Present: Schneider and Jayewardene JJ.

1923.

THE GOVERNMENT AGENT, SOUTHERN PROVINCE,
v. KALUPAHANA.

85—D. C. (Inty.), Tangalla, 2,120.

*Ordinance No. 14 of 1843—Crown debts—Sequestration of property of debtor—Claim—Investigation under sections 6. 8 and 659 of the Civil Procedure Code—Scope of inquiry not possession only—Title—Damages—*Res judicata*—Separate action—Deed executed with intent to defraud creditor—Fraudulent alienation.*

Acting under section 2 of the Crown Debts Ordinance, No. 14 of 1843, the Gonverment Agent seized the property of a Crown debtor on February 16 and 17, and filed the information in the District Court on February 26, together with a certificate of property duly seized. The District Court issued a mandate of sequestration. The appellant claimed certain property on a deed (No. 113) dated January 26.

Held, that (*a*) claims to property sequestered under section 3 can be preferred and entertained by Court; (*b*) sections 658 and 659 of the Civil Procedure Code applied to such claims; (*c*) the District Judge was right in holding that he was entitled to try the question whether the deed was void or not in the claim proceedings.

The question of possession should not be decisive; the competing rights of the claimant and of the defendant should be adjudicated upon; the Court should decide whether the property belongs to the defendant or not.

Held, further, that as the deed (No. 113) was executed *mala fide*, and for inadequate consideration and with the intention of defrauding the defendant's creditors, one of whom was the Crown, the deed was void and of no effect under section 8 of the Ordinance.

"In the construction of an Ordinance so borrowed from an English Act, we are bound to follow the decisions of the English Court of Appeal on the Imperial Statute. So that the principles of the Roman-Dutch law relating to fraudulent alienations have no application.

When it appears that the parties to a transaction impugned for fraud were actuated by a motive which is denounced as fraudulent, namely, a motive to hinder, delay, or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is, nevertheless, void in law. A mere fraudulent intent on the part of the grantor alone will not invalidate the transfer if it is for valuable consideration, and there is no want of good faith on the part of the grantee."

Obiter, PER SCHNEIDER J.—If the information or libel, which is required to be filed within seven days after the seizure, was filed after that period had elapsed, it would not vitiate the proceedings.

1923.

The Government Agent, Southern Province, v. Kalupahana

"If it had been necessary I would accordingly have held that the warrant of the Court to the Fiscal had been rightly issued, although the libel had not been filed within the time-limit mentioned in the Ordinance."

Elliot, K.C. (with him *Hayley* and *H. V. Perera*), for claimant, appellant.

Akbar, S.-G. (with him *Illangakoon, C.C.*), for respondent.

September 17, 1923. JAYEWARDENE J.—

This is a proceeding under the Crown Debts Ordinance, No. 14 of 1843, and it arises in this way: Section 2 of the Ordinance empowers the Government Agent upon his knowledge of the default of payment by any debtor of His Majesty, or notice given to him of any debt accrued to His Majesty, to promptly seize, take, and to keep in safe custody all the property of any debtor to the Crown sufficient to cover the debt due and costs. Acting under this section the Government Agent of the Southern Province authorized the Mudaliyar of West Giruwa pattu (see J 4) to seize all the property of P. N. Kalupahana, suspended secretary of the District Court, Tangalla, to an amount computed to be sufficient to cover a debt of Rs. 16,000, due and owing to the Crown. The Mudaliyar accordingly seized certain movable property, valued at Rs. 1,845, contained in the lists A, B, and C. The seizure took place on February 16 and 17. The articles in list B were seized in the house of Mr. D. A. Jayawickreme, Proctor, who stated that the articles had been sold by Kalupahana to Don Davith Ratnaweera, Patabendi Arachchi of Kudawellahella, on deed of sale No. 113 of January 26, 1923. Thereafter, the Government Agent, proceeding under section 3 of the Ordinance, filed the information or libel, which is required to be filed within seven days at farthest (exclusive of Sundays and other authorized public holidays) after the seizure, on February 26 in the District Court of Tangalla, together with a certificate of the property seized duly signed, and moved for a warrant of sequestration, and the District Judge accordingly issued a warrant of sequestration directed to the Fiscal who sequestered the property (C 7). He also reported that Mr. D. A. Jayawickreme and Ratnaweera, Patabendi Arachchi, had preferred claims orally. Subsequently, two other claims were preferred to some of the property by one K. Don Andris and G. Nonababa, respectively. There were, therefore, four claimants claiming different lots out of the articles seized and sequestered :— (1) Don Davith Ratnaweera, Patabendi Arachchi; (2) Mr. D. A. Jayawickreme, Proctor; (3) K. Don Andris; (4) G. Nonababa. The claims were entertained and fixed for inquiry, presumably, under sections 658 and 659 of the Civil Procedure Code, which permits claims to be made to property under sequestration and

provides for their investigation. The main claim was that of the 1st claimant, Ratnaweera, who claimed the bulk of the property on deed of sale No. 113 of January 26, 1923, granted in his favour by the debtor. The Crown impugned this sale as fraudulent.

