Present: Branch C.J., Dalton J., and Jayewardene A.J.

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189—D. C. Kalutara, 11,529.

Seizure—Abortive sale—Mortgage by judgment-debtor—Subsequent re-issue of writ and sale after ten years from date of decree—Validity of mortgage—Effect of first seizure—Civil Procedure Code, ss. 238 and 337.

On a writ of execution issued in pursuance of a judgment entered on February 16, 1909, against the first defendant, the property in question was first seized on August 5, 1916, and the seizure was registered on August 18, 1916. A sale was held under this seizure, and the Fiscal reported to Court on October 19, 1916, that the purchaser had failed to pay the balance purchase money. There were several applications for execution subsequently. On November 11, 1921, ten years after the date of the decree, a further application was made under section 337 of the Civil Procedure Code and was allowed. No steps were taken under the writ issued on that occasion. Writ was again re-issued, whereupon the property was seized and the sale ultimately held on November 6, 1922, at which the second defendant became the purchaser.

Meanwhile, by bond No. 360 dated December 11, 1916, and registered on December 21, 1916, the first defendant mortgaged the property with the plaintiff.

In an action brought by the plaintiff on the mortgage bond,—

Held (by Branch C.J. and Dalton J., Jayewardene A.J. dissenting), that the seizure in pursuance of which the Fiscal's sale was held was the seizure of August 5, 1916, and that the plaintiff's mortgage, having been executed pending such seizure, was null and void.

Per JAYEWARDENE A.J.—In the circumstances of this case the first seizure has ceased to be operative by circumstances of abandonment . . . . It is impossible to regard the sale at which the second defendant purchased the property as one based on the original seizure.

THE plaintiff sued the first defendant for the recovery of a sum of Rs. 1,821·43 due on a mortgage bond dated December 11, 1916, and registered on December 21, 1916. The second defendant was joined as a defendant in the action as he had purchased the mortgage property subsequent to the date of the bond. The first defendant filed no answer, but the second defendant pleaded that the bond was invalid as it had been executed, pending a duly registered seizure in D. C. Colombo, 27,264, which was an action instituted against the first defendant and another claiming a sum of Rs. 1,000 and interest on promissory notes. Decree was entered in that case against the first defendant on February 16, 1909. In execution of the decree the Fiscal seized the property of the first defendant on

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August 5, 1916, and the seizure registered on August 18, 1916. The property was sold by the Fiscal, who reported that the purchaser had defaulted. Several abortive sales followed on the re-issue of writ on subsequent occasions. By this time ten years had elapsed since the date of the decree, and an application was made under section 337 of the Civil Procedure Code for re-issue of writ, which was allowed on November 11, 1921. The property was seized by the Fiscal on October 5, 1922, and sold on November 6, 1922, to the second defendant, who obtained Fiscal's transfer dated February 28, 1923. The learned District Judge held that the sale to the second defendant took place under the seizure of August 5, 1916, that the mortgage to the plaintiff was void, and dismissed the plaintiff's action.

J. S. Jayewardene (with *Croos Da Brera*), for appellant.

H. V. Perera, for the respondent.

Cur. adv. vult.

May 12, 1926. BRANCH C.J.—

This appeal was heard by three Judges under section 41 of the Courts Ordinance, 1889. The facts of this case are as follows: Don Avuneris Silva Wettasinghe filed an action (D. C. Colombo, No. 27,264) against H. D. S. Perera and Don Simon Appu *alias* Sieneris Mudalali for the recovery of moneys due on a promissory note. Decree was entered in that case against H. D. S. Perera on September 22, 1908, and against Don Simon Appu on February 16, 1909. On August 5, 1916, the property now in question was seized against Don Simon Appu, and the seizure was registered on August 18, 1916. The Fiscal held his sale somewhere in September, 1916, and on October 19, 1916, reported to the Court that the purchaser had failed to pay the balance of the purchase money. By mortgage bond No. 3,160 of December 11, 1916 (P1), registered on December 21, 1916, Don Simon Appu bound himself to pay to one Edward Simon Perera Rs. 1,000 with interest and hypothecated to Edward Simon Perera the property in question held under the prior registered seizure of August, 1916.

After 1916 there were several applications by the judgment-creditor, Don Avuneris Silva Wettasinghe, for the re-issue of his writ for the re-sale of the property. Purchasers at all the sales failed to deposit the balance of the purchase money. When ten years from the date of the decree had expired the judgment-creditor took action under section 337 of the Civil Procedure Code, and having established that the fraud of the judgment-debtor, Don Simon Appu, had prevented the execution of the decree, an application for the execution of the decree was granted by the Court. Ultimately, at a sale held on November 6, 1922, the property was purchased by John Sinno, and that sale was confirmed on February 20, 1923. John Sinno obtained Fiscal's transfers D/2/2 and D/3/2, which were registered on May 14, 1923.

In 1923, in suit D. C. Kalutara, No. 11,529, Edward Simon Perera, the mortgagee above referred to, sued Don Simon Appu, the mortgagor above referred to, on the mortgage bond No. 3,160 (P1), and added John Sinno as a defendant, as he (John Sinno) had purchased the property at the Fiscal's sale in 1922 above referred to. Edward Simon Perera sought a declaration that the property was bound and executable under the mortgage. At the trial before the District Judge the plaintiff's Proctor agreed that the only question to be decided was whether the Fiscal's sale in 1922, at which John Sinno purchased, was held under the seizure of August 5, 1916, registered on August 18, 1916. If it was so held, then it was admitted that the alienation by mortgage (P1) of December, 1916, was void as against a claim of Don Avuneris Wettasinghe, the judgment-creditor (section 238 of the Civil Procedure Code), and that, therefore, John Sinno would be entitled to succeed. The first defendant, Don Simon Appu, filed no answer, and the learned District Judge gave a money decree against him and dismissed the plaintiff's action, with costs, against the second defendant, John Sinno. The appeal is against this decision. The second defendant's case in the Court below was, in part, that the plaintiff's mortgage bond (P1) was invalid, inasmuch as it was executed during the pendency of the seizure of the lands mortgaged, and further, that it was executed in fraud and without consideration and with the object of defeating the creditors of the defendant. No oral evidence was adduced, and the learned District Judge was left to decide the matter on the documents before him. He was of the view that the Fiscal's sale at which the second defendant purchased was held under the seizure of 1916, which, as I have said, had been duly registered. He says in his judgment :—

