

Present: Pereira J. and Ennis J.

1913.

SILVA v. FISCAL, SOUTHERN PROVINCE.

232—D. C. Galle, 11,599.

Action against Fiscal for wrongful arrest—Refund of subsistence money by Fiscal on the application of plaintiff's proctor—Stay of execution of writ without order of Court.

Orders to withhold execution of process should issue to the Fiscal from the Court. The Fiscal has no power to stay the execution of a writ without an order of Court to that effect; while the Fiscal may take the risk of acting on applications made to him by parties, he is not bound to do so. The parties should move the Court for orders on him.

THE facts appear from the judgment.

A. St. V. Jayewardene, for plaintiff, appellant.

H. A. Jayewardene, for defendant, respondent.

Cur. adv. vult.

August 22, 1913. PEREIRA J.—

In this case the plaintiff claims damages from the defendant, who is the Fiscal of the Southern Province, for an alleged wrongful

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arrest. The defendant had in his hand a warrant duly issued by the District Court of Colombo for the arrest of the plaintiff. The mandate contained in this warrant was in no way interfered with by the Court which issued the warrant, and in pursuance of that mandate the defendant arrested the plaintiff. It has been urged that the defendant allowed the plaintiff to withdraw the subsistence money deposited by him as a condition precedent to the arrest of the plaintiff, and section 313 of the Civil Procedure Code has been relied on. That section enacts that a judgment-debtor shall not be arrested unless and until the decree-holder pays into Court a certain sum for the subsistence of the debtor until he is brought before the Court. In this case the provision of this section had been duly complied with. The money had been paid into Court, and nothing further was necessary to justify the arrest. The fact that the defendant, on the application of the plaintiff's proctor, allowed a refund of the subsistence money did not in any way interfere with the defendant's right and duty to arrest the plaintiff on the warrant issued to him. Orders to withhold execution of process should issue to the Fiscal from the Court. As held in *Silva v. Rawter*,¹ the Fiscal has no power to stay the execution of a writ without an order of Court to that effect; and I have no hesitation in saying that while the Fiscal may take the risk of acting on applications made to him by parties, he is not bound to do so. The parties should move the Court for orders on him. As observed already, in the present case there was no withdrawal by the Court of the mandate issued to the defendant as Fiscal, and I fail to see that he can be blamed for making the arrest complained of.

I would dismiss the appeal with costs.

ENNIS J.—I agree.

Appeal dismissed.