After inquiry the learned District Judge held the deed (No. 113) to be fraudulent, and dismissed the claim. The other claims were also dismissed. Ratnaweera now appeals, and several points have been raised on his behalf. It is contended that the District Judge had no authority, in a claim inquiry under these sections, to go into the question of the validity of the deed of sale, and that on the production of the deed which showed that the title was in the claimant, the claim should have been upheld, and the Crown referred to a separate action to have the deed of sale set aside if it was proved to be fraudulent. For the Crown it is contended that the deed is impugned under section 8 of the Ordinance (Crown Debts Ordinance) which declares sales executed to delay, hinder, or defraud His Majesty utterly void and of no effect, and that this is not the case of a deed which is merely voidable, that is, valid till it is set aside. Both parties, therefore, concede that claims to property sequestered under section 3 of the Ordinance can be entertained under section 658 of the Civil Procedure Code, but they differ as to the scope of the inquiry into such a claim. I think the parties are right in saying that claims to property sequestered under section 3 can be preferred and entertained by the Court, and that sections 658 and 659 of the Civil Procedure Code apply to such claims. Section 3, after referring to the filing of an information or libel with a certificate of the property seized, and empowering the District Judge to deliver to the Fiscal a warrant to sequester the property, says :

> " and any further proceedings which may be had *thereon* should be according to such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court."

The use of the word " thereon" is somewhat ambiguous. Does it refer to the libel or information filed or to the warrant to sequester ? I think it refers to both the libel or information and the warrant to sequester, and the words " such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court" refer to the general rules and orders framed by the Supreme Court, which were in operation at the date of the enactment of Ordinance No. 14 of 1843, and which have now been superseded by the Civil Procedure Code. The procedure adopted by the District Judge in utilizing sections 658 and 659 of the Civil Procedure Code is, therefore, right. This should not, in my opinion, be taken as necessarily precluding a person claiming property sequestered from bringing a separate action in suitable cases for the determination of a question of title.

1923.

JAYEWARDENE J.

The Government Agent, Southern Province, v. Kalupahana.

Then, with regard to the scope of the inquiry into the claim, it is contended for the appellant that these inquiries are limited in the same way as inquiries into claims to property seized under a decree or order for money (sections 244 and 245), that the question of possession should be the deciding factor, and that the Court cannot enter into intricate questions such as fraud, &c., but that such questions should be left to be decided in a regularly constituted action with proper pleadings and after a regular trial on issues. In support of this contention reliance is placed on the words of section 658, which says that claims to property sequestered "shall be investigated in the manner hereinbefore provided for the investigation of claims to property seized in execution of a decree for money." If the provisions for the investigation of claims had ended with this section, as is the case under the Indian Civil Procedure Code, section 487 (see order 38, rule 8), a great deal might have been said for the appellant's contention. But our Code has introduced a new section (section 659), which is as follows :—

> "If upon any such investigation the Court is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure, and shall decree the plaintiff to pay such costs and damages by reason of such sequestration as the Court shall deem meet. If otherwise, the Court shall disallow the claim, and make such order as to costs as it shall deem meet."

Under this section it is clear that the Court has to be satisfied that the property sequestered is "not the property of the defendant" before it can release the property from seizure. This indicates that the question of possession should not be decisive, but that the competing rights of the claimant and of the defendant should be adjudicated upon, and that the Court should decide whether the property belongs to the defendant or not. That is, the Court has to investigate the question of title. It is also to be noted that the Court is given the power to award compensation to the claimant for any damages sustained by him by reason of the sequestration. This would not be so, if the mere question of possession is to turn the scale in his favour. So in the case of property seized under a decree for money, the Court is given the power to impose a fine on persons making an altogether groundless claim, not on the result of the claim inquiry, but on the result of an action instituted under section 247 in which the Court has to decide the question of title between the parties.

Further, the Ceylon Civil Procedure Code, sections 645 to 648, makes provision for the sequestration of mortgaged property before judgment in an action on a mortgage bond, if the defendant

cannot be found for the service of summons, and section 648 deals with claims to property so sequestered, and provides that—

> "If the property sequestered be claimed by a third party, the right thereto shall be tried between the claimant and the plaintiff as an incidental action; and the proceedings in the original action shall be stayed, if the Court shall consider such stay necessary for the purpose of justice, but not otherwise."

There the Court has to decide "the right thereto" or the title to the property, and it directs the question to be decided not by a separate action, but as an incidental action (*Ramen Chetty v. Campbell*[1]). By parity of reasoning, therefore, where the Court has to decide the question of property in similar sequestrations in other actions, the questions should be tried in the inquiry as an incidental action. Moreover, it has been held that an appeal lay against an order allowing or disallowing claims to property sequestered under section 659 (*Karuppen v. Assanar*,[2] *Saibo Marikar v. Anthony Fernando*,[3] *Carimjee Jafferjee v. Andrew Pavia*[4]), and in the last case Wendt J. pointed out the difference between the scope of an investigation under sections 244 and 245 and one under section 659, and said that the Court had in the case of claims to property under sequestration to adjudicate on title and to award damages.