> "I cannot find anywhere throughout the journal sheet minutes in D. C. Colombo, 27,264, that there was any second seizure. The writ was certainly issued and re-issued, but always under the original seizure. The re-issuing of a writ does not necessitate a re-seizure as long as the original seizure was not released by Court, and in this case it never was. The judgment in *17 N. L. R. 183* and *19 N. L. R. 225*, &c., support this principle."

Although there is no journal entry to that effect, the District Judge, it would appear, is mistaken in thinking that there was no second seizure. The Fiscal's sale report of November 18, 1922, states as follows :—

> "By virtue of the writ of execution No. 27,264 from the District Court of Colombo I have caused to be seized on October 5, 1922, and sold under due publication at the premises on November 6, 1922, the property enumerated in the annexed list."

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The first stand taken on the appeal for Edward Simon Perera, the plaintiff-appellant, is that when an application for execution of the decree after the expiration of ten years is made and granted under section 337 of the Civil Procedure Code, any former seizure, such as that of August, 1916, ceases to have any effect, and that the lapse of time lets in such a mortgage as P1. This argument cannot, I think, be sustained. The seizure of 1916 had not been withdrawn (see sections 238 and 239 of the Civil Procedure Code), and the mortgage was void as against all claims enforceable under that seizure. The grant of the application for execution of the decree would result in the property being sold, if sale became necessary, under the existing seizure of August, 1916, with respect to which there had been no abandonment of any kind. The grant of the application merely enabled the judgment-creditor to execute the decree in the usual way, namely, by sale of the judgment-debtor's lands, and the usual process of seizure and registration having been gone through, all that remained to be carried out was the sale.

The next argument turns on the seizures themselves. There was a seizure on August 5, 1916, and there was a second seizure on October 5, 1922. I think it very likely that there were other seizures between these dates, but only these two seizures are recorded. The sale, it is said, was thus under the 1922 seizure, and this being so, the first seizure must be deemed to have been abandoned or in abeyance, and thus ceased to be operative, and the claim of the plaintiff would be established against John Sinno, as the property would be bound and executable under the mortgage P1.

If the seizure of 1916 was not abandoned or in abeyance, and I can find nothing to show that it was—then there was in 1922 a subsisting seizure, and that seizure, under the terms of section 238, renders the plaintiff's mortgage void as against all claims enforceable under that seizure, and, in my opinion, the second seizure by the Fiscal, and the fact that the Fiscal states in his report that " by virtue of the Writ of Execution No. 27,264 from the District Court of Colombo I have seized on October 5, 1922 and sold . . . . ," cannot alter the position and affect John Sinno's purchase. The judgment-creditor, so far from abandoning the 1916 seizure, had time after time asked for the writ to " re-issue " in order that he might obtain the fruits of his judgment by the sale of the property, and there is no evidence whatever that he intended to abandon his seizure. If he had registered the second seizure, that would have been some evidence that he deemed the 1916 seizure abandoned or in abeyance, but relying on the 1916 seizure he took no steps to register again.

In a sense the Fiscal is right when he reports as above set out. The plaintiff applied for the " re-issue " of the writ, and a new writ in the usual form (see the last three lines of section 224 of the Code) went to the Fiscal, and this form directed seizure and, if necessary, sale. The Fiscal followed the terms of the writ and so reported.

The second seizure was, I think, unnecessary, but this work of supererogation cannot affect the judgment-creditor or the purchaser at the sale. The property was in *custodia legis*, and had been so since 1916 and merely awaited sale. On the application under section 224, whether the old writ or a fresh piece of paper went forth to the Fiscal, the position remained the same so long as there had been no abandonment or other act or process affecting the validity of the 1916 seizure.

Then it is said that the application of the plaintiff's Proctor of September 21, 1922, shows that he was abandoning former process as he asks for enforcement against both defendants. As a matter of fact this is not so. The application is for "execution of the decree," and under the heading "against whom to be enforced" are the words "the defendant." I can find no "s" to "defendant." Under the heading "mode in which the Court's assistance is required" are the words by "re-issue of writ against the defendant's property." Clearly the defendant, Don Simon Appu, is indicated. Even if an "s" can be found in the word "defendant" and the word "defendant's" read as defendants' I do not think that the position would be altered. All through these long drawn out proceedings the position has been perfectly clear, and one must look at what had happened as disclosed by the documents. The application of September 21, 1922, set out, under the heading "previous application, if any, and result" what had taken place, and referred to the issue of the writ in November, 1921, and, as I have said, asked for "re-issue of writ" against the defendant's property. There was only one defendant then in question, namely, Don Simon Appu, and only one "property," namely, Don Simon Appu's right, title, and interest in the lands seized in 1916. This will be seen by reference to the application of November, 1921, which preceded that of September 21, 1922, and was referred to therein as above stated. The application of November, 1921, was under section 224 of the Civil Procedure, Code, and that application, after referring to the previous proceedings, contains in the column "against whom to be enforced" the words the "defendants" or "the defendant." The words, I agree, look more like "the defendants" unless the "s" is merely a flourish of the pen, but in the column "mode in which the Court's assistance is required" are the words "by re-issue of writ against the second defendant's property." Under these words are written "*vide* affidavit filed." When one turns to the affidavit the position is not in doubt. The affidavit sets out the "re-issue" of the writ of execution of March 15, 1918, against the property of the defendants. It refers to the Fiscal returning the writ and reporting that the sale of the property seized was stayed by order of Court. Then the affidavit sets out the reason why the Court had ordered a stay of the sale of the property, viz., the preferment of false claims, the dismissal of these claims, and the dismissal of actions brought under section 247

