

PERERA v. PERERA.

1906.

February 6.

C. R., Kalutara, 4,400.

Contempt of Court—Resistance to execution of decree under Small Tenements Ordinance—Jurisdiction of Court of Requests—Procedure—False statement in affidavit of Fiscal's officer—False return by Deputy Fiscal—Courts Ordinance, No. 1 of 1889, s. 59—Civil Procedure Code, ss. 325, 372, 795 and 800.

The only jurisdiction which a Court of Requests has, in the matters of contempt, is that conferred by section 59 of The Courts Ordinance (No. 1 of 1889), which enacts that "every District Court, Court of Requests, and Police Court shall, for the purpose of maintaining its proper authority and efficiency, have a special jurisdiction to take cognizance of, and to punish by the procedure and with the penalties in that behalf by law provided, every offence of contempt of Court committed in the presence of the Court itself and all offences which are committed in the course of any act or proceeding in the said Courts respectively, and which are declared by any law for the time being in force to be punishable as contempt of Court."

Where the Commissioner of a Court of Requests convicted the defendant in a proceeding under the Small Tenements Ordinance (No. 11 of 1882) of contempt of Court for resisting the execution of a writ of possession issued under the Ordinance.

Held, that such conviction was bad for want of jurisdiction, inasmuch as the act complained of was not committed in the presence of the Court itself, and there is no law declaring such act to be punishable as a contempt of Court.

Held, that section 372 of the Civil Code, which enacts that "the Fiscal or Deputy Fiscal, or other person specially appointed by the Governor in that behalf, is hereby authorized to administer the oath or affirmation which is requisite to the making of the affidavit in the last section mentioned. And every officer who makes a false statement of fact in any such affidavit commits (in addition to any offence of which under the provisions of the Ceylon Penal Code he may by so doing be guilty) an offence which is punishable as contempt of Court," applies, to returns to process issued under Ordinance No. 11 of 1882, there being no provision in the latter Ordinance inconsistent with the said section of the Civil Code.

Held, further, a Fiscal's officer who makes a false statement of fact in affidavit relating to the execution of a writ of possession issued under Ordinance No. 11 of 1882 commits a contempt of Court cognizable under section 59 of The Courts Ordinance; but such false statement, in order to be punishable, must be made wilfully and with intention to pervert the course of justice.

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The Commissioner also convicted the Deputy Fiscal who administered the oath to the Fiscal's officer, whose affidavit contained the false statement, and who made a return to Court, based on such affidavit, of contempt of Court.

Held, that section 372 did not apply, and that the conviction was bad for want of jurisdiction.

THE plaintiff sued the defendant under the Small Tenements Ordinance, No. 11 of 1882, and obtained a decree ordering the defendant to deliver possession to the plaintiff of the house of which he was alleged to be tenant under plaintiff. The writ of possession was issued to the Deputy Fiscal for execution, who entrusted it to one of his officers for that purpose. The defendant having resisted the execution of the writ, the plaintiff petitioned under chapter LXV. of the Civil Code, that the defendant be punished for contempt of Court. The Commissioner convicted the defendant of contempt of Court and sentenced him, under section 800 of the Civil Code, to undergo thirty day's simple imprisonment.

The Fiscal's officer was also convicted under section 800 of the Civil Code of contempt of Court, in that he stated in the affidavit made by him, relating to the execution of the writ of possession by him, that his attempt to enforce the writ and the defendant's resistance took place on the 31st August, whereas in truth it occurred on the 30th.

The Deputy Fiscal was also punished under the same section for having, in the return to the writ made by him as Deputy Fiscal, made a false statement of fact, viz., that he caused his officer to repair to the dwelling-house of the defendant on the 31st August, when as a matter of fact he caused that to be done on the 30th August.

In appeal.

Dornhorst, K.C., for defendant, appellant.

Van Langenberg, A.S.-G., for the Fiscal's officer and the Deputy Fiscal.

E. W. Jayewardene, for plaintiff, respondent.

Cur. adv. vult.

6th February, 1906. WENDT, J.—

Defendant in the action, the Deputy Fiscal of the District and the Fiscal's process server, have been convicted respectively to thirty day's simple imprisonment, a fine of Rs. 5 with three days' imprisonment in default, and a fine of Rs. 50 with one month's imprisonment in default. I shall take the case of the defendant in the action first

(appeal No. 472). His contempt consisted in resistance to the execution of the decree in the action which directed that the appellant should deliver to the plaintiff peaceful possession of a certain tenement in Kalutara consisting of a house. The action was brought under the provisions of the Small Tenements Ordinance, No. 11 of 1882. The decree against defendant having been affirmed in appeal the Court on 16th April, 1905, issued a writ of possession to enforce it, and on the 24th August re-issued that writ. On the 30th the Fiscal's officer was resisted by the defendant in attempting to execute the writ. On the 7th September the plaintiff filed a petition supported by an affidavit, under chapter LXV. of the Civil Procedure Code, setting forth the facts relative to the resistance, and the Court, in accordance with the prayer of the petition, issued a summons against the defendant calling upon him to show cause why he should not be punished for contempt of Court. On the returnable day the defendant's proctor objected to the jurisdiction of the Court, and also took other objections to the regularity of the proceedings, which it is not now necessary to consider. The Court overruled this objection, and having examined the petitioner, the Fiscal's officer, the defendant, and other witnesses, convicted the appellant of contempt of Court and sentenced him under section 800 of the Civil Procedure Code.