There are two cases which may, however, be cited in support of appellant's contention. In *Karuppen v. Assanar* (*supra*), which is a Full Bench decision, Lawrie A.C.J. and Withers J. (*dissentiente* Browne J.) held that the disallowance of a claim to property sequestered under section 653 of the Civil Procedure Code is no bar to the claimant instituting an action to establish his right to the property seized. Lawrie A.C.J., in the course of his judgment, said :—

> "I am of the opinion that the plaintiff could have appealed against the disallowance of his claim in the other action; but, as there is no provision that the order disallowing such a claim is final, I am of opinion that it does not determine the question of the right of property; it does no more than reject a claim on the materials then before the Court. It certainly settles these points : (1) that the goods were rightly sequestered; (2) that they may be sold in execution if judgment goes for the plaintiff; but the disallowance of a claim does not profess to adjudge the property to be in one or in another, and I am not disposed to give it a larger meaning than its own terms bear."

[1] (*1896*) *2 N. L. R. 94.*
[2] (*1895*) *4 N. L. R. 379.*
[3] (*1896*) *1 Thamb. 68.*
[4] (*1906*) *3 Bal. 69.*

1923.

JAYEWARDENE J.

The Government Agent, Southern Province, v. Kalupahana

Withers J. said :—

"After giving my best consideration to this matter, I am inclined to concur with the judgment of the Acting Chief Justice. Though the Judge may not sustain the sequestration against the claim of one who is no party to this action, unless he is satisfied that what has been sequestered is not the property of the claimant, I do not think that his decision settles the question of title once and for all. Clause 660 especially conserves the rights of third parties before sequestration, and this being so, why should not a third party be allowed to establish his title by an action instituted for that purpose ? Of course, he cannot recover in that action any damages or costs given against him in the claim inquiry."

Browne J., in his dissenting judgment, gives what, to my mind, is the more correct interpretation of the section. He said :—

"On the question of procedure, whether a claimant can, after trial and disallowance of his claim under section 653, institute an action to assert and have decided in ordinary procedure his right to the property so claimed, I would hold it is not permissible for him to do so."

"I admit there is much reason why that right should be given to him. When the Indian Civil Procedure Code, section 487 (our section 658), required that a claim on sequestration should be investigated in the same manner as a claim to property attached in execution, it was not directing an investigation in a summary manner or limiting at all any right of action thereafter, more especially in that such action should be instituted within fourteen days." "But when our Civil Procedure Code, section 658, gives a like direction, that refers one back to sections 241 and 247, we find the former contains the provision of an investigation in a summary manner, which is not in the Indian section 278, and the latter, the limitation of fourteen days' time, which is not in the Indian section 283, and thus a question of title to property might fall to be decided without pleadings in a manner which possibly might work an injustice."

"As against this, however, it must be noted that the Indian Civil Procedure Code contains no such provision as section 659 in our Code and it, read in conjunction with section 207, to my mind, decides that the decree which disallows with costs and damages a claim on sequestration shall be final unless reversed by appeal."

'Nor need this always work hardship, for, in the first place, no claimant is obliged to try his title by the process of mere claim. On sequestration made of his property he may at once sue, and, if necessary, have the further proceeding enjoined till decision of his claim. While, if he only claims, it will be always in the power of the Court, and of the claimant and sequestrator, to have without any pleading save the statement of claim issues stated to develop full adjudication upon the questions of title necessary to be raised."

The principle there laid down should, I think, be restricted to cases where, in the investigation under section 659, the question of title to the property has not been fully investigated, but has been summarily disposed of in the same way as in an investigation of a claim to property seized under a decree for money. If the question of title has been fully investigated at the investigation into the claim, the subsequent action being between the same parties, it is difficult to see how the decision in the claim investigation can fail to be a *res judicata* between them in the subsequent action, especially as there is a right of appeal against the decision. The judgment cannot, therefore, be regarded as in any way limiting the scope of the investigation under section 659. In the other case, *The Bank of Bengal v. The Jaffna Trading Company*,[1] it was held that section 659 does not bar a regular suit for damages for wrongful sequestration before judgment, as it contains no machinery for the trial of an action for damages. In that case there had been no investigation of the claim, as the sequestration was withdrawn without any notice to the claimant, and the claimant had no opportunity of proving either title or damages. In such circumstances, which are not contemplated by a section 659, a subsequent action for damages would undoubtedly lie, but Wood Renton A.C.J. said :—

" I am unable to hold that, even if the Bank of Bengal under the bill of lading passed by endorsement to the Bank of Madras, the former would be precluded by anything in chapter XLVII. from bringing an independent action for the recovery of damages caused by a wrongful sequestration. Section 659 contains no machniery for the trial of actions for damages. The intention of the Legislature clearly is that claims in sequestration proceedings should be summarily disposed of. Such a demand for damages as the Bank of Bengal seeks to enforce in the present case could not be adequately investigated without the filing of pleadings, the framing of issues, and the examination of witnesses. Can it be seriously argued that the Legislature intended that this should be done in the course of summary

[1] *(1913) 16 N. L. R. 417.*

1923.

