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

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THE ATTORNEY-GENERAL *v.* PONNIAH.

D. C., Batticaloa, 2,457.

Crown debtor—Arrest—Issue of writ —Return of Fiscal—Expiry of writ—Power of Court to re-issue writ—Breaking open outer door of dwelling-house—Subsistence allowance—Crown not bound to deposit —Release of debtor who has been arrested—Illness of debtor—Civil Procedure Code, ss. 298, 305, 306, 311, 313, 319, 366, and 837.

A Judge has power in any case in which he thinks it right to do so to extend the time for the execution of a writ and to re-issue it without any application from the judgment-creditor.

WOOD RENTON J.—A writ does not *ipso jure* expire when the returnable date has been exceeded.

Section 313 of the Civil Procedure Code, requiring the deposit of subsistence allowance before a judgment-debtor is arrested, does not apply where the judgment-creditor is the Crown.

Section 366 of the Civil Procedure Code only applies where the process is issued at the suit of a private individual.

WOOD RENTON J.—Sections 306 and 311 of the Civil Procedure Code bind the Crown.

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APPEAL by the defendant from an order of the District Judge (G. W. Woodhouse, Esq.) under section 304 of the Civil Procedure Code committing him to jail for a period of six months, in execution of a judgment obtained by the Crown against him.

The facts and arguments fully appear in the judgments.

Elliott (with him *Balasingham*), for the defendant, appellant.

W. Pereira, K.C., S.-G., for the Crown.

Cur. adv. vult.

August 13, 1908. HUTCHINSON C.J.—

This is an appeal by the defendant against an order made on March 31 last for his imprisonment as a judgment-debtor.

The plaint in the action was filed in June, 1903. Service was not effected until September. Final judgment was given on the 3rd. Writs of execution were issued, under which some money was realized, leaving a large balance still due on the decree. In January, 1905, notice was served on the defendant to appear before the Court to be examined, but he did not appear. In February, 1905, fresh notice was issued, but could not be served. On March 26, 1905, a writ of execution was issued, which the Fiscal returned on May 11, 1905, with the report that " all the available properties have been seized and sold." On June 14, 1905, writs against property and person were ordered to be issued to Jaffna for execution; the writ against the person was afterwards returned by the Fiscal of the Eastern Province on August 24, 1905, and it was returned on November 18 with a report that the debtor could not be arrested, as the compound gates and the doors of the house were always kept closed. It was re-issued in December, 1905, and August, 1906, and February, 1907, with the same result. It was re-issued on October 5, 1907, returnable on December 19; no return was made until January 6, 1908, when the District Judge received a letter from the Fiscal dated the 4th asking that it might be extended for two months and re-issued, and he re-issued and extended it accordingly.

On this writ the debtor was arrested on January 16, and brought before the Court. The Judge before whom he was brought was the Fiscal who had arrested him; he was acting in the absence of the District Judge, and said that he was not aware when as Fiscal he arrested this debtor that the District Judge was absent; he was unwilling to deal with the matter himself, and he released the debtor on bail.

On February 4 the debtor appeared before the District Judge and filed an affidavit, and his proctor urged certain objections to the writ and the arrest, and objected that the Fiscal's return on January 6 (a mistake, apparently, for the 16th) had not been sworn to; the Judge thereupon sent the return to the Fiscal, and it was sworn to on the 5th. On the 7th further medical evidence was taken, and the

debtor was examined as to his means, and declared that he had no property, and was a pauper; and the Fiscal gave evidence as to the arrest. On March 10 further medical evidence was taken; and on March 31 the order now under appeal was made.

I will take the appellant's objections in the order in which they were put before us.

The first is that when the writ, which was re-issued on October 5, 1907, was returned by the Fiscal on January 4, 1908, it was dead, and that the Fiscal had no right to ask for its re-issue and the Judge had no power to re-issue it on his own motion. I can find nothing in the Code to prevent the Judge in any case in which he thinks it right to do so extending the time for the execution of a writ and re-issuing it without any application from the creditor.

The second objection is that there was no material as required by section 298 for the order of June 14, 1905, because the Fiscal's return of May 11 does not say that " he is unable to find any property of the judgment-debtor, movable or immovable. " The return says that " all the available properties have been seized and sold, " and I think that is enough.