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The Commissioner regarded the petition as one under section 325 of the Civil Procedure Code, although it is distinctly entitled under chapter LXV., which relates to summary procedure in respect of contempts of Court. In overruling the objection to his jurisdiction the Commissioner appears to depend on the last paragraph on page 180 of volume I. of *Pereira's Institutes*. He misapprehends the effect of that paragraph, which does not lay down that an offence like the present, committed in the course of any act or proceeding in a Court, is punishable as a contempt of Court, but merely summarizes section 59 of The Courts Ordinance. That is the section which confers upon the Court of Requests its only jurisdiction in the matter of contempts, and that is a special jurisdiction over "every offence of contempt of Court committed in the presence of the Court itself, and all offences which are committed in the course of any act or proceeding in the said Court, and which are declared by any law for the time being in force to be punishable as contempt of Court." Now the offence charged against the defendant was not committed in the presence of the Court itself, neither is there any law which declares that offence to be punishable as a contempt of Court. It is therefore clear that the Court of Requests was acting *ultra vires* in taking cognizance of the charge against the appellant.

1906. The conviction and the proceedings which led up to it are, therefore, quashed. I may add that even if the proceedings against the appellant had been based on the 325th and following sections, it would have been doubtful whether the order of committal could be sustained. In *Perera Hamine v. Saibo* (2 Br. 76) Lawrie, J., held that those sections could not be made applicable to the execution of a decree under the Small Tenements Ordinance, and, as at present advised, I am inclined to take the same view.

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No. 473.—The Fiscal's officer, William Silva, has also been punished under section 800, his offence being that in the affidavit made by him, relating to the execution of the writ of possession by him, he stated that his attempt to enforce the writ and defendant's resistance took place on the 31st August, whereas in truth they occurred on the 30th. Now, upon the trial of the defendant for his alleged contempt, every witness, including William Silva, himself, spoke to the events as having occurred on the 30th August. No suggestion was made of the 31st having been the true date—in fact, nothing whatever turned upon the date; William Silva was not questioned as to the mention of the 31st in his affidavit. The Commissioner fairly states that it was only when writing his judgment in the matter of defendant's contempt that he noticed the date in Silva's affidavit. When called upon to show cause against the charge of contempt, Silva stated that the wrong date in the affidavit was a mere clerical error. The Commissioner, however, was of opinion that the 31st August had been intentionally mentioned "in the hope that thereby some material assistance would be afforded to defendant to successfully contest his appeal."

Upon a review of the proof and giving the fullest weight to the Commissioner's opinion upon that point, I am unable to agree with him on this question of fact. Whether the resistance to the writ was on the 30th or on the 31st August was, as I have said, wholly immaterial; the 31st could in no way be more favourable to the defendant than the 30th was, and I am convinced that the substitution of the one for the other was a mere slip in drawing up the affidavit sixteen days after the events deposed to in it. On the merits, therefore, I consider there was no contempt. But, even had I been of a different opinion, the conviction could not have been supported owing to an entire absence of legal evidence to sustain it. Chapter LXV. of the Procedure Code, which prescribes the procedure to be followed, directs (see section 796) that when the person accused of the contempt appears and does not admit the truth of the charge, the Court shall proceed to take evidence (if any) which may be necessary in addition to the Court Minute under section 795 to establish the charge. The

" Court Minute " applies to cases where the contempt has been committed *in facie curiæ*, and the proof depends wholly or in part on the personal observations of the Judge, of the accused person's behaviour and language in his presence; it therefore did not apply to the present case. Evidence was, therefore, necessary to establish that the insertion of the wrong date was wilful and intended to pervert the course of justice. There was no such evidence.

As to the jurisdiction, I think that there being nothing in the Ordinance No. 11 of 1882 inconsistent with section 372—there being in fact no provision at all in the Ordinance on the subject of section 372—that section applies to returns to process issued under the Ordinance, and that therefore the offence of making a wilfully false return would be " punishable as contempt of Court " under section 372, and therefore cognizable by the Court of Requests in virtue of section 59 of The Courts Ordinance.

The conviction of the appellant William Silva is set aside.

No. 495.—The summons against Mr. Ginger, the Deputy Fiscal, was issued simultaneously with that against Silva. His offence is alleged to be that in the return to the writ made by him as Deputy Fiscal and based on Silva's affidavit he made a false statement of fact, viz., that he caused his officer, William Silva, who is a clerk in his office, to repair to the dwelling-house in question on the 31st August, when, as a matter of fact, he caused that to be done on the 30th August. The accused pleaded not guilty and said that he had merely attested Silva's oath to his affidavit.

Now the material part of section 372 of the Code does not apply to the Deputy Fiscal who administers the oath, but to the officer who makes the affidavit. Neither was appellant's alleged offence committed in the face of the Court. The Commissioner, therefore, had no jurisdiction to try him. Further, as in the case of Silva, there is no evidence in support of the charge. In the ordinary course of business the Fiscal's return would be based on the material furnished in the affidavit of the officer who executed the process, and that is all that appears to have been done in the present case. The return is not in Mr. Ginger's handwriting, but appears to me to be in same handwriting as the affidavit, probably Silva's own. There is no material worthy of consideration suggestive of appellant's complicity in Silva's alleged offence. The Commissioner, it might almost be said, has strained the law against him because he was "morally certain Mr. Ginger had acted in collusion with William Silva and the defendant." " I am disposed to think " (he continues) " that the law in the matter leaves him a loophole to escape. I am, however, not one well versed in law, and I am not perfectly certain that the

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WENDT, J. law is in favour of Mr. Ginger." He therefore gives him (the prosecution) the benefit of the doubt and convicts the appellant, forgetting that this is a criminal charge, and that if any reasonable doubt existed as to the facts or as to the law applicable to them the accused is entitled to the judgment of the Court.

I set aside this conviction as well.