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of the Code. Then follows a charge of fraud and dishonesty against the second defendant, Don Simon Appu. As Don Simon Appu could not even attempt to answer these charges, the Court allowed another attempt to be made to execute the decree as prayed for by the judgment-creditor, namely, "by re-issue of writ against second defendant's property." When the attempt was successful and the property of the second defendant, Don Simon Appu, is sold, his mortgagee, Edward Simon Perera, invokes the aid of the 1916 mortgage, and says that the seizure of 1916 was abandoned or in abeyance. I would agree that after the ten years had elapsed the Proctor for the judgment-creditor should have been more explicit in his application under section 224. Paragraphs (*f*) and (*j*) of that section should have been followed with greater particularity, but there is excuse for him and I do not think that there has been any mistake of such substance as would justify me in saying that the 1916 seizure was abandoned or in abeyance or that the sale in 1922 is not referrable to the seizure. I go so far as to say that, as the position is so abundantly clear from all the documents considered together, I would take the same view as I now take even if the application of September 21, 1922, and that of November, 1921, asked for "re-issue of writ against the defendant's property."

In view of the conflicting decisions on the subject of these seizures it would seem that District Judges, Fiscals, Proctors, and others are in doubt and difficulty as to how to act in cases like the present. If on an application under section 224 of the Code there has been a previous levy (section 224 (*f*)) the Court feels bound, it appears, to issue to the Fiscal the writ as in form 43 (see the last three lines of section 224). When that is done, the Fiscal feels bound, it seems, to go through again in a case like the present the whole process of seizure. When the Fiscal does this, the judgment-creditor is harassed with a claim that he has "abandoned" the first seizure. If the Fiscal does not seize again he feels he is neglecting an order of the Court made under the last three lines of section 224, and I suppose the argument would then be that the sale was void because the Fiscal had not obeyed the writ and seized.

How much of the doubt and difficulty which has arisen is due to the Stamp Ordinance, 1909, I do not know, but I hope that in future no words will be used in such an Ordinance as will interfere with the process, practice, or procedure of the Court. The provision as regards the stamping of writs of execution will be found at page 946 of Volume II. of the Legislative Enactments. With a view to obtaining increased stamp duty, that Ordinance provides that save in the cases there set out no writ whatsoever which has once been issued out of the court and returned by the officer to whom it was directed "shall on any pretext whatsoever be re-issued." Additional stamp duty in applications for execution of decree could have been imposed without the employment of words such as these, and they

could not fail to introduce confusion. When once property has been seized and the seizure registered (section 237 of the Civil Procedure Code), it will take a good deal to persuade me that it has been displaced by a mortgage subsequently executed and registered. Section 238 of the Code is very clear, and I should like to add that, as a Proctor may be inexperienced or a judgment-creditor may be without legal assistance, a District Court should see that applications under section 224 are properly made, and the Court should strictly observe the provisions of section 225 by satisfying itself as to the conformity of the application. If due care had been taken in this respect the present case would not have been even arguable. Numerous cases were cited on both sides during the course of the argument, and I have examined them to the best of my ability, and I have read others which seemed to bear on the points at issue. Amongst them are *Wijewardena v. Schubert*,[1] *Fernando v. Fernando*,[2] *Periar Carpen Chetty v. Sekappa Chetty*,[3] *Patheruppillai v. Kandappen*,[4] *Yapahamine v. Weerasuriya*,[5] *Gurusami Pulle v. Meera Lebbe*,[6] *Andris Appu v. Kolande Asari*,[7] *Fernando v. Fernando*,[8] *Silva v. Silva*,[9] and the Indian cases of *Kishen Lal v. Charat Singh*,[10] *Rahim Ali Khan v. Phul Chand*,[11] *Mujib-Ullah v. Umed Bibi*,[12] and *Madhabmani Dasi v. Lambert*.[13]

Divergent views are expressed in some of the local judgments, but I can find nothing in them now generally regarded as good law with which the conclusion I have arrived at is in conflict. The appellant's Counsel also cited the Privy Council case of *Puddomonee Dosee and another v. Roy Muthrornath Chowdry and others*,[14] where the view is expressed that "generally where the party prosecuting the decree is compelled to take out another execution his title should be presumed to date from the second attachment." That, however, is a very general statement, and in considering its meaning reference must be made to the facts of the case. The words used in the judgment are as follows :—

> "It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretaions according to the circumstances under

[1] *(1906) 10 N. L. R. 90.*
[2] *(1908) 9 N. L. R. 1.*
[3] *(1910) 2 Cur. L. R. 162.*
[4] *(1913) 16 N. L. R. 298.*
[5] *(1914) 17 N. L. R. 183.*
[6] *(1914) 17 N. L. R. 467.*
[7] *(1916) 19 N. L. R. 225.*
[8] *(1917) 4 C. W. R. 47, 49.*
[9] *(1918) 5 C. W. R. 98.*
[10] *23 All. 114.*
[11] *(1896) 18 All. 482.*
[12] *(1908) 30 All. 499.*
[13] *(1910) 37 Cal. 796 (804).*
[14] *20 W. R. 133.*

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which it was done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained."

