Present: Garvin and Lyall Grant JJ.

1926.

DON JAMES *et al.* *v.* DON CHARLES.

319—D. C. Colombo, 12,387.

Wrongful seizure—Default in payment of sanitary rates—Failure to observe the order of precedence—Malice—Ordinance No. 6 of 1873, s. 1.

Where a Vidane Arachchi seized and sold certain property, which was not movable, belonging to the plaintiff, in default of the payment of sanitary rates, and where the plaintiff failed to point out movable property, sufficient to cover the amount of the tax, for seizure,—

Held, that the Vidane Arachchi was exempt from liability for not observing the order of seizure and sale prescribed by Ordinance No. 6 of 1873.

THIS was an action brought by the plaintiff to recover a sum of Rs. 1,000 damages from the defendants. In default of payment of Sanitary Board rates by the plaintiff, a distress warrant was issued by the Government Agent for the seizure and sale of the property of the plaintiff to cover the amounts due. The Mudaliyar, Vidane Arachchi, and a clerk acting on orders proceeded to the spot, and when the Vidane Arachchi had seized some coconuts on the trees they were resisted. A prosecution was successfully lodged against the plaintiff in the Police Court, but the conviction was set aside in appeal on the ground that there was no authority to seize the nuts and that consequently the resistance offered was not unlawful. The plaintiff thereafter filed the present action for damages against the Vidane Arachchi for malicious prosecution and wrongful seizure.

The learned District Judge dismissed the plaintiff's action.

H. V. Perera, for plaintiff, appellant.—The question of *bona fides* need not be considered where the act is an unlawful one. If the defendant thought that his authority extended even to the plucking of nuts this would be ignorance of the law. *Bona fides* would have to be considered if the action is purely one of malicious prosecution. Here it is not necessary to show malice as ordinarily understood, but only a reckless disregard of the consequences of his act. The Ordinance requires movable property to be seized first, and also ten days should elapse before the sale. In this case, therefore, the seizure and sale are both illegal.

[Drieberg K.C. points out that the action was for malicious prosecution and not for wrongful seizure.]

The paragraph in the plaint which says that the defendant acted in abuse of the distress warrant is wide enough to include an allegation of wrongful seizure. With regard to malice, it is not necessary to prove an intent to injure, but only a reckless disregard of the consequences of his act (*vide Serajudeen v. Allagapa Chetty* [1]). Coconuts on the trees, being immovable property, cannot be seized before movable property. Even if they could be seized, there was no legal seizure. There was only a notice that the coconuts would be sold if the rates were not paid.

With regard to damages, the unnecessary expenses we were put to in defending ourselves in the Police Court would not be too remote.

Driebery K.C., for defendant, respondent.—The action was for malicious prosecution and not for wrongful seizure.

The only grievance is that in seizing coconuts the defendant did not observe the correct order of seizure. How could the plaintiff object to this when he did not surrender the movable property ? A mere notification is sufficient to constitute seizure. (*Corea v. Peiris.*[2])

H. V. Perera in reply.

GARVIN J.—

This is an appeal from a judgment dismissing the plaintiffs' action to recover from the defendant a sum of Rs. 1,000. The cause of action is set out in the plaint as follows:—

> " That the defendant acted maliciously, unlawfully, and without reasonable and probable cause " in entering a certain prosecution against the plaintiff; " and further stated that the defendant committed and caused to be done or committed acts of mischief and damage to the plaintiffs' property by acting illegally and in abuse of a distress warrant issued to him by the Government Agent of the Western Province."

The facts of the case has been clearly found by the District Judge. The defendant was a Vidane Arachchi. By a letter of authority, D 3, dated January 27, 1923, signed by the Government Agent, Western Province, he was authorized " to seize and sell the properties of the persons named in the annexed schedule marked Homagama " for default of payment of Sanitary Board rates due and payable to the Sanitary Board of Homagama. Acting in pursuance of this authority the Vidane Arachchi made a seizure of the coconuts on a land belonging to the plaintiff. He went to the land, served a notice on the first plaintiff, intimating to him that he had seized the coconuts, and the fact of the seizure was further

[1] *(1919) 21 N. L. R. 428.*

[2] *(1909) 12 N. L. R. 147.*

1926.

