1908.
June 1.

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

DARLEY, BUTLER & CO. *v.* FERNANDO

C. R., Colombo, 5,532.

Rates—Payment by third party—Liability of owner to repay—Legal compulsion.

The owner of a house mortgaged it and afterwards sold it to the defendant subject to the mortgage. The mortgagee sued on the mortgage bond and obtained judgment; and under a writ issued in execution of the judgment, the house was sold and bought by the plaintiffs on February 16, 1907, and the sale was confirmed on April 15, 1907.

On May 15, 1907, the Municipal Council gave notice to the plaintiffs that the house would be sold unless the consolidated rate for the second quarter of 1906 was paid. The plaintiffs thereupon paid the rates not only for the second, but also for the third and fourth quarters of 1906, and brought this action to recover the amount from the defendant.

Held, that the defendant was liable to pay amount.

APPEAL by the defendant from a judgment of the Commissioner of Requests, Colombo. The facts are fully stated in the judgment of the Court.

A. St. V. Jayewardene, for the defendant, appellant.

Bawa, for the plaintiffs, respondents.

Cur. adv. vult.

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The plaintiffs brought this action against the appellant claiming Rs. 133.65, being the consolidated rate due for a house in Colombo for the second, third, and fourth quarters of 1906, which the plaintiffs had paid.

A former owner of the house had mortgaged it, and then, by deed of November 19, 1904, sold and conveyed it to the defendant subject to the mortgage. The mortgagees then sued on their mortgage bond and obtained judgment; and under a writ issued in execution of the judgment the house was sold and bought by the plaintiffs on February 16, 1907, and the sale was confirmed by order of the Court on April 15, 1907.

On May 15, 1907, the Municipal Council gave notice to the plaintiffs that the house would be sold unless the rate for the second quarter of 1906 was paid; and the plaintiffs thereupon paid the rates, not only for the second, but also for the third and fourth quarters of 1906. They say that the house was, during the period

when the said rates were incurred, the property of the defendant, and that the rates were legally payable by him. All this was admitted, except that the defendant denied that the rates were legally payable by him. It was also admitted that such rents as were recovered for the last three quarters of 1906 were taken by the defendant.

The defendant in his answer denied that the rates were legally payable by him; and the Commissioner records that, whilst the plaintiffs contended that a person holding a property should pay the rates on it, the defendant contended that the property itself is liable. The Commissioner decided that the defendant was bound " in equity " to repay the plaintiffs. In the petition of appeal the defendant takes two points: (1) That the plaintiffs were under no compulsion to pay the rates for the third and fourth quarters; and (2) that the rates are a charge on the house, and that the plaintiffs bought it subject to the charge. In the argument on the appeal the defendant's counsel abandoned the contention which he had put forward before the Commissioner and in his petition of appeal that the house was liable, and contended both that he was not personally liable to pay the rates, and also that the house was not liable for them, and that, therefore, the plaintiffs were not compelled to pay them.

The Commissioner says that " the plaintiffs were under no legal compulsion to pay the taxes, and did so to save the property," meaning, I think, that they were not personally liable, but that the property was liable. When he speaks of the " taxes," he means the " rate "; and, similarly, the plaintiffs in their plaint, though they talk about the " rate," " the tax," " the said rates and taxes," and " the said taxes," mean only the rate; for it does not appear that any " tax " was ever demanded from or paid by the plaintiffs. A " tax," of course, stands on a different footing from a " rate."

The issues settled were: (1) Does the plaint disclose a cause of action against the defendant? (2) Was the rate legally payable by the defendant to the Municipality? The first must be answered in the negative, because the plaint does not allege that the plaintiffs were compelled to pay; but that can be remedied by an amendment of the plaint, and I think that I ought to treat it as if the amendment, which ought to have been made, had been made, so that the real question at issue can be determined, which is, whether the plaintiffs were compelled to pay.

The Municipal Councils' Ordinance gives in section 127 power to assess a rate on the annual value of houses. By section 138 notice of the assessment is to be served on the " occupier," in Form D, with a demand for payment; and Form D is a notice that " You " (*i.e.*, the occupier) are assessed in respect of the under-mentioned property at the sums mentioned, and that " you are required to pay the amount of the above rate, in failure whereof a warrant will be issued for recovery of the same." If the rate is not paid, a warrant is, by

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section 149, to issue to levy it by seizure and sale of all the movable and imovable property of " the proprietor " of the premises and of all movable property to whomsoever belonging which is found on the premises. The form of the warrant, Form E, recites that the persons named in the schedule to it have been " rated " at the sums mentioned in it, and directs the officer " to seize the property of the said persons (*or* the movable property of any person whomsoever which you may find on the premises)," and, if the rate is not then paid within eight days, to sell the property seized.

It seems, then, that the rate is assessed on the annual value of the house; notice of the assessment is served on the " occupier " that he is assessed and is required to pay; in default of payment all the property of " the proprietor " and all movables found on the house can be seized under section 149; and the warrant (E) directs the seizure of the property of " the said person," *i.e.*, of the person rated. Who is the " person rated?" Is it the same as the " person assessed " of Form D? Or is it the " proprietor "? I think it must be the " proprietor," in accordance with section 149, and that it must mean the person who was the " owner " of the house (as defined in section 3) during the period in respect of which the rate was due. For, although it is the occupier who is to be notified of the assessment and required to pay, and no provision is made for informing the owner, the Legislature can hardly have meant that all the property of the occupier should be liable; and the word " proprietor " in section 149 cannot mean the occupier. It seems strange that the Legislature, after carefully defining an " owner," should speak of a proprietor, unless it meant something different from an owner; but I think it means the same thing.

The plaint alleges, and the defendant admits, that the notice received by the plaintiffs was " to the effect " that the house would be sold if the rate was not paid. This could not have been a notice in Form D. The original has been produced to me. It is on a printed form; it is not addressed to any one, and there is no space on it for writing any name, and no statement or place for the statement of the property in respect of which the rate is due. It says " Notice is hereby given that the premises No. 3, Polwatte road, seized on February 27, 1907, by virtue of a warrant issued by the Chairman of the Municipal Council of Colombo, in terms of the 149th clause of the Ordinance No. 7 of 1887, for arrears of consolidated rate due for second quarter of 1906, will be sold....., unless in the meantime the amount of the rate and costs be duly paid."

It appears, then, that the house had been seized in February, whilst the defendant was still the owner of it, and that it was liable to be sold for default in payment of the rate for the second quarter; so that the plaintiffs were obliged to pay that rate in order to save the house, which since the seizure had become their property. And the defendant was liable to pay that rate, at least to this extent,

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that all his property was liable for it. His counsel contended that, inasmuch as he was not personally liable, the rule does not apply that when one man has been compelled to pay a sum which another is liable to pay, he can recover it from that other. In my opinion, the rule does apply, and I decide that the plaintiffs can recover the rate for the second quarter from the defendant.

With regard to the rates for the third and fourth quarters, the defendant was the owner of the house during the period for which those rates were assessed, and all his property was liable for them. And although the house itself might not be liable, because the defendant was not the owner of it at the date when the warrant to recover it would have been issued, all the movable property of the plaintiffs in the house would be liable to be seized and sold if those rates were not paid. I do not think it necessary to require evidence that the plaintiffs had any movables in the house; it is enough that anything which they might have in the house would be liable. I hold that the plaintiffs were compelled to pay those arrears.

I dismiss the appeal with costs.

Appeal dismissed.