The case came before their Lordships in May, 1873, and one of the questions that arose was whether an attachment was subsisting and in force after the year 1844. The facts were that in 1830 a money decree had been recovered. In execution of that decree certain land was attached in February, 1832. The plaintiff died, and nothing was done between the date of the attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. I very respectfully agree that when a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained, and that is all that the case decides in this respect. The view taken in that judgment is, I think, against the present appellant as showing what are circumstances of abandonment.

I wish I dare lay down the practice which I think should be followed in the future in the matter of execution of decree. I should do so at considerable risk, however, as ground some distance away from the scene of the present dispute would have to be covered and I find it impossible to reconcile all the existing decisions. I think, however, that if Proctors and others carefully follow the provisions of section 224 of the Civil Procedure Code, especially as regards paragraphs (*f*) and (*j*), setting out the position and clearly stating what they want done, and if the District Court will obey section 225 and satisfy itself by reference to the record that the application is in conformity with the directions contained in the preceding section, no great difficulty should arise in the future.

I am glad to be able to come to a conclusion in favour of the respondent. The documents and the record show that Don Simon Appu sought by every means in his power to delay proceedings in D. C. Colombo, No. 27,264. I have little doubt that when judgment had been obtained he gave Edward Simon Perera the mortgage of December 21, 1916 (P1), in the hope that it might some day prove useful in defeating the claims of the judgment-creditor. The proceedings show that Don Simon Appu could have paid the debt (see the affidavit of the plaintiff of July 19, 1916, which sets out that Don Simon Appu had received Rs. 9,000 that day from a debtor of his), and he had nothing to say in answer to the plaintiff's affidavit of November, 1921, above referred to, which charged him with

preventing the execution of the decree by making false claims and with "fraud" and "dishonesty." If the mortgage were now given priority, the case would represent a very serious failure on the part of the Court to issue adequate process. There is no evidence that Edward Simon Perera knew when he took the mortgage in 1916 that a seizure had been registered, and, of course, even in the absence of moral merits, his legal merits, if such had existed, must be given effect to. I cannot understand, however, why, if he took the mortgage of 1916 without knowledge of the registered seizure, he took no steps after he discovered the deception practised on him until 1922. Apparently it is still a question (see *Guneris v. Karunaratne* [1]) whether notaries are bound to search the register of seizure in addition to the register of deeds when making up a deed, but I cannot understand any prudent notary omitting to do so in the absence of written instructions to the contrary, and any intending mortgagee giving such instructions would be suspect if a seizure had in fact been registered.

As regards proceedings on the judgment, I would not have believed it possible had I not seen these proceedings that a judgment-debtor could so successfully harass and hold off his creditor as Don Simon Appu has in these proceedings succeeded in doing, and when after a struggle of many years the judgment-creditor at last succeeds in getting the property sold, the mortgage of 1916 is invoked by the debtor's mortgagee. A High Court Judge in India once said, I believe, that the troubles of a litigant in that country are only beginning when he obtains judgment in his favour. If one may judge from the present case, there is much truth in this remark as applied to Ceylon, but all I can say is that such a position is not creditable to our process and procedure, and I trust that the result of this appeal will enable a judgment-creditor to seek to recover the fruits of a judgment with less trouble and risk than heretofore, and that it will safeguard—somewhat at any rate—a *bona fide* purchaser at a Fiscal's sale.

The appeal should, I think, be dismissed, and with costs, against the appellant, Edward Simon Perera.

DALTON J.—

The plaintiff, Edward Simon Perera, on October 18, 1923, sued the first defendant, Don Simon Appu *alias* Sineris Mudalali, for the recovery of the sum of Rs. 1,821·43 due on a mortgage bond dated December 11, 1916, and registered on December 21, 1916; the second defendant, John Mudalali *alias* John Sinno, was joined as a defendant in the action as he had purchased the mortgaged property subsequent to the date of the bond.

[1] *(1914) 18 N. L. R. 47.*

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The first defendant filed no answer, but the second defendant pleaded that the bond was unenforceable and invalid in law because it had been executed pending a duly registered seizure in D. C. Colombo, 27,264, under the provisions of section 238 of the Civil Procedure Code. He also pleaded that it had been executed in fraud with the object of defeating the creditors of the first defendant.

D. C. Colombo, 27,264, was an action by one Don Avuneris Silva Wettasinghe against the present first defendant, Don Simon Appu, and another, commenced on August 4, 1908, claiming the sum of Rs. 1,000 and interest on joint and several promissory notes. Decree was entered for the plaintiff in that case against the present first defendant on February 16, 1909, and against the other defendant in that case on September 22, 1908. On those decrees the Fiscal seized certain properties at the instance of the plaintiff as against the defendant, Don Simon Appu. That seizure was made on August 5, 1916, and duly registered on August 18, 1916.

The property was then sold by the Fiscal, and on October 19, 1916, he reported that the purchaser had defaulted, and failed to pay the balance of the purchase price, and on the same date Counsel for the plaintiff, Wettasinghe, moved that the Fiscal be directed to re-sell the property at the risk of the purchaser, and that for that purpose the writ be re-issued to the Fiscal. No cause appears to have been shown by the purchaser against this order being made, and on February 9, 1917, the writ was re-issued.

In February the property appears to have been sold again, followed by a default by the purchaser, and a similar application, which process was repeated by a further sale, and default in August, and in November, 1917. In each case the writ appears to have been extended and re-issued. The plaintiff, Don Avuneris Silva Wettasinghe, also obtained orders for the payment out to him from time to time of amounts recovered from the various sales, amounting in all to Rs. 1,279·75. What part of this total was paid to him on account of his claim, and what part went in costs of the action and the subsequent proceedings and sales, does not appear.

