NARAYANAN CHETTY *v.* ELLIS.

D. C., Colombo, 11,003.

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Action against Fiscal—Damages for negligently allowing property seized to be removed—Right of Fiscal to plead that such property was not the execution-debtor's property—Civil Procedure Code, s. 226.

To an action for damages brought against a Fiscal for negligently allowing the property which had been seized by him to be removed by a third party, it is a good defence to show that the property which he had failed to sell was not the property of the execution-debtor.

THE plaintiff in this case obtained a money decree against one Gauder, a livery stable-keeper of Colombo, and on the 22nd September, 1897, pointed out to the Fiscal for seizure certain horses and carriages then in his possession. The Fiscal seized all the property so pointed out and placed guards in possession and advertised the sale for the 23rd October. On the 29th September another creditor, who had a mortgage decree against the same property, save a hansom carriage which was under seizure, caused the Fiscal to make a second seizure. The sale of the articles thus seized was fixed for the 22nd October, and was duly carried out; but when, the following day, the Fiscal's officer went to sell, under the plaintiff's writ, the hansom carriage left unsold at the previous sale, it had disappeared.

The plaintiff now sued the Fiscal for the value of this carriage, in that by his gross negligence and irregularity of proceeding he permitted the removal of the said carriage, and the plaintiff thereby lost the benefit of the seizure made, and in consequence he was unable to recover the amount of the said judgment. By reason of the premises plaintiff alleged that he had incurred loss and damages to the extent of Rs. 600.

Defendant pleaded that the plaint discolsed no cause of action, because there was no averment that the carriage in question was, at the time of the seizure, the property of either of the execution-debtors, and as such liable to be sold in execution of the decree in plaintiff's favour. He denied negligence and irregularity.

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The Additional District Judge entered judgment for plaintiff for Rs. 250, as the fair market value of the carriage in question at the time of its seizure, holding that the English cases cited for the defendant—namely, *Stimson v. Farnham* (*7 L. R. Q. B. 175*) and *Sevi v. Hall* (*29, L. J. C. P. 127*)—were not authorities in support of the proposition that the debtor's ownership of the property seized was an indispensable averment in the plaint; and that even if they were so, the liabilities of the Fiscal, being clearly defined by the local Ordinances, could not be affected by decisions pronounced in England.

Defendant appealed.

Van Langenberg (*with Allan Drieberg*), for defendant, appellant.

Sampayo (with *De Saram*), for respondent.

BONSER, C.J.—

I am unable in this case to agree with the law as laid down by the Additional District Judge of Colombo. The case is one of some importance as regards the duties and liabilities of Fiscals.

The plaintiff in this action had recovered judgment against one Gauder, who was apparently a livery stable-keeper, having horses and carriages which he let out for hire. The plaintiff pointed out to the Fiscal for seizure a number of horses and carriages, which he alleged to be the property of his execution-debtor. Amongst these was the carriage, which is the subject of the present action. Whilst this was in the custody of the Fiscal, another creditor who had a conventional mortgage over all this property other than the last-mentioned carriage placed his decree in the hands of the Fiscal for execution, and we are told that the Fiscal went through the interesting process of seizing the property again which was already in his own custody, and thereupon double the number of guards were placed over the property. It seems to me that this was a very useless proceeding, and only resulted in additional expense to the parties concerned and in no other useful result, and I trust that it will not be repeated. Under the second writ the property included herein was sold. Of course the carriage in question was not sold, not being included in it.

The next day, when the Fiscal proceeded to the sale of this carriage, it was found to have disappeared and to have got into the possession of a nephew of the execution-creditor, who claimed it as his own property. The Fiscal's officers told a story, which the District Judge did not believe, of a rescue of this carriage by

violence from their custody. The District Judge believed that the Fiscal's officers allowed the nephew to take away this carriage. Plaintiff thereupon brought this action against the Fiscal for improperly releasing the carriage, alleging that he had thereby suffered damage to the extent of its value. The District Judge held that it did not matter whether the nephew was the true owner or not; and that even if he was the true owner, the duty of the Fiscal was to sell; and that he had failed in that duty and gave by way of damages the full value of the carriage, which he estimated to be Rs. 250.

He declined to follow the English case which was cited to him (*Stimson v. Farnham, 7 L. R. Q. B. 175*), on the ground that the position of a Fiscal in this Island was quite different from that of a Sheriff in England. It was there held that it was a good answer to such an action as this for the Sheriff to show that the property which he had failed to sell was not the execution-debtor's property, and that therefore the execution-debtor had sustained no damage. The Additional District Judge says this: " It cannot be doubted that unless the plaintiff can show that he " has suffered some damage from the conduct of the Fiscal, he " cannot succeed, but is it correct to say that, because a thing seized " at the instance of a creditor may turn out to belong to a stranger. " therefore the creditor cannot possibly be damaged by the Fiscal " allowing it to get out of his control? I venture to think not. " The law has cast on the Fiscal the duty of seizing and selling, " among other things, any property in the possession of the execu- " tion-debtor pointed out to him for seizure by the creditor." Now, it seems to me, that that is an incorrect statement of the law as regards the duties of Fiscals. Secion 226 of the Code enacts that it is the duty of the Fiscal to " seize and sell *such property of the judgment-debtor* as may be pointed by the judgment-creditor," not such property as may be in the possession of the judgment-debtor, as the learned District Judge seems to read the section. Unless, therefore, the property belongs to the judgment-debtor, the Fiscal has no authority or right to seize or to sell it. If he does seize and sell it under a *bonâ fide* belief that it is the property of the judgment-debtor, the Code says that he is not to be liable in damages for his action; but it is quite clear that he is going beyond the authority given to him by the Court in selling a third person's property, though the Code says that in the circumstances his conduct shall not afford ground for an action for damages against him. Section 363 is no authority for the proposition that a Fiscal can, or ought, under any circumstances, to sell one person's property to satisfy another's debt. It seems

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to me that the principle laid down in the English case, to which I have referred, should be applied to the present case.

The District Judge did not decide the issue as to whether this carriage was the property of the judgment-debtor's nephew or not, but we were told by counsel that the evidence is all one way, and the counsel for the plaintiff did not desire to have the case sent back to the District Court for the decision of the District Judge upon the evidence adduced on that issue. We therefore order that the action be dismissed with costs.

LAWRIE, J.—

The Judge did not decide the issue to whom the carriage belonged at the date of seizure, whether to the execution-debtor or to a third party. It is not necessary to send the case back for his decision on that issue, because the evidence is short and clear and can be adjudicated on by this Court. The best of that evidence is that the carriage originally belonged to the debtor. It has been sold by him and the purchaser had taken delivery and had kept possession, though at the date of seizure the carriage was in the coach-house or yard of the debtor. The carriage after seizure was removed, whether forcibly or with the consent of the Fiscal's watchers may not be certain. The Fiscal did not recover the carriage, and it was not sold. In this action by the decree-holder against the Fiscal for damages for wrongful release of the property seized, it seems to me a sufficient defence for the Fiscal to prove that the property did not belong to the execution-debtor named in the writ; if it did not, the decree-holder suffered no loss by the release, which was legal. I see little or no difference between the release of property which does not belong to the execution-debtor, and the release of a man arrested under a civil writ. It would surely be a good defence to an action of damages for illegal release to prove that the man arrested was not the debtor.