases which do not embrace the present one.

It seems clearly implied that in these excepted cases the writ may be " reissued " without paying any further duty in stamps. If there was not to be this exemption from further duty, I fail to see the reason for permitting a reissue at all. In *Palaniappa Chetty v. Samsadeen* (1) the writ had been reissued without the duty being paid afresh, and in holding that it was therefore void, Layard C.J. construed the prohibition in the Stamp Ordinance as absolute, while I ventured to express the opinion that, it being a part of the law relating to stamps, the prohibition would not be infringed by the re-employment of the old writ if the duty were paid over again as on a new writ. I remain of that opinion still. It is quite true that many instances come before us in which the writ has been so often reissued that the paper on which it was written has become frayed and dirty and the writing undecipherable. To avoid that and other inconveniences it would be well if practitioners made it a rule never to reissue an old writ, and it would of course be in the power of the Court, whenever the original writ had ceased to be conveniently legible, to insist upon a new one being substituted for it upon a reissue of execution, but I cannot hold that the reissue of a writ of execution in any case not falling within the exceptions enumerated in the Stamp Ordinance must be considered *ipso facto* illegal.

The third objection is based on the fact that the note in the journal entry, initialled by the Secretary of the Court, is that 1st December, 1905, was the returnable date. That appears to have been the date originally inserted in the endorsement on the writ itself, but it appears to have been altered to 5th February, 1906, and the alteration initialled by the Secretary before the writ actually went out. The primary document is the writ itself, it is that which goes to the Fiscal; the journal entry is merely a diary of the steps in the action, and in this instance it is proved to be incorrect. We must be guided by the writ. The objection therefore fails.

I think that the appeal should be dismissed with costs.

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LASCELLES A.C.J.—

I concur. I only wish to add that in my opinion the observation of Layard C.J. with regard to the reissue of writs in *Palaniappa Chetty v. Samsadeen* (1) should not be disassociated from the facts of the case. If the stamp duty had been paid in that case, I am by no means confident that the Chief Justice would have held the writ to be a nullity. The provisions of the Stamp Ordinance with regard to the reissue of writs have in view a purely fiscal purpose, and I cannot read them as an enactment that a writ, if reissued after having been returned into Court, is a nullity, whether stamped or not. For questions of procedure we have to look to the Code rather than the Stamp Ordinance.