In February, 1918, following a default by the purchaser, the writ was again extended and re-issued, a sale followed, and again the purchaser defaulted. Again the writ was extended and re-issued in that year, followed by a sale, and a default by the purchaser.

By this time ten years had elapsed since the date of the decree in D. C. Colombo, 27,264; at any rate in regard to one of the defendants in that action. Accordingly, on November 23, 1921, Counsel for the plaintiff in that action again applied for the execution of that decree, at the same time filing an affidavit alleging fraud on behalf of the judgment-debtor. Notice of that application was served upon Don Simon Appu, and he had no cause to show against the application being granted. The writ was accordingly re-issued, and the property, it is stated, was eventually

seized by the Fiscal on October 5, 1922, sale held on November 6, and the properties purchased by the second defendant. The latter obtained Fiscal's transfers for the properties dated February 28, 1923, which were registered on May 14, 1923.

The question for consideration and determination is whether or not the Fiscal's sales at which the second defendant purchased was under the seizure of August 5, 1916, or under an entirely separate and distinct seizure of October 5, 1922. If the answer is that it was under the seizure of August 5, 1916, then the plaintiff, Edward Perera's mortgage bond of December 11, 1916, is under the provisions of section 238 of the Civil Procedure Code void as against all claims enforceable under the seizure.

The learned trial Judge came to the conclusion that the sale was in respect of the seizure of August 5, 1916, and dismissed plaintiff's action, with costs. From that decision he now appeals.

It would appear at first sight, after the sale to the purchaser in August, 1916, that it would be necessary for the Fiscal to seize the property again when the writ was extended and re-issued, but this he has not done. There have been in fact, it is stated, only two seizures of the property throughout these lengthy proceedings : one on August 5, 1916, and the second on October 5, 1922. The earlier sales not having been completed by transfer owing to the default of the purchasers, fresh seizure after each sale was presumably not necessary. Wendt J. in *Wijewardene v. Schubert* [1] points out that it may be said that "the seizure is regarded as continuing until the confirmation and completion of the sale, and if that sale be set aside for irregularity, a new one could properly be held under that seizure."

I think, therefore, the question to be answered on this appeal will depend upon what answer is given to a second question. Was the seizure of October 5, 1922, by the Fiscal necessary for the purpose of the execution of the decree under the writ in the hands of the Fiscal at the time ? If it was necessary, then, in my opinion the resulting sale was in respect of that seizure ; if it was not necessary, I do not think that anything done by the Fiscal in respect of that second seizure could in law affect the position and rights of the parties resulting from the seizure of August, 1916. This is in accordance with the decision of the Court in *Periar Carpen Chetty v. Sekuppa Chetty* (*supra*), which was cited with approval in *Andris Appu v. Kolande Asari* (*supra*). I find support for this conclusion also in *Puddomonee Dossee v. Roy Chowdry and others* (*supra*) decided by the Privy Council in 1873 :—

> "It seems to their Lordships that generally, where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is

[1] *10 N. L. R. 94.*

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struck off the file, such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it was done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained."

The case of *Kishen Lal v. Charat Singh* (*supra*) is one in which the Privy Council's decision was applied. It was alleged there that at the date of the mortgage (1885) sued on there was a subsisting attachment. There had been an attachment in 1883, but no sale took place thereunder, and the proceedings therein had been struck off some considerable time before the mortgage was made. The proceedings in fact appear to have been dropped. A fresh attachment was, however, made in 1887, and under that the property was sold. The Court held that as the party prosecuting the decree was compelled to take out another execution, his title should be presumed to date from the second attachment.

It seems to me that although a very long time has elapsed in this case between the original execution and the sale by the Fiscal in 1922, that lapse of time has been adequately explained. There has been no withdrawal of or striking off the proceedings. The sales proved abortive owing to the fraud of the judgment-debtor, Don Simon Appu, who seems to have had no answer whatsoever to that charge, when application was made under the provisions of section 337 for execution of the decree notwithstanding the lapse of ten years from the date of the decree. That application, coupled with the previous attempts to obtain the fruits of his judgment, is quite inconsistent with any argument that there had been any abandonment on the part of the applicant. Whether or not an application under section 337 is a step in the former proceedings or an entirely new proceeding must depend upon the circumstances. In *Rahim Ali Khan v. Phul Chand* (*supra*) Knox J. refers to a case in which an application under section 230 (equivalent to section 337 of our Code) was held to be continuous with previous proceedings in execution. He adds: "It cannot be presumed that the Legislature intended him (the decree holder) to suffer because, either from a desire not to harass unnecessarily or owing to obstacles for which the decree holder is not responsible, the property covered by the application is sold piecemeal and the Court has to be reminded to complete the assistance it ordered."

In the instructions to the Fiscal, which preceded the alleged seizure by the latter on October 5, 1922, I can find nothing which suggested any withdrawal or abandonment of the first seizure, or which directed the Fiscal to make a second seizure. They seem to me to differ in no way from the instructions given on the re-issue of the writ on earlier occasions. The application to the Fiscal of November 22, 1921, which is a printed form, is headed "Application for execution of a decree by seizure and sale of property." But if the body of the form is looked at, it will be seen that the previous proceedings are set out, and all that is asked for therein under the sub-head "Mode in which the Court's assistance is required" is set out in the following words: "By re-issue of writ against second defendant's property; *vide* affidavit filed." Exactly the same form was followed on September 21, 1922, when the request was for re-issue of the writ against the defendant's property, and the same order was made on that application.