The third objection is that the debtor should have received notice before the writ of October 5, 1907, was issued, because more than a year had elapsed since the last order on any previous application for execution. But that seems to be a mistake; an order had been made in February, 1907, as I have stated above.

The fourth objection is that no subsistence allowance was deposited, as required by section 313, before the arrest. The District Judge thought that that objection was not proved, inasmuch as a sum of Rs. 10 was deposited for the purpose in the kachcheri on the day of the arrest, and there was no evidence to show that it was not deposited before the arrest. By section 313 the amount paid in has to be such as the Judge thinks sufficient. This enactment was, I think, intended for the protection of the revenue; and it is usual, where the judgment-creditor is a private person, for the amount to be approved by the Court and paid in before the warrant of arrest is issued. In the present case the judgment-creditor was the Attorney-General, who sued on behalf of the Government; that was doubtless the reason why the Court did not require the amount to be approved and paid in before the issue of the warrant; it would be a useless proceeding to require Government to take money out of one of its pockets and put it in another; and in my opinion this enactment does not apply to a case where the creditor is the Government.

The fifth objection is that the Fiscal's return of January 16, 1908, was not sworn to until February 5. Section 371, which is part of the chapter dealing with service of process, requires that the return " shall be accompanied by an affidavit made by the officer charged with the duty of executing the process, which affidavit shall set out

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the facts of the service effected." In my opinion, if a return is received without the affidavit which ought to accompany it, the Court should send it back to have the defect remedied; that was done in this case, and the defect, if there was one, was remedied in good time, and I think this objection ought not to prevail.

The sixth objection is that the Fiscal climbed over the wall of the debtor's house in order to get inside and arrest him, and that his doing so was a violation of section 366. That section only applies where the "process is issued at the suit of a private individual."

The seventh objection is that the debtor is not in a fit state of health to undergo imprisonment, and therefore he ought to be released in accordance with section 857. The District Judge, after considering the medical evidence, found that "at present the defendant is not in an unfit state to undergo imprisonment," and I am not satisfied that that finding was wrong.

Lastly, it was urged that the debtor was entitled to his release under section 300 or section 311. By section 300 the debtor is to be released if the Court is satisfied that he is unable to pay the amount of the decree; but before making an order under that section the Court may take into consideration (section 301) any allegation of the decree-holder touching, amongst other things, the decree being for a sum for which the debtor was bound as a trustee or as acting in any other fiduciary capacity to account, or the transfer, concealment, or removal by him of any part of his property after the commencement of the action with the object or effect of obstructing or delaying the execution of the decree. By section 311 he is to be discharged, if he petitions for that purpose, if the Court is satisfied that the statements in his affidavit in support of his petition are substantially true, and that he has not done certain things mentioned in sub-sections (*b*) and (*c*). The debtor filed an affidavit, as I have stated above, on February 4 last, in which he said that all his property had been sold by the plaintiff, and that for the last three years he had been a pauper, and unable to pay the balance amount of the decree, and that he did not conceal, transfer, or remove any part of his property since the institution of the action with intent to defraud his creditor. The affidavit does not fulfil all the requirements of section 307; it does not state the amount or particulars of pecuniary claims against him or the names or residences of his creditors; nor does it appear that any petition was filed. The Solicitor-General has contended that the Crown is not bound by section 300 or section 311, but I think that, as the warrant of arrest was obtained under the provisions of the Code, the provisions of those sections must be held to apply when the debtor is brought before the Court under the warrant. The Solicitor-General also contends that the debtor had to account for the money for which he is sued as a trustee or as acting in some other fiduciary capacity. He was, according to the evidence, storekeeper of the Government

Salt Stores and was bound as such to receive the salt and to issue it upon the authority of the Government Agent, and was responsible for its safe custody; he failed to account for a large quantity of it; and the decree was for the value of the salt so unaccounted for. Section 301 does not apply to a petition under section 306 to section 311; but I cannot find there was such a petition in this case. I think the debtor had to account for the salt in a fiduciary capacity. This point, however, was not referred to in the District Court.

