1919.

Present: De Sampayo J. and Loos A.J.

SERAJUDEEN *v.* ALLAGAPPA CHETTY.

157—D. C. Nuwara Eliya, 452.

Action based on false allegation of partnership—Summons not served—Seizure of goods—Action for damages for malicious institution of civil action and for wrongful seizure of goods—Malice—Animus injuriandi.

The defendant sued on a promissory note granted to him by Sawanna Sina Abdul Cader both Abdul Cader, the maker, and his brother, the plaintiff, falsely alleging that they were partners, obtained judgment without service of summons on the plaintiff, and seized his shop goods in execution.

The plaintiff on hearing of these proceedings took steps to get the judgment set aside, and thereafter instituted this action for damages for malicious institution of a civil action and for malicious seizure of goods.

Held, that in the circumstances the defendant's conduct was malicious, and that he was liable in damages.

Malice does not mean ill-will. It has the import of *mala fides*, an intention to cause wrongful injury, or such reckless action that the party must be held responsible for the consequences. It is generally expressed as *animus injuriandi*, but the intention need not be express.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Hayley* and *Sunderam*), for defendant, appellant.

Bawa, K.C. (with him *Bartholomeusz*), for plaintiff, respondent.

October 15, 1919. DE SAMPAYO J.— 1919.

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This is an action for damages for malicious institution of a civil action for an alleged debt, and for malicious and wrongful seizure of property in execution of a decree in the civil action. The plaintiff Serajudeen, is a trader at Nuwara Eliya, carrying on business under the *vilasam* or initials of Sawanna Sina. The defendant sued the plaintiff and his brother Mohamadu Abdul Cader in the action No. 44,765 of the District Court of Colombo on a promissory note signed by Mohamadu Abdul Cader with the said initials Sawanna Sina, alleging that the plaintiff was a partner of Mohamadu Abdul Cader. The District Judge has found that there was no such partnership, and there is no reason to disagree with him on that point. The only facts which the defendant really had to go upon in alleging the two men to be partners are that they were brothers and used the same initials. The plaintiff says, and there is no evidence to the contrary that the initials were those of their father's name, and were common to all the brothers, including a third brother named Omer Abdul Cader. These facts could not possibly have induced a belief in the defendant that the plaintiff and Mohamadu Abdul Cader were partners. The defendant was apparently conscious of this weakness, for he called as his witness his kanakapulle or manager, who pretended that at the commencement of the defendant's dealing with Mohamadu Abdul Cader the plaintiff had come and said that he was his partner, and asked the defendant to deliver to Mohamadu Abdul Cader the goods represented by the promissory note. This is manifestly false, and it must be taken that the defendant had no knowledge that the plaintiff was partner of Mohamadu Abdul Cader, and the allegation to that effect on which he joined the plaintiff as defendant in the action No. 44,765 was quite reckless. The proceedings in that action throw a further sinister light on the defendant's conduct in regard to the plaintiff. Both the plaintiff and his brother reside at Nuwara Eliya, and had no residence in Colombo, but in the plaint and the affidavit filed with the plaint it was falsely alleged that they were residents of Third Cross street, Colombo. The summons purported to be served on them in Colombo, and on this false return of service, for which the defendant or his agent was responsible, a judgment by default was entered in the case. A writ was applied for and obtained for execution of the judgment. The plaintiff's case is that, in pursuance of the defendant's design to recover from him a debt, which was to the defendant's knowledge not due by him, the defendant maliciously caused certain goods in the plaintiff's boutique at Nuwara Eliya to be seized on January 19, and again on May 4, 1917. The fact of these seizures was put in issue by the defendant. The District Judge has found that there was a seizure on January 19. This finding was attacked, because the plaintiff had in an affidavit, filed in support of an application to open up judgment, stated

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that the defendant had " threatened " to effect a seizure, and compelled his servant to pay Rs. 300 on account, and because in his evidence in this case he only said that the defendant had " intimidated " his servant. The fact as appears from the evidence of the Fiscal's Marshal is that the officer went with the writ to the plaintiff's boutique accompanied by the plaintiff's representative and seized some things, but before he proceeded further and seized other things the man in charge of the boutique, in order to prevent injury to his master's name and business, paid Rs. 300, whereupon the Fiscal's officer and the defendant's representative withdrew.

The plaintiff was then absent in India, and hearing of these proceedings he came at once and made preparations to get the judgment set aside. He took steps later and succeeded in proving that summons was not served on him, that he was not a partner of Mohamadu Abdul Cader, and that he was not indebted to the defendant in the amount of the promissory note sued upon. The District Court then set aside the judgment and dismissed the defendant's action, with costs.

In the meantime the plaintiff says the defendant caused his boutique goods to be seized again on May 4. I have no doubt whatever as to the fact of such a seizure. The plaintiff, together with a surety, executed a security bond in favour of Mr. Wedderburn, the Deputy Fiscal of Nuwara Eliya, and had the goods released from seizure. The only question as regard this seizure is whether the defendant was responsible for it. It appears that the Deputy Fiscal acted upon a letter from one Periyanen, who purported to be the defendant's agent, and instructed the Deputy Fiscal to effect the seizure. It was stated for the defendant that Periyanen was the defendant's agent some time before this but not at this time, and had no authority to give the instructions to the Deputy Fiscal. As the plaintiff was not in a position to controvert this statement by evidence, the District Judge has held that the defendant had not authorized the seizure. We have to accept this finding, though for my part a suspicion cannot be avoided that Periyanen, who had no interest in or concern with the business personally, was the defendant's agent for this purpose. However, it is sufficient to go upon the seizure of January 19.

As regards the element of malice, it is, of course, well known that it does not mean ill-will. It has the import of *mala fides*, an intention to cause wrongful injury, or such reckless action that the party must be held responsible for the consequences. It is generally expressed as *animus injuriandi*, but the intention need not be express. De Villiers, on the *Law of Injuries*, *p. 28* (*note*), says: " When a person knows that an act of his is necessarily an injury unless certain modifying circumstances exist, the existence of which he

has no right to assume, but is indifferent as to whether these circumstances exist or not, if he then commits the act and the circumstances do not exist, he can hardly be heard to say in excuse that he had no knowledge of the non-existence of these modifying circumstances. A person is intentionally ignorant who knows that his being ignorant will be the necessary consequence of his not ascertaining whether facts exist which he may not presume to exist, and yet does not ascertain the facts. If eventually his act prove an unlawful one, then in the absence of such modifying circumstances, since both his act and his want of knowledge were intentional, *animus injuriandi* may very well be held to have existed." In view of all the circumstances connected with the institution of the action and the subsequent proceedings, this description of malice fits the defendant's case, and, I think, he was liable in damages to the plaintiff. The seizure of a trader's stock in trade in execution has a serious effect on his credit and reputation, and I think the amount of damages awarded by the District Judge is not excessive.

In my opinion the appeal should be dismissed, with costs.

Loos A.J.—I am of the same opinion.

Appeal dismissed.