Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

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LETCHIMANEN CHETTY *v.* MUTTUSAMY PILLAI.

D. C., Colombo, 25,257.

Seizure by Fiscal—Property already in his custody under another writ—What amounts to seizure under another writ—Action under s. 247, Civil Procedure Code—Purchase pending seizure—Invalidity—Civil Procedure Code, ss. 236, 241, 247, 657, 659, 660, 661.

Where at the instance of the plaintiff in a case the Fiscal had taken into his custody certain movable property on a mandate of sequestration issued against the property of the defendant in the case, and, where pending such sequestration, another judgment-creditor of the same defendant placed in the hands of the Fiscal a writ against the said defendant's property with a request to seize the sequestered goods,—

Held, that the placing of the writ of execution in the hands of the Fiscal *ipso facto* amounted, in the circumstances, to a valid seizure of the goods, and a sale of the goods after that by the judgment-debtor was void as against such seizure, under section 236 of the Civil Procedure Code.

Jones v. Atherton,[1] *Johnson v. Evans*,[2] *Hutchinson v. Johnston*,[3] *Murgatroyd v. Wright*,[4] and *Narayan Chetty v. Ellis* [5] followed.

THIS was an action under section 247 of the Civil Procedure Code by the unsuccessful claimant to certain movable property seized under writ in D. C., Colombo, 24,798 C. The facts

[1] *7 Taunton 56.*
[2] *7 M. & G. 240-47.*
[3] *7 Term Reports 729.*
[4] *(1907) 2 K. B. 333.*
[5] *4 N. L. R. 367.*

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which gave rise to the claim and the proceedings thereunder are set out in the following order of the District Judge (P. E. Pieris, Esq.) adjudicating on the claim (July 15, 1907):—

"On March 18, 1907, certain shop goods valued at Rs. 1,628.67, and which formed the subject-matter of the present claim, were seized on a mandate of sequestration issued in D. C., Colombo, 24,694 C, and were removed and kept for safe custody in the office of the Deputy Fiscal of Kalutara. Shortly after the present writ-holder obtained a judgment in D. C., Colombo, 24,798 C, against the very party against whom the mandate had issued in the previous case, and on April 17, 1907, he took out writ of execution. This he delivered to the Deputy Fiscal of Kalutara on May 3, 1907, with a letter from his proctor, pointing out these very goods at the time in the Deputy Fiscal's office for seizure. On May 6, 1907, the writ was forwarded to the Fiscal's officer of the division where the judgment-debtor resides, and payment was demanded; on May 15 the officer reported that no payment was made, and that he had seized some immovable property belonging to the judgment-debtor. Regarding that seizure, the Fiscal's officer has stated in the box as follows:—'A Chetty pointed out the lands on behalf of plaintiff. I do not know that Chetty's name; he said he came on behalf of plaintiff.'

"*Cross-examined.*—'I questioned Abdul Raheman at the time of the seizure. He admitted some shares of the lands were his. I seized accordingly.'

"The value of the immovables seized was estimated at Rs. 2,650; the writ was for Rs. 3,546, to which has to be added interest and costs. The Fiscal has thus strictly carried out the provisions of section 226 of the Code; the demand for payment was not complied with; the judgment-debtor was given the opportunity of pointing out property, at the least he acquiesced in the seizure of certain properties which were pointed out on behalf of the plaintiff; that property fell considerably short in value of the amount of the claim; under section 226, therefore, the writ-holder had the right to point out any further property of the judgment-debtors; this he had already done by his proctor's letter on May 3; that letter was in the Deputy Fiscal's file, and was a standing instruction to the Fiscal, and as such came into operation as soon as the writ-holder had the legal right to point out property, *i.e.*, as soon as the judgment-debtor had failed to avail himself of his opportunity by pointing out sufficient property to satisfy the writ. Accordingly, I am of opinion that on May 15, when the report of his officer reached the Deputy Fiscal, this proctor's letter seemed to point out these shop goods for seizure. These goods were already in the custody of the Fiscal; the fact that they were so on a mandate of sequestration

would not appear to me to affect the case, the Fiscal being in actual physical possession of the goods at the time, when by operation of law the proctor's letter became effective to point out property, and the letter having pointed out this particular property, I am of opinion that no further ceremonial was necessary on the part of the Fiscal, and that his possession was sufficient seizure on the judgment-creditor's writ. That being my opinion, the present claimant, who bases his title on a transfer of June 6, 1907, had no interest in the subject-matter of the claim at the date of seizure. His claim is accordingly dismissed with Rs. 100 costs. "

