1922.

Present: De Sampayo and Schneider JJ.

CREASY *v.* STEPHEN.

111—D. C. Colombo, 5,747.

Civil Procedure Code, s. 650—Warrant for arrest of defendant before judgment.

Before issuing a warrant of arrest before judgment under section 650 of the Civil Procedure Code, the Court must have materials before it tending to show that the debtor was about to quit the Island under circumstances rendering it improbable that the debt would be paid.

"It is not necessary, and, in most cases, it is impossible to prove intention by direct evidence; it is sufficient if circumstances are established from which a reasonable inference may be drawn. A man's intention must be collected from his acts."

THE facts are set out in the judgment.

Samarawickreme, for defendant, appellant.

Loos, for plaintiff, respondent.

December 4, 1922. DE SAMPAYO J.—

The plaintiff instituted this action on July 26, 1922, to recover from the defendant a sum of Rs. 46,218.97, and at the same time applied for and obtained a warrant of arrest before judgment under section 650 of the Civil Procedure Code. On July 31 the defendant, appearing by a firm of proctors, moved that the order issuing the warrant of arrest be vacated and the warrant be recalled. On August 7 the District Judge, after hearing counsel on both sides, refused the motion, and the defendant has appealed.

The point urged in the Court below and repeated before us in appeal is that there was no sufficient foundation for the issue of the warrant, inasmuch as the plaintiff in applying for it had not alleged or shown that the defendant was about to quit the Island with the intention of evading payment of the plaintiffs' claim. It is not denied, and it is the defendant's own case, that he was going to leave the Island about this time, but he says that in doing so he had no intention to evade paying the plaintiff's claim. Section 650 of the Code only requires of the plaintiff to verify his claim and the fact of the defendant being about to quit the Island, and does not provide for the plaintiff proving any *mala fide* intention on the part of the defendant. The District Judge accordingly held

against the defendant with regard to the specific ground on which the defendant's motion was made. It is noticeable that under section 653 of the Code, which relates to the allied remedy of sequestration before judgment, it is expressly required of the plaintiff, when he applies for an order, to show that the defendant is alienating his property to avoid payment of the plaintiff's claim. The distinction between section 650 and section 653 in respect of the defendant's intention must have some meaning, and the omission in section 650 to require proof of such intention is apparently intentional. But we have to recognize judicial authority on this point of practice. In *Ramen Chetty v. Vallipuram*,[1] Wood Renton J., in whose judgment Hutchinson C.J. concurred, decided that, notwithstanding the omission in section 650 the Court would not, in the exercise of its discretion, be justified in issuing a warrant of arrest before judgment, unless materials were put before it tending to show that the debtor was about to quit the Island under circumstances rendering it improbable that the debt would be paid. We must, therefore, examine the evidence, premising that it is not necessary, and, in most cases, it is impossible to prove intention by direct evidence, and that it is sufficient if circumstances are established from which a reasonable inference may be drawn. A man's intention must be collected from his acts.

It is important, in the first place, to note the circumstances under which the plaintiff's claim arose. The defendant, though a native of Ceylon, was for some years resident in Singapore, and carried on a business there under the name of the Singapore Estates Supply Agency. Early in 1922 the Netherlands Trading Society of Singapore, on the orders of the defendant, shipped from Java to Colombo by the ss. "Oranje" to be delivered to the Colonial Storekeeper, on behalf of the Government of Ceylon, 31 cases of quinine. The steamer was due to arrive in Colombo on February 16, and the defendant on February 7 wrote to the plaintiff informing him of the shipment, and asking him to take delivery of the cases of quinine on arrival of the steamer "by giving the usual Bank guarantee" for taking the goods without the bills of lading, and promising to forward the bills of lading as soon as they came to hand. The plaintiff accepted this order. The agents in Colombo of the steamer were Messrs. Aitken, Spence & Co., and the guarantee had to be given to them. On February 16, when the steamer arrived, the plaintiff gave an undertaking to Messrs. Aitken, Spence, in which the National Bank of India at the plaintiff's request joined, to save that firm harmless from any liability by delivering the goods without the bills of lading, and obtained their endorsement to the Customs entry for clearing the goods. At the same time the plaintiff had to give an indemnity to the Bank. The plaintiff was thus enabled to clear the goods and

[1] *(1910) 13 N. L. R. 337.*

deliver the same to the Colonial Storekeeper. The bills of lading, however, were not forwarded as promised, though the plaintiff cabled to the defendant on that subject. In reply to one of the cables, the defendant replied by cable on March 18 that the bills of lading were delayed "owing to adverse exchange," and that they would be sent as soon as possible. As a matter of fact, they were never sent by the defendant. It is difficult to understand how adverse exchange can cause the bills of lading to be delayed. The fact appears to be that the draft drawn upon the defendant by the shippers for the value of the quinine was dishonoured, and so the defendant was not given the bills of lading. The plaintiff wrote and cabled to defendant in Singapore several times about this matter, but nothing was done by the defendant, and, finally, on April 29, the plaintiff was informed by cable that the defendant was coming to Ceylon and would settle the matter personally. The defendant arrived on May 5, and stayed at a well-known hotel in Colombo. One would have expected the defendant to see the plaintiff at once and make some arrangement, but he did not. On the contrary, the several letters written by plaintiff and addressed to the defendant at his hotel were left unanswered, nor was the plaintiff able to have any interview with the defendant. In the meantime the Bank would appear to have received from the shippers the bills of lading and the dishonoured draft for the purpose of obtaining payment. The amount for which the plaintiff became liable under this guarantee was Rs. 56,218.97, and an urgent telegram sent on July 18 by the plaintiff to the defendant's hotel, informing him that the Bank was demanding immediate payment of this sum, brought the defendant at last to the plaintiff on July 24. This was the first and last time the defendant saw the plaintiff, though he had been in the Island ever since May 5, and at that interview the only satisfaction the defendant gave the plaintiff was a vague promise. He said that he intended shortly to leave for Madras, and that he would obtain some money to send to the plaintiff. The defendant cannot complain if this is construed as a mere evasive attempt to put the plaintiff off. The defendant does not appear after all to have gone to Madras as stated, and even his counsel does not know where the defendant is at the present moment. There is no question, however, that no payment has been made to plaintiff, except a sum of Rs. 10,000, which the defendant's firm transmitted to the plaintiff on July 21. Another important fact to note in this connection is that as early as February 24 the Ceylon Government deposited Rs. 53,280 in the National Bank of India to the defendant's credit in payment of the amount due for the quinine. The least that the defendant would be expected to do was to pay the plaintiff out of this money, but he appears to have drawn the whole of it, and calmly told the plaintiff, at the interview of July 24, that he had no sufficient funds in Ceylon to

satisfy the plaintiff's claim. The plaintiff then came into Court and filed his action on July 26. It will be seen that by his course of conduct the defendant has reaped a double benefit. He has received from the Ceylon Government the full value of the quinine, and has made the plaintiff liable for the same amount to the Bank on behalf of the shippers.

What is the fair inference to be drawn from the circumstances above detailed? I think that they lead to the conclusion that the defendant, if he did not intend wholly to avoid payment of the plaintiff's claim, meant to delay payment indefinitely, and that this case therefore comes within the principal of the decision in *Ramen Chetty v. Vallipuram* (*supra*). It is strongly urged that such an inference should not be drawn because Singapore was the defendant's home, and his leaving Ceylon, where he had been on a holiday, was merely for the purpose of going back to his home. With regard to this, I need only say that a man may be found to leave a place *in meditatione fugæ*, though his ultimate destination may be his home. In my opinion this appeal should be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.