The learned trial Judge points out that he cannot find anywhere throughout the journal sheet minutes in D. C. Colombo, 27,264, that there was in fact any second seizure, and I have been equally unsuccessful. The condition of the writ is so torn and dilapidated, that it is impossible now to follow the numerous endorsements thereon or to ascertain if any or what returns have been made. It appears to be the case that the Fiscal's sale report of November 18, 1922, makes the first and apparently the only reference to a seizure on October 5, 1922. Why, or under what circumstances, that seizure was made is not stated. The subsequent transfers do not help Exhibit D 2/2 recites the writ of execution dated September 25, 1922, which was the result of the extension asked for on September 21, 1922, to which I have referred, and further goes on to recite "and whereas the Fiscal of the said province through his deputy at Kalutara did cause to be seized and taken the property herein described." Here, however, there is no reference to the date of seizure. The recital is applicable as well to a seizure of August 5, 1916, if it was still existing, as to any subsequent seizure, so far as the words are concerned. It is true that the plaintiff's bill of costs include an item under date September 5, 1922, in the following terms: "drawing letter to Fiscal pointing out property of the defendants." The argument based upon that is, why should it be necessary to point out property already seized by the Fiscal and in his custody unless the earlier seizure had been abandoned or withdrawn. A detailed examination of the bill, however, shows that the same item appears under the dates February 18, 1918, and November 11, 1921. Hence any importance attributable to the item of September 25, 1922, as going to show the necessity in the mind of plaintiff's Proctor of a fresh seizure at that date disappears.

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Lastly, the omission to register the second seizure may be said to be entirely consistent with the acts, and to confirm the reliance, of the plaintiff in D. C. Colombo, 27,264, upon the seizure of 1916.

The conclusion I have come to is that if there was a fresh seizure on October 5, and the evidence of that is not entirely satisfactory, it was quite unnecessary, inasmuch as the property seized was at the time already under seizure and in *custodia legis*.

In my opinion the judgment of the learned trial Judge is correct, and the appeal of the plaintiff against the second defendant should be dismissed, with costs.

JAYEWARDENE A.J.—

This is an action on a mortgage bond. The second defendant, who has been joined as a subsequent purchaser in execution of the mortgaged property, claims the property free of the mortgage on the ground that it is void as against his Fiscal's transfers. The facts on which the question arises are matters of record and do not admit of any doubt or dispute. The controversy is with regard to their legal effect. On February 16, 1909, the first defendant, the mortgagor, was decreed to pay plaintiff in case No. 27,264, D. C. Colombo, a sum of Rs. 1,000 with legal interest and costs. On November 6, 1913, an application was made, and allowed, for execution of the decree " by issue of writ against the defendants' property." On January 11, 1916, the writ was returned to Court unexecuted. On February 2, 1916, a fresh application under section 224 was made for execution " by re-issue of writ against the second defendant's property." Application " to issue writ " was allowed on July 10, 1916. On August 16 the decree holder obtained leave to bid for and purchase, and also an order directing the Fiscal to give him credit to the extent of his claim under section 272 of the Code. Under this writ, which was issued against the second defendant's property only, certain lands were seized on August 5, 1916, and the seizure registered on August 18 the same year. One of the lands was sold, but the purchaser made default, and the land had to be sold at the risk of the purchaser. Between 1916–1918 this same land was sold about five times, and each time the purchaser made default. It would also appear that in respect of some of the lands seized including the one in question here, claims had been preferred and their sale had been stayed. By February, 1919, ten years had expired after entry of decree, and under section 337 no subsequent application to execute it could be granted unless the decree holder satisfied the Court that the judgment-debtor had by " force or fraud " prevented the execution of the decree within the ten years. Therefore, when on November 11, 1921, a fresh application under section 224 was made for execution " by re-issue of writ against the second defendant's property," as this application was made ten years after decree, an affidavit was

filed with the application stating that complete satisfaction could not have been obtained " all these days " owing to the fraud and dishonest conduct of the second defendant. The second defendant's Proctor had no cause to show against the allowance of the application, and it was accordingly allowed. On February 8, 1922, the plaintiff again applied for and obtained leave to bid for and purchase the property of the debtor, and also an order authorizing the Fiscal to give him credit up to the amount of his claim. On September 21, 1922, another application in terms of section 224 was made for execution of the decree " by re-issuing of writ against the defendants' property." This application was also allowed, and a fresh writ was issued to the Fiscal on September 22, 1922, for seizure and sale of the second defendant's property. On the receipt of this writ, the Fiscal seized the property referred to in the plaint on October 5, 1922, and sold the same on November 6, 1922, when the second defendant became the purchaser. He has obtained two Fiscal's conveyances, D 2/2, D 3/2, in which it is stated that the lands were seized and sold by virtue of the writ of execution bearing date September 25, 1922. The plaintiff has, in his bill of costs, charged the defendants for attending Court to re-issue writ on September 22 and for drawing a letter to the Fiscal pointing out property of the defendants for seizure under this writ.

The position emerging from the above facts is as follows :—

The lands in claim were seized under a writ issued on February 2, 1916, and the seizure duly registered. The lands were not sold under that seizure. A fresh writ was issued on September 25, 1922, and they were again seized on October 5, 1922, and sold under this seizure. This seizure was not registered, but its non-registration is immaterial. The question is whether the sale can be treated as a sale following on the seizure of August 5, 1916, or must it not be regarded as a sale under the seizure of October 5, 1922, as in fact it was. Now, it has been held by a Bench of three Judges (one of the Judges dissenting) that there is nothing in the Civil Procedure Code to prevent the re-issue of a writ in the sense of its being issued again for execution or further execution ; and that when a writ is so re-issued the Fiscal can continue execution proceedings from the point at which they were stopped owing to the expiry or return of the writ. *Andris Appu v. Kolande Asari* (*supra*). "In my opinion," said De Sampayo J. in that case, " the Fiscal on the re-issue of a writ need only do such acts as are under the circumstances of each case necessary for further execution of the decree. Moreover, section 224 itself provides for the judgment-creditor stating in his application the mode in which the assistance of the Court is required, whether (for instance) by the attachment of property or otherwise. Surely the last words ' or otherwise ' authorizes the judgment-creditor, who has already seized property, to say that he requires the assistance of the Court by re-issue of the writ for the sale of the