JAYEWARDENE J.

The Government Agent, Southern Province, v. Kalupahana

proceedings with a view to the removal of a sequestration of property ? Moreover, chapter XLVII. of the Code contemplates arrest of the person as well as of the property. If the appellant's contention in regard to the scope of the chapter is correct, I see no reason why a defendant, who has been unlawfully arrested, should not be forced to prefer his claim to damages under chapter XLVII. on pain of finding himself debarred from his remedy altogether. This view of the scope of section 659 is confirmed to some extent by the decision of Sundara Aiyar J. and Phillips J. in *Manjappar Chettia v. Canapathi Gounden*,[1] to which Mr. Hector Jayawardene kindly called our attention as *amicus curiæ*. It was there held that section 95 of the new Indian Civil Procedure Code, which corresponds to section 659 of our own Code, is no bar to a regular suit for damages for wrongful attachment before judgment."

The learned Judge has in this passage overlooked, if I may point out respectfully, the fact that under section 659 the Court is expressly empowered to decree the plaintiff to pay all the damages sustained by reason of the sequestration. If the Court can decree such damages, there must necessarily be the machinery for passing such a decree. Under section 95 of the Indian Civil Procedure Code the party has to apply for damages, the damages the Court can award are restricted to Rs. 1,000, and it is also expressly provided that an order on any such application shall bar any suit for damages, clearly implying thereby that otherwise a suit for damages would lie. Reliance on section 659 was hardly necessary in that case as by the withdrawal of the sequestration the Court was prevented from making an order under the section.

On the other hand, there is the judgment of Wendt J. (in which Grenier J. agreed) in *Carimjee Jafferjee v. Andrew Pavia* (*supra*) where the question of title to the property sequestered was fully gone into. The claim was based on a notarial deed, which was impugned as a fradulent alienation. The matter was investigated as in a regular action, and the judgment of the District Judge holding the deed to be in fraud of creditors was set aside, and the case was sent back for the District Judge to assess under section 659, the damages payable to the claimant by reason of the sequestration. The attention of the Court was drawn to *Karuppen v. Ussanar* (*supra*), for it was cited in support of the contention that an appeal lay from an order under section 659, but the Court does not appear to have thought that that case prevented it from entering fully into the merits of the case and deciding on the title of the parties. The Court also found no difficulty in directing the District Judge to assess damages in the claim inquiry itself. The judgment of

[1] *(1911) 21 Mad. L.J. 1052.*

Mr. Justice Wendt does not appear to have been referred to at the argument of the Bank of Bengal case (*supra*).

The terms of section 659 empower the Court to decide questions of title and claims to damages, and some machinery must be found by which the Court can exercise these powers, and that machinery, I think, is an incidental action as provided for in section 648. It may be that when the order on the claim is made summarily without any investigation on the merits, a subsequent action is competent as laid down in *Karuppen v. Ussanar* (*supra*). In view of the terms of section 659, the District Judge was, in my opinion, right in holding that he was entitled to try the question whether deed No. 113 was void or not in the claim proceedings.

Mr. Elliot has also assailed the foundation of these proceedings. He contended that the warrant to sequester was illegally issued, inasmuch as the information or libel of the Government Agent was not filed within seven days of the seizure, as required by section 3 of the Crown Debts Ordinance. I gravely doubt whether it is open to a person in the position of a claimant to question the regularity of the proceedings in the main action, but it is not necessary to decide the point definitely here, as I have no reason to question the correctness of the District Judge's finding that the goods claimed by the appellant were seized on February 17, and that the information having been filed on February 26, it was filed within the prescribed time. So much for procedural matters.

There remains the contention on the merits. The learned District Judge has held that the deed of sale No. 113 was made with intent to delay, hinder, and defraud His Majesty, and has declared it void under section 8 of the Ordinance. It is strenuously contended that this finding is wrong. Mr. Elliot asserts that the claimant has proved that the transfer was made *bona fide* and for valuable consideration. Section 8, under which the Crown impeaches the validity of the deed, enacts that:

(I give only the material parts) :—

"All gifts, grants, sales, transfers . . . . as well of lands and tenements as of goods and chattels of any debtors to Her Majesty . . . . which have been or shall at any time hereafter be contrived, executed, had, or made by fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud Her Majesty . . . . in their just and lawful action, suit, debts, ... shall be from henceforth deemed and taken to be utterly void and of none effect . . . ."

(The rest of the section declares the party or parties knowing of such fraud, &c., guilty of an offence, and prescribes the penalties to which they are liable.) Section 7, on which the appellant relies, declares that:

1923.

JAYEWARDENE J.

The Government Agent, Southern Province, v. Kalupahana

"No sale, pledge, transfer, or alienation of any goods, chattels, or other movable property, upon good consideration and *bona fide* to any person or persons or body corporate, prior to the date of the execution of the Crown upon any judgment or award of any debt, fine, penalty, or forfeiture being due and payable to it, shall be invalidated by anything contained in this Ordinance to the contrary notwithstanding."

