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[In Review.]

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice
Wendt, and Mr. Justice Middleton.

WIJEWARDENE *v.* SCHUBERT *et al.*

D.C., Colombo, 20,475.

*Seizure—Recall of writ, effect of—Re-issue—Second seizure and sale under
such seizure—Mortgage pending first seizure—Validity—Civil Pro-
cedure Code, s. 238.*

Held, that where a writ is recalled a seizure made under it comes
an end.

Where a writ under which property had been seized (the seizure
being duly registered) was recalled, but was subsequently re-issued,
and the property was seized again and sold by the Fiscal under
such second seizure, and where the judgment-debtors mortgaged the
property pending the first seizure, but before the second seizure,—

Held, that such mortgage was valid as against the purchaser at
the Fiscal's sale, his rights being derived not from the first seizure
during the pendency of which the mortgage was executed, but from
the second seizure, which was subsequent to the mortgage.

THE first and second defendants, being the owners of certain
premises, mortgaged them to one Don Philip Wijewardene,
Muhandiram, by bond No. 1,236, dated 21st December, 1901, and
registered on 14th March, 1902, to secure a sum of Rs. 4,000 and
interest thereon.

Writ having issued against the first and second defendants in D.C.,
Colombo, 14,558, at the instance of one Murugappa Chetty, the
said premises were seized by the Fiscal on 21st September, 1901,
and the seizure was registered on 24th September, 1901; on 5th

May, 1902, the writ was recalled by the Court; and on 7th July, 1902, the order of 5th May, recalling the writ, was vacated, and writ was ordered to be re-issued: the property was seized again on 1st August, 1902, and sold on 9th September, 1902, and purchased by one Nelson, who having obtained Fiscal's transfer, dated 10th January, 1903, and registered on 16th January, 1903, sold the property to the third defendant by transfer dated 30th May, 1903, and registered on 10th June, 1903.

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The mortgagee having died, his executrix sued the mortgagors on the bond and joined the third defendant as party in possession of the mortgaged property. The first and second defendants did not defend the action; but the third defendant pleaded that the mortgage bond was void, as it was executed pending a seizure which was duly registered. The Acting District Judge's (J. R. Weinman, Esq.) judgment on this point was as follows :—

“ The plaintiff sues on a mortgage bond made by the first and second defendants in favour of her husband now dead. She sues as executrix.

“ The mortgage bond was made on the 21st December, 1901, and registered on the 14th March, 1902.

“ The third defendant purchased the land from one Nelson by deed No. 1,238 dated the 20th May, 1903 (D 4).

“ Nelson purchased the land at a Fiscal's sale held on the 9th September, 1902, on a writ issued in case No. 14,558 of this Court against the first and second defendants. Nelson got this conveyance on the 10th January, 1903 (D 3).

“ It is also clear that the seizure of the property under the writ which went out in case No. 14,558 was registered on the 24th September, 1901.

“ So far the facts are admitted. The third defendant further says that at the date of the mortgage, *i.e.*, 21st December, 1901, the property was under a seizure which had been duly registered. Undoubtedly the property was seized under writ in D. C., Colombo, 14,558, early in September, 1901, and such seizure was registered on the 24th September, 1901. On the 5th May, 1902, the writ was recalled and I take it that the recalling of the writ released the seizure and discharged the registration, for both were consequential on the issue of the writ. The sale to Nelson by the Fiscal was on the 9th September, 1902. It would not have been under the first seizure, for that seizure came to an end on the 5th May, 1902. In July, 1902, the plaintiff moved to re-issue the writ, which was allowed, and the property was seized a second time on the 1st August, 1902, and sold on the 9th September, 1902. So far, then,

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with regard to the first issue, my finding is that the mortgage property was seized in execution of a decree in case No. 14,558 of this Court on the 21st September, and such seizure was registered on the 24th of the same month. With regard to the second issue, I hold it proved that at the date of the mortgage by the first and second defendants to the plaintiff's intestate the property was still subject to such seizure and registration. With regard to the third issue, I find that the property was not sold in execution of such seizure. This is abundantly clear. The writ under which that seizure was made was recalled by the Court on the 5th May, 1902, four months before the sale. And the Fiscal's return (P 1) shows a second seizure on the 1st August, and that the property was sold on the 9th September, 1902, having been seized on the 1st August, 1902.

“ Section 238 of the Civil Procedure Code provides that any private alienation by the debtor of the property seized shall be void as against all claims enforceable under the seizure. The alienation is void, I take it, not as against the whole world, but as against the attaching creditor or persons who acquire under or through the attachment. The property not having been sold in execution of the seizure which was subsisting at the date of the mortgage, but being sold on a seizure subsequent thereto, I hold that the third defendant's defence fails.”