The claimant then instituted this action under section 247 of the Civil Procedure Code, claiming a declaration that the said goods were not liable to seizure and sale, and praying that the same may be released from seizure. The Additional District Judge (H. A. Loos, Esq.) gave judgment for the plaintiff as prayed. He held as follows (December 9, 1907):—

" The plaintiff in this case was the claimant in respect of certain goods which had been seized under a writ of execution issued by the defendant against one Abdul Raheman in case No. 24,798 C of the District Court of Colombo. His claim was inquired into in the District Court, Kalutara, and was dismissed. He now brings this action to have it declared that the goods in question belonged to him, and that they be released from seizure under the defendant's writ. The facts which had led up to the institution of this action are briefly as follows:—

" The plaintiff sold the goods now in question to Abdul Raheman on credit, and subsequently instituted the action No. 24,694 C against him in the District Court of Colombo to recover their value, and at the same time obtained a mandate to the Fiscal to sequester the goods now in question, which were accordingly sequestered by the Deputy Fiscal of Kalutara and kept in his custody in his office, on March 18, 1907. Soon after their sequestration one Omer Lebbe claimed the goods, and the Deputy Fiscal reported the claim to the District Court of Kalutara. That Court held an inquiry into Omer Lebbe's claim and dismissed it early in May, whereupon Omer Lebbe appealed to the Supreme Court against the order of the decision. While the appeal was pending, the plaintiff, Abdul Raheman, and Omer Lebbe appear to have come to an arrangement, whereby Omer Lebbe was to withdraw his appeal, plaintiff was to consent to the dismissal of his action No. 24,694 C, and Abdul Raheman and Omer Lebbe were to execute a deed transferring the goods which were under sequestration to the plaintiff. In accordance with that arrangement Abdul Raheman and Omer Lebbe on June 6, 1907, executed deed No. 6,645 transferring the goods to the plaintiff. Now Abdul Raheman was also indebted to the defendant at this time, and the defendant having instituted

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the action No. 24,798 C in the District Court of Colombo against him and having obtained judgment against him, obtained a writ of execution and placed it in the hands of the Deputy Fiscal of Kalutara on May 3. That writ (D 1) ordered the Deputy Fiscal to levy and make of the houses, lands, goods, debts, and credits of Abdul Raheman by seizure and, if necessary, by sale thereof, the sum of Rs. 3,546.50. On April 17, 1907, the defendant's proctor wrote a letter (D 2) to the Deputy Fiscal requesting him to seize the goods which had been sequestered under plaintiff's action No. 24,694 C. The Deputy Fiscal followed the procedure laid down by section 226 of the Civil Procedure Code and sent an officer to demand payment of the amount due under defendant's writ from Abdul Raheman, and on his declaring his inability to pay, and failing to surrender or point out any property for seizure, the Fiscal's officer, on May 11, 1907, seized certain lands belonging to Abdul Raheman, on one of which Abdul Raheman was residing, and which had been pointed out to him for seizure by a man who represented himself to be an agent of the defendant. The lands so seized were valued by the Fiscal's officer at Rs. 2,650; the goods in question in the present action are valued at Rs. 1,628.67. Apparently the Deputy Fiscal made his return to the writ to the Court stating that he had seized the lands; and on May 16, 1907, defendant's proctor wrote a letter (D 4) to the Deputy Fiscal, Kalutara, stating that he had not authorized the seizure of the lands, requesting him to release the seizure, which the Deputy Fiscal accordingly did. On June 7, 1907, the defendant's proctor wrote a letter (P 3) to the Deputy Fiscal inquiring what steps he had taken in respect of the seizure of the goods now in question, and on the same date defendant himself wrote a letter (P 1) and despatched a telegram (P 2) to the Deputy Fiscal requesting him to seize under writ in case No. 24,798 C the goods which had been sequestered under case No. 24,694 C, if he had not already done so. The Deputy Fiscal states that he thereupon seized the goods under the defendant's writ in case No. 24,798 C, the goods being then in his custody, and the plaintiff claimed the goods. His claim having been dismissed, he instituted this action.