The District Judge was of opinion that the debtor had not made a full and free disclosure of his assets and liabilities; and I think that he was right in that. But he also says that the decree in this action was for money which the defendant had embezzled while he was a Government servant, and that he appears to have done away with his property in fraud of his creditor. I cannot, however, find in the record any evidence to support either of those statements. And the fact that he did his best to evade arrest is no reason for committing him to prison.

The debtor has stated in his examination that he had properties in Jaffna, but that he does not know what has become of them, and that all his property had been sold by the plaintiff. Apart from that, he has given no information as to what property he had at the time of the commencement of the action. In his affidavit he admits that there was a shortage of salt in the Government Store (meaning the salt for the value of which this action was brought), but says that it was due to his carelessness, not to dishonesty. On the evidence before him the Judge was justified in saying that he was not satisfied that the debtor was unable to pay, or that he had no property which can be sold in execution of the decree. I think the appeal should be dismissed.

WOOD RENTON J.—

This is an appeal by one Ponniah, a judgment-debtor of the Crown, against an order of the District Judge of Batticaloa under section 304 of the Civil Procedure Code, for his committal to jail for a period of six months. On behalf of the appellant, Mr. Elliott attacked the order on a variety of grounds, with which I will now deal, touching upon the facts only where it is necessary to do so for the purpose of making the point of his argument clear.

The writ on which the debtor was arrested was returnable on October 5, 1907. No return to it was, in fact, made till January 6, 1908. On that day the following journal entry appears on the record: "The Fiscal, Eastern Province, returns warrant, and applies for two months' extension. Warrant re-issued. Returnable March 12, 1908." The debtor was arrested and produced before the Court on January 16, 1908. Mr. Elliott argued, however, that the writ under which the arrest was effected, not having been

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returned on the date fixed in it, viz., October 5, 1907, was dead, and that the Fiscal had no power to apply for, or the Judge to grant, any extension of its operation. No authority, statutory or judicial, was cited to us in support of this proposition, and I have been unable to find any. On the contrary, section 319 of the Civil Procedure Code seems to recognize the possibility of execution by the Fiscal being effected after " the latest day specified in the warrant for the return thereof " has passed, and is in any event inconsistent with the view that the warrant *ipso jure* expires when that date has been exceeded. I can find nothing in the Code to prevent a Judge from extending the time for the return of a writ of execution against person. Section 305 directs the officer entrusted with the execution of such a writ to bring the debtor before the Court, not on or before a certain day, but " with all convenient speed. " That section says nothing about any time limit within which the writ must be executed. It prescribes the form (Form No. 61) of warrant for the ultimate commitment of the debtor, but no form of warrant for his preliminary arrest. A form of such a warrant (No. 60) is indeed given in Schedule II. to the Civil Procedure Code. But in that form, again, the Fiscal is directed to bring the debtor before the Court " with all convenient speed. " The warrant contains, it is true, a further direction for its return on a specified date. But in view of the provisions of sections 305 and 319, I should be disposed to hold that the object of this direction was to protect not the debtor, but the creditor, by keeping the Court in close touch with all that was done to secure the execution of the writ. In my opinion Mr. Elliott's first objection fails.

His second point was that the original issue (on June 14, 1905) of the writ of execution against the person of the judgment-debtor was bad, inasmuch as the Fiscal's return (on May 11, 1905) to the writ of execution against property merely stated that " all the available properties have been seized and sold, " whereas section 298 of the Civil Procedure Code makes a return by the Fiscal " that he is unable to find any property of the judgment-debtor, movable or immovable, " a condition precedent to the issue, under the branch of that section with which we are now concerned, of a warrant of arrest. I do not think it is essential that the exact words of section 298 should be followed in the Fiscal's return. What is necessary is that the Court should have before it a statement by the Fiscal that there is no property, movable or immovable, by means of which the amount leviable under the writ can be satisfied. A statement that " all the available properties " of the debtor " have been seized and sold " substantially predicates the existence of this state of things. In my opinion, this objection fails.