I was at first inclined to the view that section 7 had no application to the present case, but after careful consideration I have come to the conclusion that the appellant can rely on it. The sale in question here was prior to the execution of any judgment by the Crown, and the order issuing the warrant of sequestration must be regarded as a judgment.

Now, section 8 of our Ordinance is based on the English Act against fraudulent deeds, gifts, alienations, &c., enacted in the reign of Queen Elizabeth (*13 Elizabeth, c. 5*), and reproduces almost word for word the language of the preamble and section 1 of that Act, and section 7, similarly, reproduces the material words of section 6 of the English Act. The English Act refers to fraudulent alienations generally, while the local Ordinance is restricted to those affecting the rights of the Crown, and the verbal alterations necessary for this purpose have been introduced into our Ordinance. In the construction of an Ordinance so borrowed from an English Act, we are bound to follow the decisions of the English Court of Appeal on the Imperial Statute. See the judgment of the Privy Council in *Trimble v. Hill*,[1] the local case of *Meeden v. Bawa*,[2] and the Indian case of *Romendra v. Brojendra*.[3] So that the principles of the Roman-Dutch law relating to fraudulent alienations have no application. These sections do not appear to have been the subject of any judicial decisions locally, but they have been frequently interpreted in England and also in India, where the Statute of Elizabeth forms a substantial part of the ground work of section 53 of the Transfer of Property Act. In *Hakim Lal v. Mooshahar Sahu*,[4] Mookerjee and Holmwood J.J., upon a review of all the authorities and an examination of the principles underlying them, deduced the following rule :

"A conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay, or defraud creditors (His Majesty) is void as to them. It is not enough, in order to support a conveyance or transfer as against creditors (His Majesty), that it be made for valuable consideration ; it must also be *bona fide*."

[1] *(1879) 5 A. C. (P. C.) 342.*
[2] *(1895) 1 N. L. R. 51.*
[3] *(1917) 27 Cal. L. J. 158 (170).*
[4] *(1907) 34 Cal. 999.*

"In other words, in the language of Lord Coke: 'A good consideration doth not suffice if it be not also *bona fide*.' *Twyne's case.*[1]"

"When it appears that the parties to a transaction impugned for fraud were actuated by a motive which is denounced as fraudulent, namely, a motive to hinder, delay, or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is nevertheless void in law. A mere fraudulent intent on the part of the grantor alone will not invalidate the transfer if it is for valuable consideration, and there is no want of good faith on the part of the grantee. Where, however the transferee is himself a creditor, he occupies a more favoured position. . . . . If however the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. The preferred creditor participates in the fraudulent intent of the debtor, where his purpose is not to secure the payment of his own debt, but to aid the debtor in defrauding other creditors, in covering up his property, in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit. Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent."

May, in his commentary on the Act of Elizabeth, lays down the same principles, but they are not summarized in the same way as they have been summarized in the Indian judgment I have just quoted. (See May's *Treatise on the Statutes of Elizabeth against Fraudulent Alienations, 2nd edition, chapters III. and IV.*)

In the present case, therefore, two questions arise for decision. Was the deed, No. 113, contrived, executed, or made with intent to hinder, delay, or defraud His Majesty, or was it made upon good consideration and *bona fide?* In determining these questions we have to examine all the facts and circumstances of the case in the light of the rules stated above. What are these facts and circumstances? Kalupahana who was the Secretary of the District Court of Tangalla was charged with misappropriating about Rs. 16,000, being moneys entrusted to him in his official capacity. He was suspended in July or August, 1922. He appears to have been in insolvent circumstances. In addition to the Rs. 16,000

[1] *(1602) 1 Smith's L. C. 1.*

1923.

JAYEWARDENE J.

The Government Agent Southern Province, v. Kalupahana

claimed by the Crown, he had many other creditors. The furniture, &c., seized in this case appear to have been practically the only property he was possessed of. Two of his creditors, the plaintiffs in D. C., Matara, 345, and C. R., Matara, 15,793, had obtained judgments against him for Rs. 753·85 and Rs. 112·04, respectively. On the charges brought against him by the Crown, Kalupahana was arrested, and the Court ordered him to give security in Rs. 10,000 for his release on bail. Mr. Jayawickreme, the Proctor and Notary already referred to, one of the claimants in this case, was asked by Kalupahana's brother-in-law, one Solomon Fernando, to stand surety, he refused, but Peneris Jayasuriya, a cousin of Mr. Jayawickreme stood surety. Peneris Jayasuriya lives in Mr. Jayawickreme's house. The property now in question in this case was seized under writ issued in D. C., Matara, 345, in November, 1922. Peneris Jayasuriya obstructed the Fiscal's officers, and was threatened with a criminal prosecution. It is said that Mr. Jayawickreme also joined in the obstruction. On November 28, 1922, Peneris Jayasuriya, as surety, and the judgment-debtors, Kalupahana and his wife, as principals, entered into a bond, J 3, with the Deputy Fiscal, by which Jayasuriya undertook to take charge of the property seized until the sale, and in the meantime keep them safely and securely. A claim appears to have been made to the property by the debtor's brother-in-law, but the claim was rejected. Thereupon the Deputy Fiscal advertised the sale of the property for January 27, 1923. The property was also seized under the writ in the Court of Requests case. In the meantime the sale now impugned was arranged. The present claimant-appellant came forward as the purchaser. He is married to Mr. Jayawickreme's first cousin. The sale took place on January 26, Mr. Jayawickreme acting as Notary and attesting the deed. The consideration was stated to be Rs. 1,500. The writ holders in cases Nos. 345 and 15,793 were also present. They were paid what was due to them, and they signed the deed as witnesses. They gave evidence in the case, and the learned District Judge has accepted their evidence that they received in full the amounts due to them. The purchaser asserted a claim of Rs. 500 on a promissory note dated August 1, 1922, granted by Kalupahana. This amount was set off against the consideration, the Fiscal was paid Rs. 25·91 as his charges, and the balance, it is said, was paid to Kalupahana. The deed was executed in the presence of the Deputy Fiscal, who was ill, and did not notice the details of the transaction. The Crown denied that any sum was due to the claimant, and contend that the note, if there was one, was a bogus note. The learned District Judge has found that the claim of the appellant of Rs. 500 is false, and that the granting of a note by Kalupahana has not been proved. The note itself was not produced, and the only documentary evidence of it is a counterfoil from Mr. Jayawickreme's letter of