On an appeal preferred by the third defendant the Supreme Court (Layard C.J. and Grenier A.J.) affirmed the judgment of the District Judge (2nd June, 1905). On the application of the third defendant the case was heard in review preparatory to an appeal to His Majesty in Council.

Van Langenberg (with him *Wadsworth*) appeared for the third defendant, appellants.

Walter Pereira, K.C., S.-G. (with him *H. Jayewardene*), for the plaintiff, respondent.

Cur. adv. vult.

4th December, 1906. HUTCHINSON C.J.—

The plaintiff sues as the executrix of her late husband on a mortgage given to him by the first and second defendants. The third defendant claims the mortgaged property under a purchase made by his predecessor in title, Nelson, at a sale under a writ of execution against the first and second defendants.

The first and second defendants were the judgment-debtors in an action in the District Court of Colombo; on the 23rd August, 1901, a writ of execution was issued in that action; on the 21st September, 1901, the property was seized in execution under that writ; and the seizure was registered three days afterwards. On 21st December, 1901, the mortgage was executed; on the 14th March, 1902, the mort-

gage was registered; on the 5th May, 1902, an order was made by consent, " that plaintiff's claim be and the same is hereby declared satisfied in full, and that the writ issued in this case be recalled. " 1906.
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On the 7th July, 1902, another order was made in the action in consequence, it is said, of its having been found that the plaintiff's claim had not been fully satisfied, and that the order of the 5th May was thereby vacated and another writ ordered to issue; on the 16th July a new writ issued; on the 1st August the property was again seized, and on the 9th September it was sold by the Fiscal under the new writ and seizure. This sale was duly confirmed and a Fiscal's transfer of the property was executed to Nelson, who afterwards sold it to the plaintiff; the Fiscal's transfer is dated 10th January, 1903, and recites that the Fiscal was directed to seize and sell the property by virtue of a writ of execution dated 25rd May, 1901, making no mention of the subsequent writ; but that was a mistake, for it is proved that the second seizure was made on the 1st and registered on the 4th August, 1902, and that the sale was made in pursuance of that seizure.

The District Judge gave judgment for the plaintiff, and the third defendant appealed against that judgment; his appeal was dismissed by the Supreme Court, and he now brings the case before the Full Court with a view to appealing to His Majesty in Council. Section 238 of the Civil Procedure Code enacts that when a seizure of any immovable property has been effected and made known and registered, any private alienation of the property seized, " after the seizure and before the removal of the same by the Fiscal, shall be void as against all claims enforceable under the seizure. "

Was there, after the order of the 5th May, 1902, any claim enforceable under the seizure of the 21st September, 1901? In my opinion there was not. There is no evidence of any formal order directing the Fiscal to vacate the first seizure and stop the sale; but in fact there was no sale, and after the recall of the writ directing the seizure and sale nothing was done, and nothing could have been done in consequence of the seizure.

In my opinion the judgment under review is right.

WENDT J.—

This is an action upon a mortgage executed by the first and second defendants (who are husband and wife), and the object of the action so far as the appellant is concerned is to render the mortgaged land liable for the debt, in his hands, he having acquired from a vendor who had purchased it at an execution sale held subsequent to the mortgage. The appellant's contention is that the mortgage is void

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as against him, because it was effected pending the seizure by the Fiscal under which he bought (section 238 of the Civil Procedure Code.) The facts upon which this contention is based are set forth in the judgments of my Lord and my brother Middleton, which I have had the advantage of perusing, and I need not repeat them. I agree in holding that when the judgment was declared satisfied and the writ of execution recalled on 5th May, 1902, the seizure which had been made under that writ came to an end. Nothing was done by the Court or the Fiscal which purported to revive that seizure. On the contrary, a new writ issued, backed by a copy of the Court's order of 7th July, 1902, and on 1st August, 1902, a new seizure was effected (see document P1). These steps were subsequent to the mortgage. If the appellant, before he purchased, had demanded to see the writ, he would have seen that it bore date subsequent to the seizure upon which he now relies, and was issued to execute an order also subsequent to it. In my opinion the learned District Judge, and the Judges of this Court who dealt with the appeal, were right in holding that the mortgage had not been effected pending the seizure under which appellant bought, and that is fatal to his claim. The case from the *Indian Weekly Reporter* (20 W. R. 20) which appellant cited to us is distinguishable in principle. It may be 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. Here, however, there was an adjudication *inter partes* that the decree had been satisfied, without the necessity of resorting to an execution sale at all, and an order that the writ be therefore recalled.

I think, therefore, that the judgment under review should be confirmed, with costs of the review hearing.