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property so seized." In that case the Court accepted, with approval the decision in *Periar Carpen Chetty v. Sekappa Chetty* (*supra*), where it was held that an order for re-issue of a writ on fresh stamps was not a cancellation or withdrawal of the original writ, nor of a seizure previously effected and registered under it, and that a fresh seizure under a re-issued writ did not operate against the continued validity of the first seizure. It was an action under section 247 of the Code for a declaration by an execution-creditor that certain property was liable to be sold under his writ. The property had been seized under his writ and the seizure duly registered. Three years later writ was re-issued on fresh stamps on a fifth application for the extension and re-issue of the writ. Under this writ the Fiscal purported to re-seize the property. In the meantime the judgment-debtor had transferred the property, and the transferee claimed it, when seized, and his claim was upheld. Hence the action. It was held that the re-seizure was unnecessary, and that the property was liable to be sold under the first seizure. Hutchinson C.J. said :—

> " In this case the writ was returned by the Fiscal on July 25, 1907, 'for an extension of time.' The creditor applied on August 26 for execution 'by re-issue of writ,' and the order of the Court on the 27th was that the application is 'allowed, on fresh stamps.' I do not think that the Court when it made this order intended to cancel or withdraw the original writ, and thereby remove the seizure which had been made under it. The original writ was not recalled, but was ordered to be re-issued ; and in my opinion the seizure made under it, and the registration of the seizure, still remained in force.
>
> " I would, therefore, answer the first issue by declaring that the seizure made on November 8, 1905, is still in force ; and in answer to the third issue, declare that the seizure of May, 1908, was not necessary and did not operate against the validity of the first seizure."

In the present case the facts are not the same. The execution proceedings have gone a step further, and the property seized has been sold under the second seizure. Further, the application for execution under which the first seizure was made was for issue of writ against the second defendant's property only, but the application under which the second seizure was effected was for re-issue of writ against the defendants' property, that is, the property of both defendants. The property seized is, no doubt, the property of the second defendant, but, nevertheless, a fresh application for execution became necessary as the plaintiff intended to seize property belonging to the first defendant also. I do not say that if any property belonging to the second defendant had been seized on a previous issue of the writ that a re-seizure of the property

would have been necessary (that is apart from the effect of the lapse of ten years) under the new writ, but the point is, that a fresh application for writ had to be made, as in the previous applications the writ was asked for against the second defendant's property only. As the Judicial Committee said in *Puddomonee Dossee v. Chowdry* (*supra*), cited by learned Counsel for the appellant, " generally, where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment." A fresh writ was issued and a seizure has been effected under it, the expenses of issuing this writ and of pointing out property under it have been charged to the defendant, and the sale has taken place under the writ so issued, can it then be said that the judgment-debtor or his transferees, or mortgagees, are not entitled to take advantage of any benefit accruing under it ? In *Periar Carpen Chetty v. Sekappa Chetty* (*supra*) the proceedings took place before the sale under the re-seizure was held, and the re-seizure was declared unnecessary, and the sale of the peoperty must, therefore, have been held under the original seizure. The mistake which has created the difficulties in this case was corrected before the sale. If the same thing had happened here, the case of *Periar Carpen Chetty v. Sekappa Chetty* (*supra*) would have applied, but in view of what has actually happened, can it be said that when the Fiscal says that he seized and sold the property under a writ issued on September 25, 1925, it should be construed not as a seizure and sale under that writ but under a previous writ under which the Fiscal did not in fact seize and sell the property ?

It is argued that the second seizure was a useless and unauthorized proceeding on the part of the Fiscal, and that no one should suffer in consequence. The Fiscal was, however, only carrying out the directions of the Court which was put in motion by the judgment-creditor, and in seizing the property in 1922 he acted under section 226 of the Civil Procedure Code, which requires him to seize and sell such property of the judgment-debtor as may be pointed out by the judgment-creditor. The responsibility for the seizure in 1922 rests entirely on the judgment-creditor, who pointed out the property for seizure. Most of these difficulties arise owing to the failure of judgment-creditors or their Proctors to keep in touch with execution proceedings. When a writ is returned to Court not completely executed, they do not care to ascertain what steps the Fiscal has taken under it, but simply apply for a re-issue against the property of the judgment-debtor, instead of asking the Court to direct the Fiscal to continue the proceedings from the stage which they had reached when the writ was returned. What an execution-creditor should do in such a case was clearly indicated by De Sampayo J. in the passage I have quoted above from his judgment in *Andris Appu v. Kolande Asari* (*supra*). In the present instance, the execution-creditor, in his application for writ, should have asked the