demand book, which showed that he had sent a letter of demand to the debtor on January 17, 1923, for Rs. 500. J 1, the counterfoil, was produced in the District Court, but is not now in the record. Unfortunately the document, J 1, bore an alteration which greatly affected its value as evidence. It originally bore the date October 30, 1922, but this had been struck off, and the date January 17, 1923, entered instead. From October 18, 1922, to April 25, 1923, this is the only letter of demand issued from the book. The suggestion for the Crown is that when this litigation began, the piece of evidence afforded by the counterfoil was fabricated to support the existence of the note. Mr. Jayawickreme and the claimant both gave evidence in support of the indebtedness on the note, but the District Judge has rejected their evidence. He has seen and heard the witnesses, and, in view of the alteration in the date on the counterfoil and taking the circumstances into consideration, I think his conclusion is right. The relationship existing between the parties and the financial position of the claimant who, it has been proved, owns property only worth about 1,000 appear to strengthen this conclusion. So, there has been a failure of consideration to the extent of at least Rs. 500. This finding throws considerable doubt on the assertion of the claimant and his witnesses that any sum whatever was paid to the vendor. Deducting the sum of Rs. 893·76 paid to the creditors and as Fiscal's fees, the balance sum of Rs. 606·24 stands unaccounted for. It is suggested that the claimant is the nominal purchaser, and that the person for whose benefit the transaction was put through was Mr. Jayawickreme, and that all along an attempt had been made to place these assets of Kalupahana beyond the reach of his creditors.

A very significant fact is that when the Deputy Fiscal seized the furniture at Kalupahana's house in November, 1922, he was resisted and obstructed by Peneris Jayasuriya, and was prevented from removing the goods. Hence the necessity for giving a security bond, J 3, by Peneris Jayasuriya and the judgment-debtors. By this bond Peneris Jayasuriya undertook to have charge of the goods and keep them safely and securely till the sale. Then a false claim to the property was put forward by Kalupahana's brother-in-law, a claim which, as I said, was rejected. Even thereafter the Fiscal experienced some difficulty in getting delivery of the goods from Peneris Jayasuriya, and Mr. Jayawickreme promised to give over the goods on behalf of Jayasuriya if the latter did not do so. The Fiscal also threatened Peneris Jayasuriya with a criminal prosecution. All these facts go to show that a determined attempt was made to prevent these goods being taken in execution for the benefit of creditors.

Things were in this state when the sale to the claimant was brought about. The sale according to the claimant was arranged for him by Peneris Jayasuriya. Is the deed No. 113 then anything

1923.

JAYEWARDENE J.