" Several issues were agreed upon, but the principal issue was as to the date on which the goods in question can be considered to have been seized under defendant's writ in case No. 24,798 C. It was contended on behalf of defendant, on the authority of certain English cases (*Jones v. Atherton*,[1] *Drew v. Lainson*,[2] *Johnson v. Evans* [3]), that the seizure under defendant's writ must be considered as having been made on the date on which the writ came into the hands of the Deputy Fiscal, viz., May 3, 1907, for it was argued, the goods being at that date in the custody of the Deputy

[1] *7 Taunton 56.*
[2] *11 Adolphus & Ellis 529.*
[3] *7 M. & G. 240.*

Fiscal under sequestration under the mandate issued in case No. 24,694 C, they became by process of law seized under defendant's writ as soon as it came into the hands of the Deputy Fiscal, it not being necessary for the Deputy Fiscal to seize again what he had already seized and had in his custody. That argument is based on the assumption that a sequestration before judgment under a mandate is tantamount to a seizure under a writ of execution. Now it appears to me that the sequestering of the defendant's goods before judgment is not tantamount to a seizure of goods under a writ of execution, for in the former case all that happens is that the goods are temporarily taken into custody to prevent their being disposed of by the owner pending the decision of the action instituted against him, and in the event of the action failing the goods revert to their owner. The sequestration can only be considered as a seizure similar to that under a writ of execution, after the plaintiff has obtained judgment; whereas in the latter case the seizure is with a view to the sale of the goods immediately and not dependent on the happening of any further event.

" Section 661 of the Civil Procedure Code specially provides that where property is under sequestration, and a decree is given in favour of the plaintiff, it shall not be necessary to again seize the property as preliminary to its sale or delivery in execution of such decree. Had it been the case that a sequestration was the same thing as a seizure under a writ of execution, it would have been quite unnecessary to enact the provisions of section 661.

" Being then of opinion that a mandate of sequestration cannot be considered as creating a seizure for the purposes of a writ of execution, I hold that the English cases cited do not apply to the present case, for there was no seizure of the goods at the time that the defendant's writ came into the hands of the Deputy Fiscal, and therefore it was necessary that the Deputy Fiscal should seize them under that writ before they could become liable for execution under it; and I hold that they were not so seized until June 7, 1907, one day after they had been transferred to plaintiff by deed No. 6,645 dated June 6, 1907. So much for the first issue.

" On the second issue, I am not satisfied that plaintiff had notice of the writ in case No. 24,798 C being in the hands of the Deputy Fiscal on June 6. The defendant states that he informed the plaintiff that he (defendant) had a writ against Abdul Raheman, but he says that he did not inform the plaintiff that he had handed the writ to the Deputy Fiscal, so that even if it be true that he informed plaintiff, which I am inclined to doubt, that he had a writ, the plaintiff is not fixed with notice of its being in the hands of the Deputy Fiscal. The defendant was a very unsatisfactory witness.

" Having decided the first and second issues in the plaintiff's favour, it is unnecessary to decide the third and fourth issues.

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" The fifth issue—viz., whether the plaintiff is entitled to damages, and if so, to what damages—was not pressed, and no evidence was adduced as to any damages having been sustained by plaintiff.

" At the trial a sixth issue was suggested by Mr. Bawa, who appeared for defendant, viz., whether plaintiff bought the goods *bona fide* and for valuable consideration. There is nothing in the evidence to establish the contrary, and so far as I can see the purchase by plaintiff was made *bone fide* and for valuable consideration. It is true that plaintiff made no payment for the goods at the time they were transferred to him, but the consideration for the transfer was the extinction of Abdul Raheman's debt by the plaintiff's withdrawal of the action No. 24,694 C, which was then pending against him.

" It was also urged for the defendant that under section 25 of ' The Sale of Goods Ordinance, 1896,' as soon as the writ of execution in No. 24,798 C was delivered to the Deputy Fiscal, *i.e.*, on May 3, the goods in question became bound for execution under that writ, and that the proviso to that section, which enacts that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, did not apply in this instance, for plaintiff had at the date of the transfer to him—June 6, 1907—notice that the defendant's writ had been delivered to and remained unexecuted in the hands of the Fiscal.

" As I have pointed out above, I am not satisfied that plaintiff had such notice, and I am satisfied that plaintiff acquired title to the goods in good faith and for valuable consideration. Let judgment be entered declaring the plaintiff owner of the said goods in the schedule A annexed to the plaint, and releasing them from seizure under the defendant's writ in case No. 24,798 C, with costs."