MIDDLETON J.—

This was an action begun on 1st August, 1904, on a mortgage bond given by first and second defendants on the 21st December, 1901, and registered on the 14th March, 1902, to the plaintiff's testator, in which decree was entered on 10th November, 1904.

The third defendant was the assignee of a purchaser of the mortgaged property under a Fiscal's sale upon a seizure under a money decree in action D. C., Colombo, 14,558.

Judgment in action No. 14,558 was given on 23rd August, 1901, at the suit of a Chetty against the first and second defendants here, and the property was seized on 21st September, 1901, the seizure being registered on 24th September, 1901.

On the 15th May, 1902, the writ in D. C., Colombo, 14,558, was by order of the District Judge recalled on a mistake of fact that it had been satisfied, but on the 5th July, 1902, an order vacating the order of 5th May was made and a fresh writ issued for the balance of the judgment debt due in No. 14,558.

On the 1st August, 1902, the property was again seized in No. 14,558, and the sale report shows that on 9th September, 1902, the property was sold by the Fiscal and bought by one Nelson, the sale being confirmed by the Court on 11th November, 1902.

On the 10th January, 1903, Nelson got a Fiscal's transfer, registered six days later, and on 20th May, 1903, Nelson sold to the third defendant.

The District Judge in the present action held (1) that the mortgaged property was seized in execution of a decree in case No. 14,558 of the Colombo Court on the 21st September, 1901, and such seizure was registered on the 24th September; (2) that at the date of the mortgage by the first and second defendants to the plaintiff's intestate the property was still subject to such seizure and registration; and (3) that the property was not sold in execution of that seizure, but of the subsequent seizure, and that third defendant's defence, that the property was not liable to be sold in satisfaction of a mortgage decree against the first and second defendants failed.

The third defendant appealed, and the Supreme Court in a very short judgment dismissed the appeal, holding that the Fiscal did not appear to have sold the land on the original seizure, but on a subsequent one.

The case is now brought in review before three Judges with a view to an appeal to the Privy Council.

The question in the case was whether the recall of the writ in action No. 14,558 on the 5th May, 1902, had the effect of cancelling the seizure made under it on 21st September, 1901, registered on the 24th September, 1901.

It was submitted on behalf of the appellant and maintained by the Solicitor-General that a new writ in fact issued on 7th July, 1902, there being no apparent provision in the Civil Procedure Code for the re-issue of a writ.

The appellant's counsel, however, contended that there had been no removal of the original seizure by the recall of the first writ, and that such removal must be by special order, and he referred to sections 239, 244, 249, 259, and 343 as indicating that the intention of the Code was to that effect. Under section 239 it must be the writ which is to be ordered to be withdrawn, as it orders the seizure. Under section 244 a special order is necessary as only one possibly

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MIDDLETON adjournment, or stay of execution.

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In the present case the order of 5th May, 1902, was made practically as within the terms of section 239.

He also urged that the proctor for the first and second defendants on the 5th May, 1902, moved for a stay of sale, and not for a release of seizure; that the Fiscal's transfer showed that Nelson bought under the old writ; and that the effect of its recall was not to cancel the seizure under it.

He referred also to an Indian case reported in *20 Weekly Reporter*, p. 20. In that case the setting aside of a sale for irregularity was held not to displace the attachment upon the property under the writ, which presumably was still in force.

My view is that the effect of recalling a writ by the Court is to nullify a seizure which has been made under and by virtue of it. The writ is the continuing authority to the Fiscal to seize and sell; when that is withdrawn, his power to do so is gone. Without the writ the Fiscal has no right to retain in his charge nor to sell the property. I would hold then that the withdrawal of the writ from the Fiscal's hands by the Court has the effect of determining the Fiscal's authority and the seizure he may have made under it, even though it be registered.

If a mortgagor pays off his mortgagee under a registered mortgage, there would not appear to be any necessity for the cancellation of the registration of the mortgage. The payment of the debt avoids the mortgage *ipso facto*, and so its registration; *a fortiori* the withdrawal of a writ by the Court which authorizes the seizure should avoid the seizure, and its registration thereby becomes null and inoperative.

I can find nothing in the Land Registration Ordinance, No. 14 of 1891, rendering it necessary to cancel registrations formally.

I think, therefore, that the sale to Nelson took place under the second writ and seizure thereunder, as the Fiscal's report says, dated 1st August, 1902, issued for the balance of the judgment in No. 14,558, that the mortgage to the first and second defendants was previous to and good against that seizure, though bad as against the first seizure.

I would therefore dismiss the appeal with costs and uphold the judgment of the Supreme Court, which will not inflict any hardship on the appellant, although it may deprive him of what he may have supposed was a good bargain.

Judgment in appeal confirmed.