Present: Mr. Justice Middleton.

1907.
November 21.

THE KING *v.* LAVENA MARICAR.

D. C. (Criminal), Colombo, 1,761.

Cheating—Concealing fact of seizure from mortgage—Incumbrance—Fraud—Penal Code, s. 403.

A person who obtains money on a mortgage of property, which at the date of such mortgage is under seizure, by concealing from the mortgagee the fact of such seizure, is guilty of cheating under section 403 of the Penal Code.

Emperor v. Bishan Das[1] referred to.

APPEAL by the accused from a conviction by the Additional District Judge of Colombo (E. R. Ondaatjie, Esq.) under section 403 of the Penal Code.

The facts are fully out in the judgment.

Van Langenberg (*H. Jayewardene* with him), for the accused, appellant.

W. de Saram, C.C., for the Crown.

Cur. adv. vult.

November 21, 1907. MIDDLETON J.—

In this case the appellant has been convicted of cheating under section 403 of the Penal Code and sentenced to six months' imprisonment.

The facts constituting the alleged offence were, that while the appellant was in treaty with Mr. Pedris, Proctor, on behalf of a client for the transfer of a mortgage given by Mr. Hunter on certain property, this property was seized by the Fiscal in satisfaction of a judgment debt of the appellant in a money suit on June 5, 1907. Prohibitory notices under section 23 of the Civil Procedure Code were duly affixed to the premises seized in which the appellant resided, although he was not at home at the time of their affixing. The notice C was in English, and prohibited appellant and his wife from "transferring, alienating, or charging" the property seized in any way. The seizure must have been registered on the afternoon of June 6, as on the morning of that day Pedris searched the books in the Registry and found no incumbrance on the property other than the mortgage it was proposed to transfer. In the course of that day the appellant called on Pedris and was asked if there were any incumbrances other than Hunter's mortgage on the property, and he replied there were none, and was told to come the next day to complete. On the 7th the new mortgage was completed, and the appellant received a cheque for the balance between

[1] I. L. R. 27, All. 561.

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the amount lent on the old and new mortgages. A few days afterwards Pedris incidentally discovered at the Registry Office that a seizure of the property in question had been registered on June 6, presumably later in the day than his first visit on that day. Pedris stated that if he had known there was a judgment against the appellant he would not have given him the loan. The appellant, when charged by Pedris with deceiving him, suggested that the judgment debt was on a money decree while the money advanced by Pedris was on a mortgage.

It was contended on the authority of *Emperor v. Bisham Das*[1] that the appellant was not liable to be convicted of cheating, as he was under no legal obligation to inform Pedris that the property had been seized in execution, and so had not been fraudulent or dishonest, and further that there was no evidence to show that appellant was aware that the seizure had been registered, and thereby an incumbrance created on the property under section 238 of the Civil Procedure Code.

In Snell's *Principles of Equity, 3rd Edition, p.* 450, the suppression by a vendor of the fact of existing incumbrances in land sold is deemed to be a fraud on the vendee (*Arnot v. Biscoe,*[2] *Edwards v. McLeay;*[3] *Ellard v. Llandaff*[4]).

Here the appellant distinctly suppressed the fact that the property had been sized in execution, while he must have known, if he had taken the trouble to read the prohibitory notices affixed to his premises, that he was prohibited to charge the property. He was asked if there was any incumbrance on the property on June 6, and replied in the negative. A seizure under a writ may, I think, be fairly included in the term " incumbrance " in its ordinary etymological sense. This question must have caused him to disclose the fact of the seizure if he had desired to do so. I think also it was the duty of the appellant under the circumstances to disclose the fact of the seizure. He does not disclose it, and he must have known he was not entitled to charge the property. He has not chosen to give evidence on a point peculiarly within his own knowledge (section 106 of the Evidence Ordinance), and the fair inference is that he fraudulently and dishonestly suppressed the fact of the seizure from Pedris, and so induced him to advance the money on the mortgage, thereby cheating him.

I have considered the question of sentence, but do not propose to interfere. I dismiss the appeal.

Appeal dismissed.

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[1] *I. L. R.* 27, *All.* 561.
[2] 1 *Vesey Senior*, 95.
[3] 2 *Swanst.* 287.
[4] 1 *Ball & B.* 241.