The Government Agent, Southern Province, v. Kalupahana

more than a mere cloak intended to invest the original object of preventing an execution with the formalities of law? No doubt the claims of two creditors have been paid, but they were paid, according to the Deputy Fiscal, under the threat of a criminal prosecution for resistance and after a false claim had proved unsuccessful. The deed in question is, therefore, partly for value and partly voluntary. Is this sale not a contrivance either for retaining for the debtor an interest in the goods or for making a gift of a good part of the property to one of the debtor's friends? The person who came forward to purchase the goods is married to a first cousin of Mr. Jayawickreme, and is also a cousin of Peneris. He lives and trades in a planked boutique of two rooms in the village Kudawellahella. He is worth about Rs. 1,000, but he buys valuable and fashionable furniture, and leaves the bulk of them at Mr. Jayawickreme's. Some of the articles have been traced to the possession of Don Andris and Nonababa, the father-in-law and the sister-in-law, respectively, of Peneris. The claimant says he bought the furniture for sale, but this does not sound very convincing, as he is not a furniture dealer. He says that he himself conceived the idea of having a deed for the sale, although he had not heard of a deed for the sale of movable property before. He wanted the deed to be executed in the presence of the Deputy Fiscal and to procure his signature as a witness to the deed. Why all these elaborate precautions? He knew, and Peneris Jayasuriya and Mr. Jayawickreme also knew, that Kalupahana had been suspended for misappropriating moneys paid in testamentary cases, and that he had been prosecuted and had to find bail in Rs. 10,000. He also knew that Kalupahana had other creditors besides those satisfied at the execution of the deed. All this, in my opinion, points to the sale being a mere contrivance to place a good part of Kalupahana's only property beyond the reach of his creditors and to benefit some of his friends. The sale is, in my mind, clearly *malâ fide*. But Mr. Elliot points to the deed, the publicity, and the openness of the transaction, and the discharge of the debt of the two creditors as indications of its being entirely *bona fide* and for good consideration. But as Lord Macnaghten once said: "Fraud is infinite in variety, sometimes it is audacious and unblushing, sometimes it pays a sort of homage to virtue, and then it is modest and retiring, it would be honesty itself if it could only afford it. But fraud is fraud all the same, and it is the fraud and not the manner of it which calls for the interposition of the Court."

Acts and conduct which in some cases prove *bona fides* are in others unmistakable badges of fraud. In this case the deed and the publicity attending its execution were intended to cover the absence of *bona fides*. The fact that some consideration was paid is of no avail. The attempt to prevent the furniture from being taken in execution was conceived with the intention of delaying

and defeating Kalupahana's creditors, and the subsequent deed was a contrivance to effectuate the same object. Such an intention is very often incapable of direct proof, but must be inferred from the acts and conduct of parties, that is, from a consideration of all the facts and circumstances of the case.

Upon a consideration of all the facts and circumstances here, I find, as the District Judge has found, that deed No. 113 was executed *malâ fide* and for an inadequate consideration, and with the intention of defrauding Kalupahana's creditors, one of whom is His Majesty. Applying the rules formulated above to these conclusions, the deed must be declared void and of no effect under section 8 of the Ordinance. Strictly speaking, the claimant is not entitled to claim any benefit under the deed, but the Crown has offered to give him credit for the sum of Rs. 893·76 paid to the creditors and as Fiscal charges. The claimant will pay to the Crown the sum of Rs. 606·24, being the difference between the value of the goods (Rs. 1,500) stated in the deed and the sum paid to the creditors and to the Fiscal, and the claimant will be entitled to the furniture Unless this is done, the Crown will not be bound by its offer, for it might become impossible to give the claimant credit for the sum paid, as the furniture might by now have greatly deteriorated, and it will be uncertain how much will be realized by their sale. However, I have no doubt that the Crown will do what is just and fair in the matter.

As my brother thinks that the claimant is entitled to a first charge upon the movables to the extent of the sum paid by him in satisfaction of the two writs, I am prepared to adopt the variation in the decree suggested by him, and to declare that the claimant-appellant should have a first charge upon the movables in any case.

With this modification the appeal is dismissed, with costs.

SCHNEIDER J.—

I accept all the findings of facts arrived at by the learned District Judge, for there appears to me to be no good reason why I should not accept them. *Inter alia* he has found that the debts to Sonandara and L. M. de Silva were genuine. The evidence proves that these creditors had obtained decrees against Kalupahana, and had seized the very movables which are involved in the contest now before the Court, and that a sale was only averted by those debts being satisfied by payment, and the seizures being consequently removed. It is also proved that it is the claimant-appellant who paid those debts. It might be that the money was actually not his own, but that makes no difference in so far as the claim of the Crown is concerned to levy execution on those movables. At the time that the Crown asserted its claim, the movables, upon which the Crown was entitled to levy execution as being the

1923.

SCHNEIDER J.

The Government Agent, Southern Province, v. Kalupahana

property of the debtor, were subject to the encumbrance created by those seizures. The claims of these judgment-creditors had to be first satisfied before any part of the proceeds, if there had been a sale, would have been available for the satisfaction of the claim of the Crown. The person who has satisfied those claims is entitled to be placed in the same position as those creditors would have been had these seizures not been removed. The learned District Judge does not appear to have considered this aspect of the case. Therefore, while I accept his finding that the sale in favour of the claimant-appellant was executed to defraud His Majesty and therefore void, or to express the same thing in the language of the Ordinance (No. 14 of 1843, section 8) that the "sale was contrived by collusion to the end, purpose, and intent to defraud His Majesty," and that it was "utterly void and of none effect." I must, at the same time, give effect to that aspect of the case to which I have just referred. I would, therefore, while affirming the order of the learned District Judge setting aside the sale in favour of the claimant, add to the order that although the sale is set aside, and the movables in question are therefore available for the satisfaction of the claim of the Crown, those movables are subject to the encumbrance created by the seizures under the writs issued by Sonandara and de Silva, or, in other words, that the claimant-appellant is entitled to a first charge upon those movables to the extent of the sum paid by him for the satisfaction of those writs.