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Court to direct the Fiscal to sell property already seized, and to seize and sell other property if necessary. Instead of doing so, he has misled the Fiscal by actually pointing out for seizure in 1922 property which had already been seized in 1916. Rightly or wrongly, a second seizure has been effected at the instance of the Court and the judgment-creditor and a sale held under it. It is a fact which cannot be ignored in deciding this case. Not much importance can be attached to the fact that in the applications for writ in 1922 "re-issue" of writ is asked for. This term is used indifferently to indicate the issue of an entirely fresh writ as well as the "re-issue" of a writ when such is permissible in law. See the observations of Wendt J. in *Muttappa Chetty v. Fernando*.[1] The Stamp Ordinance has apparently adopted the popular misuse of the term. However, when in September, 1922, the judgment-creditor's Proctor asked for "re-issue" of writ he was not entitled to it under the Civil Procedure Code or the Stamp Ordinance, and his application must be regarded as one for the issue of a fresh writ, which was in fact issued. The fact that he wrongly asked for a "re-issue" can therefore have no significance. Further, in the circumstances of this case, I think the first seizure has ceased to be operative by "circumstances of abandonment." The fact that the decree-holder thought it necessary to make a second application for leave to bid for and purchase the property in reduction of his claim appears strongly to support this view. The decree holder appears to have thought that on the expiration of ten years after decree the decree ceased to be capable of execution unless he established fraud or force on the part of the judgment-debtor, and that the execution proceedings also came to an end, and that a fresh writ and fresh steps in execution had to be taken, and so the original writ and all the steps taken under it were, I think, abandoned and steps taken *de novo*. It may be that the original seizure is still operative, and no sale has taken place under it. It may be that it is possible for the judgment-creditor to sell this property under that seizure which has not been removed or withdrawn by order of Court. But it seems to me to be impossible to regard the sale at which the second defendant purchased the property as a sale based on the original seizure. His claim is not one enforceable under that seizure. It was also contended for the appellant that the view taken by the decree holder of the effect of the lapse of ten years under section 337 was right, and that as the right to execute the decree was extinguished, the steps taken in aid of execution must also be regarded as of no effect, and that a fresh application has to be made for execution under section 224. In support of this view *Silva v. Silva* (*supra*) was cited. For the respondent, it was contended that even after ten years a fresh application for execution should be treated as an application in continuation or revival of the

[1] (*1906*) *9 N. L. R. 150* (*154*).

previous application, the progress of which has been interrupted by claims and actions under section 247 ; and reliance was placed on the case of *Rahim Alim Khan v. Phul Chand* (*supra*), a decision of a Full Bench. A close examination of that case shows that it is not an authority for the proposition in support of which it was cited. There, there was no second application for execution in the prescribed form, and the Court refused to treat an application to Court to enforce an order for execution already made as a substantive application under section 235, that is, section 224 of our Code. But the Court stated clearly that if the application had taken the form of a new application under section 235 (224) it would have treated it as a " subsequent application " under section 230 (337). For the sake of clearness in the new Indian Code (see section 48) the words " fresh application " have been substituted for the words " subsequent application." See also *Mujib-Ullah v. Umed Bibi* (*supra*) and *Madhabmani Dasi v. Lambert* (*supra*). The principle laid down in these cases cannot apply to the present case in veiw of the fact that we have here a fresh application in all respects conforming to the requirements of section 224, and where the " mode in which the Court's assistance is required " is different in the fresh application from the mode in the application of which the fresh one is claimed as a continuation or revival. The subsequent application in question here is not one for the continuation of execution proceedings commenced under an order which had been previously granted, as it might have been. Such an application, the Indian Courts have laid down, cannot be regarded as one in continuation or revival of a previous application.

If the question had arisen in the execution proceedings, and before the property had been sold and conveyed, it may be that it would have been possible to adjust matters and to declare under which writ the property had in law been seized, and then to have it sold under the proper writ and seizure, but when execution proceedings have come to an end such an adjustment is not possible, and the property must be taken to have been sold under the writ under which, the Fiscal has stated in his conveyance, it was in fact sold. For instance, if the plaintiff had claimed this property when seized in execution on October 5, 1922, the Court might have declared, as it did in *Periar Carpen Chetty v. Sekappa Chetty* (*supra*), that seizure under the second writ was unnecessary, and that as the seizure under the first writ was still subsisting, the property should be sold under it. In the present case that can no longer be done. The property has been seized and sold under the second writ, and the rights of the parties must be decided upon that basis. The learned District Judge in his judgment says that there is no evidence of a second seizure. There he is not correct. The fact that there was a seizure on October 5, 1922, is clear from the Fiscal's sale report

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to Court. It is upon the basis of the absence of a second seizure that the learned District Judge decided the case in favour of the second defendant.

In my opinion, therefore, the second defendant is unable to claim the benefit of the registration of the seizure of August 5, 1916, as the sale at which he purchased the property did not follow on that seizure. That seizure has been abandoned, or is in abeyance.

As to the merits of the plaintiff's claim. There is no doubt that the judgment-debtor, the first defendant in this case, has done his best to delay and harass the judgment-creditor in obtaining satisfaction of the decree in his favour. But in the absence of any evidence in the case it is impossible to say that the mortgagee, the plaintiff, was acting in collusion with the judgment-debtor, or was a party to any fraud. There was an allegation of fraud in the second defendant's answer, but no issue was framed on it, and there is no evidence to support it. When a mortgage bond was executed in December, 1916, the lands mortgaged had been seized, and the seizure registered. It was, therefore, void as against all claims enforceable under the registered seizure. If the mortgagee knew of the seizure and its registration, it is difficult to see how the parties to the bond could defraud the judgment-creditor or a purchaser in execution by entering into a void transaction. It is only the mistake of the judgment-creditor in causing the seizure of the property again in October, 1922, that has enabled the mortgagee to assert his rights under the bond. In 1916 he could not have foreseen that the judgment-creditor would commit this mistake in 1922 and have had this bond in readiness for such a contingency. It is common knowledge that transactions regarding land are entered into without searching the register of seizures: *Guneris v. Karunaratne*,[1] where two eminent Judges of this Court disagreed on the question whether notaries are bound to search the register of seizure in addition to the register of deeds before drawing up a deed. In these circumstances I am inclined to think that however reprehensible the conduct of the mortgagor might be the mortgagee was acting *bona fide* and is entitled to insist on his legal rights.

I would allow the appeal, with costs, in both Courts.

Appeal dismissed.

[1] *(1914) 18 N. L. R. 47.*