The defendant appealed.

Bawa (with him *Van Langenberg* and *H. A. Jayewardene*), for the defendant, appellant.

Sampayo, K.C. (with him *F. M. de Saram*), for the plaintiff, respondent.

Cur. adv. vult.

March 17, 1908. MIDDLETON J.—

This was an action under section 247 of the Civil Procedure Code. The defendant was an execution-creditor of one Abdul Raheman in action No. 24,798 C, D. C., Colombo. The plaintiff brought action No. 24,694 C, D. C., Colombo, against the same defendant, and obtained a mandate of sequestration of the goods in question on March 18, 1907. The defendant's judgment was dated April 16, 1907, and on the 17th writ issued, and was put in the Fiscal's hands

the next day; the Fiscal at any rate admits that he got the writ at least as early as May 3. With the writ the defendant's proctor sent a letter to the Fiscal requesting him to seize the sequestered property. The Fiscal, however, purported to seize certain immovable property belonging to Abdul Raheman, and reported the seizure to defendant's proctor. On May 16 the defendant's proctor wrote to the Fiscal to the effect that the seizure of immovables was unauthorized, and again requested the Fiscal to seize the sequestered property. On June 7 the Fiscal by a certain overt act purported to seize the sequestered property, which as a matter of fact was already in his custody under seizure by virtue of the sequestration mandate at the suit of the plaintiff in action No. 24,694 C.

On June 6 an arrangement was come to between the plaintiff, Abdul Raheman, and one Omer Lebbe, another alleged creditor of Abdul Rameman, who had also claimed the goods, and whose claim had been rejected on appeal by the Supreme Court on May 3, 1907, whereby the plaintiff purported by notarially executed instrument to purchase the goods in question in consideration of the sum due and owing to him by Abdul Raheman for their original purchase from him by the latter.

The Fiscal was prepared to sell the goods in question under his seizure of June 7 on behalf of the defendant.

The plaintiff, however, filed a claim under section 241, which was inquired into by the District Judge of Kalutara and dismissed, whereupon he instituted this action in the District Court of Colombo and obtained the judgment now appealed against by the defendant.

The first point raised by the appellant was that as soon as his writ reached the hands of the Fiscal it thereby bound all the goods of Abdul Raheman in the possession of the Fiscal, and that therefore, at least on May 3, the goods in question being in fact seized by the Fiscal under the sequestration mandate at the suit of the plaintiff were in effect seized under the defendant's writ without further action on the part of the Fiscal.

Counsel for the appellant cited *Narayan Chetty v. Ellis;* [1] *Murgatroyd v. Wright;* [2] *vol. 97, 108, Law Times Reports; Johnson v. Evans;* [3] *Jones v. Atherton;* [4] *Hutchinson v. Johnston;* [5] *2 Bombay High Court Reports 147, 151 and 165; 26 Calcutta 531,* with a view to support his argument that once the writ was in the hands of the Fiscal no further action was necessary under the circumstances to constitute a valid seizure, which occurred *ipso facto* from the deposit of the writ with the Fiscal. Upon this

[1] *4 N. L. R. 367.*
[2] *(1907) 2 K. B. 333.*
[3] *7 M. & G. 240-47.*
[4] *7 Taunton 56.*
[5] *7 Term Reports 729.*

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footing the appellant's counsel claimed that his client was entitled to concurrence with the plaintiff in the proceeds of the sale of the sequestrated goods.

It was practically admitted by counsel for the respondent that if a writ in Ceylon was of the same nature as a writ of *fieri facias*, and if English Law applied to it on such points, as our Code of Procedure was silent, that the goods in question would become bound in the hands of the Fiscal immediately on the receipt by him of the defendant's writ, in accordance with the principle underlying the cases quoted.

For my own part I find it difficult to see that a writ of execution issuing from our Courts, although it includes in its grasp immovable property, is in any way different in its scope and object to a writ of *fieri facias*. At the same time I think also our process of execution being in a great measure derived from the English procedure upon such proceedings, though enlarged by the inclusion in its scope of immovable property, and the principle of concurrence derived from Roman-Dutch Law, should be governed by those principles which have emanated from the English judicial construction of the rights and liabilities existent under writs where our rules of procedure are silent.