As regards the procedure, the learned District Judge appears to me to have followed the correct procedure. The Ordinance No. 14 of 1843 prescribes a special procedure which is intended to secure the recovery of debts due to the Crown. In section 2 it authorizes a Government Agent or Assistant Government Agent or other persons duly authorized by writing signed by such Government Agent upon the Agent's own knowledge, or notice given to him, that a debt has accrued to His Majesty, immediately to seize and keep in safe custody, but without removing the same (except in those cases only where there are no adequate means for safely and securely keeping the said property at the place where it is seized, and no sufficient security given for the value thereof) all the property of the debtor to an amount sufficient to cover the debt due and costs. In section 3 it directs that a libel or information setting forth the nature and amount of the debt shall be filed "within seven days at farthest after such seizure." It directs the Court in which such libel or information is filed, upon the filing of the libel, together with a certificate of the property seized, "to deliver to the Fiscal a warrant to sequester the property." It is enacted in the same section that "any further proceedings which may be had thereon shall be according to such general rules of practice as now are or hereafter may be framed by the Judges of the

Supreme Court." It is to be noticed that the special procedure prescribed ends with the warrant for sequestration being issued by the Court to the Fiscal. The question which arises is as to the interpretation which should be placed on the last sentence of section 3 with regard to the further proceedings after the warrant of sequestration had been issued. The word "thereon" in that sentence it might be argued refers, strictly speaking, to the warrant to sequester. But, it seems to me, that if the word were so construed, it would not bear out the obvious intention of the whole of the section, which is that when the procedure specially prescribed comes to an end with the issue of the warrant of sequestration, the proceedings begun by the filing of the "libel," which must be regarded as an action, are to be construed according to the general rules of practice. In my opinion, therefore, the word "thereon" refers to the "libel and also to the warrant of sequestration, and what the section was intended to mean was that further proceedings after the issue of the warrant of sequestration should be according to general rules. The words "such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court" would, I think, be interpreted reasonably if they be regarded as indicating that the further proceedings are to be governed by the Civil Procedure Code, which prescribes general rules of practice and which repealed, and has taken the place of the rules and orders of the Supreme Court, which at one time governed general practice. Accordingly, the warrant to sequester issued to the Fiscal must be regarded as a warrant to sequester before judgment, and the sequestration as being of the nature contemplated in section 653 of the Civil Procedure Code. Section 658 of the Civil Procedure Code indicates that claims may be preferred to the property sequestered, and section 659 that the scope of the investigation of such a claim is as to the ownership of the property. This was also pointed out in the case of *Ramen Chetty v. Campbell* (*supra*). In view of the provisions of section 8 of the Ordinance No. 4 of 1843, it was within the scope of the investigation to inquire whether the deed of sale in favour of the claimant-appellant was "void." I would here add that where a deed is being attacked as fraudulent in proceedings, such as these presents, the deed should be set aside if any of the causes set out in section 8 are present independent of any consideration whether the ordinary elements of a Paulian action are present or not. A proceeding such as this should not be regarded as a Paulian action.

Besides contending that the findings of the learned District Judge on the question of the invalidity of the deed were not right, Mr. Elliot argued that the District Judge's order was bad for two reasons. First, because there was no proof that Kalupahana was indebted to the Crown. The Ordinance requires no proof other

1923.

SCHNEIDER J.

The Government Agent, Southern Province, v. Kalupahana

than knowledge on part of the Government Agent of the existence of a debt or notice received by him to that effect. The proceedings here afford the necessary proof. The information filed in Court by the Government Agent of the Southern Province sets out that a debt amounting to Rs. 16,000 was due to His Majesty from Kalupahana, late Secretary of the District Court, and there is a certificate signed by the Mudaliyar of West Giruwa pattu certifying what property he had seized under the authority of the Government Agent. Accordingly, there was placed before the District Court all the material which the Ordinance requires should be furnished before the Court issues a warrant to the Fiscal to sequester. His contention that the warrant to sequester was issued without the due material being placed before the Court must therefore fail. He next contended that the libel was filed out of time, because the seizure, or at least the seizure of some part of the movables, had been effected on February 16, whereas the information or libel was filed on February 26, that is, after the lapse of the seven days mentioned in section 3. As a matter of fact, the District Judge has held that the seizure was made on February 17, and not on the 16th. I accept that finding. But even if the seizure had been made on February 16, I do not think I would have been justified in upholding Mr. Elliot's contention that all the proceedings taken after the libel was filed were vitiated thereby. The intention of the Legislature in requiring that the libel shall be filed within the time mentioned in section 3 is clearly to compel the Government Agent to seek the assistance of a Court of law without delay, but that provision should not be regarded as depriving a Court of its jurisdiction to entertain a libel even after the expiration of the time fixed by the Ordinance.

In this case the Court accepted the libel and acted upon it—in doing that it vested itself with jurisdiction to deal with the matter. If it had been necessary, I would accordingly have held that the warrant of the Court to the Fiscal had been rightly issued, although the libel had not been filed within the time-limit mentioned in the Ordinance.

I would accordingly affirm the order of the learned District Judge, subject to the variation I have indicated in this judgment, and would dismiss the appeal, with costs.

Appeal dismissed.