Mr. Elliott's next objection, viz., that the re-issue of the writ against the person on October 5, 1907, was bad in virtue of the provisions of section 347 of the Civil Procedure Code, inasmuch

as the appellant had no notice of the application for re-issue, one year having elapsed between the last order and that application, is disposed of by the fact that, as shown by the journal entries of February 21 and September 18, 1907, the writ was re-issued within the year.

Mr. Elliott's fourth objection was that the appellant's arrest was illegal, inasmuch as, prior to its being effected, no subsistence money was paid into Court as section 313 of the Civil Procedure Code requires. The only evidence that I have found in the record bearing on this point is the following journal entry under date February 17, 1908: " The Fiscal by his letter No. 65 of 15th instant reports deposit of a sum of Rs. 10 in the kachcheri, on the 16th ultimo, for interim subsistence. " The letter itself will be found at page 166 of the record. It will be observed that the letter speaks of a deposit of subsistence money on January 16, 1908, the day of the appellant's arrest. The learned District Judge says that no evidence was put before him to show that the deposit was not made before the arrest, and that in the absence of such evidence he must overrule the objection. In the case of a suit between private individuals, I think that if the point were raised, the burden of proving that section 313 had been complied with would rest on the decree-holder. But I think that while section 313 no doubt contemplates to some extent the comfort of the debtor, its main object is the protection of the revenue. I agree with the Chief Justice that it does not bind the Crown.

I think that the provision in section 371 of the Civil Procedure Code that the report of the Fiscal constituting his return to the writ " shall be accompanied by an affidavit, " is directory only, and that where, as in the present case, a return was made without having been sworn to, the defect could be, as it was here, subsequently remedied. It could not well be contended that we should attribute an imperative force to the additional requirements of section 371, that the Fiscal's report should be " fair written, " and should " concisely state the mode in which the process had been served." And although the requirement of an affidavit as an exhibit to the return is no doubt of far greater importance than these, and is one that the Court ought to see complied with, I do not think that non-compliance with it in the first instance in any way vitiates the proceedings.

The sixth objection was that the actual arrest of the appellant had been illegally effected. On this point Mr. Freeman, Fiscal of the Eastern Province, gave the following evidence: " I found the gate of the compound locked with a padlock. I got over the gate into the compound. The house was open. " Mr. Freeman entered in spite of the objection of some of the ladies of the house, and eventually found the appellant hidden under a bed in one of the rooms. Mr. Elliott argued that in Ceylon the gate of a compound is, to all intents and purposes, " the outer door " of the " dwelling

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house, " and that Mr. Freeman had practically " forced " it " open " within the meaning of section 366 of the Civil Procedure Code. Even assuming that Mr. Elliott's contention as to the gate of the compound being the " outer door " of a Ceylon " dwelling house " is correct, it would be—if it were necessary to decide the point—a serious question whether an entry effected by climbing over the wall of the compound could be said to be a " forcing open " of the " outer door. " Mr. Elliott urged us to construe section 366 strictly and *in favorem libertatis*, and he referred in this connection to *In re De Vos*.[1] I do not think that *In re De Vos* lays down any such principle of construction. The point for decision there was whether a bolt, which the Fiscal's officer had bribed a servant to leave withdrawn, was placed in its position merely for purposes of keeping the gate closed to prevent its being accidentally thrown open, or to prevent outsiders from entering. The Court held that it belonged to the latter class of fastenings, and that as it would have been illegal for the Fiscal to withdraw such a bolt from without himself, it was equally illegal to secure its withdrawal from within by bribery. So far I quite agree that section 366 should be strictly construed. But it does not follow that it should be held to extend to acts which by no stretch of language can be said to a forcing open of the outer door, and which in no way impair the debtor's security against thieves—the original *raison d'être* it must be remembered of the privilege in question. In England this privilege is strictly construed. " The rule, " said Sir Mitchell Foster (*Discourse on Homicide, pages 319, 320*), " that every man's house is his castle, when applied to the case of arrests on legal process, hath been carried as far as the true principles of political justice permit, perhaps beyond what in the scale of sound reason and good policy they will warrant . . . . . But this rule is not one of those that will admit of any extension. It must therefore be confined to the breach of windows and outward doors, intended for the security of the house against persons from without endeavouring to break in. " It has accordingly been held that the maxim does not extend to the outer door of a workshop of the judgment-debtor (*Hodder v. Williams*) [2], or—a case more nearly in point—to an entry made by climbing over the curtilage wall (*Long v. Clarke* [3]). It is not, however, necessary, in the present case, expressly to decide the point that I have been considering, for section 366 is by its own terms limited—a limitation rendered all the clearer by the inclusion of the Crown within the purview of section 365, and borrowed, it may be added, from English Law (see *Semaynes* case [4]), to civil process issued at the suit of a private individual.