Ashurst J., in *Hutchinson v. Johnston*, *ubi supra*, stated " the general principle of law, and which has not been contradicted by any of the cases cited, is that the person whose writ is first delivered to the Sheriff is entitled to a priority, and that the goods of the party are bound by the delivery of the writ. " Originally at common law goods were held bound from the teste of the writ, and even now as between the execution-creditor and the execution-debtor the goods are still so bound. See *ex parte Williams*, *in re Davies*;[1] *Giles v. Grover*,[2] per Patterson J.

I should read Ashurst's judgment in *Hutchinson v. Johnston* as intimating that the common law had been restricted in the principle of the binding character of the writ on its delivery to the Sheriff before the Statute of Frauds (29 Car. ii. C. 3, S. 16) was passed, but that the Statute embodied the existing judicial ruling on the point and further safeguarded *bona fide* purchasers for value. The Mercantile Law Amendment Act (19 & 20 Victoria C. 97, S 1) made an actual seizure necessary as against a *bona fide* purchaser.

The Sale of Goods Act, 1893 (56 & 57 Victoria C. 71), repealed the Statute of Frauds and the Mercantile Law Amendment Act, but re-enacted them in positive instead of negative terms.

The goods here were already seized under the mandate of sequestration, and it would be useless, as Bonser C.J. stated in *Narayan Chetty v. Ellis* (*ubi supra*), for the Fiscal to go through a duplicate overt process of seizure.

[1] (1872) *L. R. 7 Ch. 314.*

[2] (1824) *1 H. L. C. 74.*

The property here being sequestered in the hands of a public officer, the Fiscal comes under the exception " *c* " to section 229 of the Civil Procedure Code, and would be governed by section 232. Are we then to say that, as a condition precedent to the due and lawful seizure of these goods, the Fiscal is to give notice to himself to hold the goods subject to the further orders of the Court; and that if he fails to do so, the writ-holder is to be deprived of his rights? I cannot think so. *Lex neminem cogit ad vana seu inutilia.*

I presume the Fiscal keeps a book in which he records all seizures made by him under process of the Court, and would naturally have a record of the mandate of sequestration of these goods. All that he would, therefore, have to do for his own guidance would be to note in that book the date of receipt of the defendant's writ. In the present case the Fiscal apparently entirely ignored the directions of the defendant's proctor, but the defendant ought not to be damnified by the action of an officer of the Court, if he has taken all the necessary steps to obtain his legal rights. This case is to be distinguished, I think, from the neglect of the Fiscal to furnish a list, such as was held to be a material irregularity avoiding a sale *in Dahanayaka v. Zilva.*[1] This obligation apparently was held to be an imperative material condition, without the fulfilment of which the sale must be deemed materially irregular. The object of giving this list to the judgment-debtor or the headman was no doubt to enable verification of the ownership of the property to be made previous to sale, while the obligation of the Fiscal to give notice to himself cannot be deemed to be either necessary or imperative. In the present case the Fiscal has omitted to do an act in itself useless of giving notice to himself, and has expressly ignored the directions given him by the defendant's proctor.

In the case reported in *2 Bombay High Court Reports* 152, 155, the Court there supported its ruling that a second seizure was unnecessary when the goods were already under attachment in the custody of the Nazar, by *Jones v. Atherton* (*ubi supra*) and *Johnson v. Evans* (*ubi supra*), and the principle on which Frost's case, *5 Reports 89*, was decided.

Section 660 of the Civil Procedure Code permits a judgment-creditor of a person whose goods are under sequestration to apply for the sale of the sequestered goods, and section 661 renders it unnecessary for the sequestrator, who afterwards obtains a decree, to again procure the seizure of the property as a preliminary to sale. It seems to me that the issue of the writ in favour of the defendant presupposes the due fulfilment of all the conditions precedent to its issue under sections 224 and 225, unless the contrary is shown, which is not the case here.

[1] *(1889) 9 S. C. C. 26.*

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I therefore think that where the Fiscal has already seized property upon a mandate of sequestration, and while so having the property in question *in custodia legis* receives a writ of execution from a judgment-creditor of the person whose goods are under sequestration, the receipt by the Fiscal of such writ operates as a seizure of such goods without further action on the part of the Fiscal. Under these circumstances I do not propose to decide the other point arising under section 26 of the Sale of Goods Act, 1893.

HUTCHINSON C.J.—

I concur. The judgment of the District Court should be set aside, and the action dismissed with costs in both Courts.

Appeal allowed.