GARVIN J.

Don James v. Don Charles

advertised. Despite the seizure the plaintiff omitted to pay the small amounts due to the Board. There apparently was reason to believe that the officers who were charged with the collection would be obstructed, and so the Government Agent directed the Mudaliyar of the district and the chief clerk of the Sanitary Board to accompany the Vidane Arachchi. Accordingly on the day appointed for the sale the Vidane Arachchi accompanied by the Mudaliyar and the chief clerk proceeded to the plaintiffs' land. They caused a number of coconuts, which they have thought sufficient in value to cover the amount due by way of tax to be picked. The Vidane Arachchi then proceeded to sell these nuts. The plaintiff to whom application had been made that very day for payment of the tax and who did not do so then proceeded to give trouble. The second plaintiff held the Vidane Arachchi, while the first plaintiff and his brother appeared on the scene and started to push him about. The clerk, Harry Silva, intervened and seized the second plaintiff. Then another young man appeared with a mamoty and struck the defendant. The defendant succeeded in wresting the mamoty from the assailant who ran away. A headman, who was also present, succeeded in arresting him, but he escaped. In a short while this man returned brandishing a knife. The officers ultimately succeeded in securing the plaintiffs and two others and the party proceeded to the police station. The Mudaliyar then reported all the facts and circumstances to the Government Agent who directed a prosecution of these persons for resistance to the public officers in the execution of their duty. It is this prosecution which it is alleged was entered by the defendant maliciously and without reasonable or probable cause and is the foundation for the claim for damages. The persons charged were all convicted but in appeal they were acquitted, the presiding Judge observing that he came to the conclusion with reluctance. He was driven to do so because he took the view that the Vidane Arachchi had no authority to seize the nuts and consequently that he was not resisted in his capacity of a public servant. The point raised in the appeal from the conviction was that in levying execution the officer was bound by the provisions of Ordinance No. 6 of 1873 to seize and sell property belonging to the defaulter in the order set out in that Ordinance. It is a requirement of the Ordinance that movable property of the defaulter should be first seized: failing movable property the rents and profits of the house, building, land, or tenement liable to such tax; failing such rents and profits the materials of such house, and finally the house or land itself. It was successfully argued that the seizure of nuts which had not yet been picked was not a seizure of movable property, and that the Vidane Arachchi was resisted when he did that which he had no authority to do. There can be little doubt that when the Vidane Arachchi seized these nuts he did so in

the belief that he was seizing movable property, and there are indications that this is a view which was shared by his superior officers. But the question with which we are here concerned is whether the prosecution by the Vidane Arachchi can be said to have been with malice as that term is known to the law. It is, I think, a sufficient answer to the claim that in entering this prosecution the Vidane Arachchi was acting on the orders of his superior officers. These orders were issued upon facts which were stated to the Government Agent by the Mudaliyar, and not by the Vidane Arachchi. There can be no doubt the prosecution was the direct result of the needlessly aggressive and obstructive conduct of the plaintiffs themselves. It is impossible to believe that that conduct was induced by an honest conviction that the officers were acting illegally. It is, I think, obvious that the real reason which actuated the plaintiff was a determination to resist the payment of this tax at all costs. Be that as it may, they have had the benefit of a technical defect in the procedure followed in execution of the distress warrant. Apart from this defect there is nothing in the facts and circumstances of this case which justify the suggestion that the defendant was impelled to institute this prosecution out of mere desire to revenge himself for the humiliation to which it is said he was subjected, nor is there anything to show that from beginning to end the defendant acted otherwise than in the honest belief that he was entitled in law to do all he did. The claim for damages for malicious prosecution fails. It was urged, however, that the plaintiffs were entitled to recover the damage sustained by them in consequence of what is referred to as the illegal seizure of these coconuts. In point of fact no damage has been proved, but had there been evidence of such damage, I think, that the proviso to section 1 of the Ordinance No. 6 of 1873 protects the officer from any such claim. It was competent for the plaintiffs to point out movable property sufficient to cover the amount of the tax for seizure and sale. They did not do so. Under the circumstances the defendant, even if he did not observe the order of seizure and sale prescribed by the Ordinance, is exempt from liability.

The appeal is dismissed with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.