The next point taken by Mr. Elliott in support of the appeal is that, within the meaning of section 837 of the Civil Procedure Code, the debtor " is not in a fit state of health to undergo imprison-

[1] (*1901*) *2 Browne 357.*
[2] (*1895*) *2 Q. B. 663.*
[3] (*1894*) *1 Q. B. 119.*
[4] (*2 Jac. I.*) *5 Coke Rep. 91.*

ment. " I think that from its very nature this provision binds the Crown. I think too that the learned District Judge is wrong in holding that " section 837 of the Code requires that the Court shall first find that the prisoner is so seriously ill that he canot undergo imprisonment. " On the other hand, in view of the ample safeguards provided by the latter portion of section 837 for the release of the debtor in case of supervening unfitness for imprisonment, the mere possibility that imprisonment may tell prejudicially on the debtor's health ought not to be too readily regarded as present unfitness for it. The medical evidence on the question is conflicting. Dr. Oorloff, Provincial Surgeon of the Eastern Province, when first he gave evidence, stated only that " imprisonment might possibly have a prejudicial effect on the general health of the debtor. " After a further examination of the debtor, however, he committed himself to the opinion that " if he is confined in jail, incarceration would affect him prejudicially, especially in view of the mental strain and anxiety which must result if a man of his social position and standing be incarcerated, and in view of the present state of his health. " Dr. Oorloff does not say that the debtor is unfit to undergo imprisonment. He only says that imprisonment will affect him prejudicially. On the other hand, Dr. Rutnam, the Government Medical Officer, Batticaloa, gives the following evidence: " Mental emotion may possibly aggravate (the debtor's) disorder. Confinement alone will not aggravate it, but the mental state of grief and emotion resulting from confinement in a jail might aggravate his disorder . . . . . If the defendant has rest and good food and treatment he ought to improve. " In view of (*a*) the guarded character of Dr. Oorloff's evidence, (*b*) the opinion of Dr. Rutnam, (*c*) the fact that the debtor, if he is really, as he says, a pauper, is much more likely to get the rest and good food and treatment which he needs in prison than out of it, and (*d*) the statutory facilities for securing his immediate release if imprisonment is found to aggravate his disorder, I am not prepared to differ from the decision of the District Judge on the point now under consideration.

There remains only the question whether the debtor is entitled to his release under section 300 or section 311 of the Civil Procedure Code. I think that both those sections bind the Crown. When the Crown has brought a judgment-debtor before the Court under a warrant of arrest issued under the provisions of the Civil Procedure Code, it seems reasonable to hold that the Court should have the right to exercise, even as against the Crown, the power with which section 300 invests it; section 311 marks the final stage in the procedure, commencing with section 306, by which a debtor may obtain his discharge on petition. Section 306, which enables any judgment-debtor arrested or imprisoned in execution of a decree for money to avail himself of this procedure, must, I think, be held to bind the Crown. If it does so, section 311 binds the Crown also.

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It appears to me, however, that whether viewed from the standpoint of section 300 or from that of section 311, the District Judge was right in refusing a discharge. If the case comes under section 300, he might well doubt, both from the terms of the debtor's affidavit and from his evidence, the debtor's inability to pay, and he was further entitled under section 301 (*a*) to have regard to the facts that the decree was for a sum for which the debtor was bound to account in a fiduciary capacity (viz., as a Government storekeeper), and had not accounted. If the case comes under section 311, the Judge might fairly hold on the same materials that the debtor had not made a full disclosure of his assets and liabilities. I would dismiss the appeal.

Appeal dismissed.