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

BYRDE *v.* CARPEN CHETTY.

D. C., Kandy, 18,152.

Sale of movable property—Contemporaneous verbal agreement to re-convey—Rights of purchaser—"Bill of Sale"—Ordinance No. 8 of 1871, s. 6—Sale of Goods Ordinance (No. 11 of 1896), s. 58 (3)—Civil Procedure Code, s. 247—Evidence Ordinance (No. 12 of 1895), ss. 92 and 99.

Where the owner of certain goods sold them to B by an instrument in writing, and by a contemporaneous verbal agreement B undertook to re-convey them to the owner on payment of the amount paid by him, and where the said goods were seized by a creditor of the owner as his property,—

Held, that B must be considered to be the absolute owner of the goods, and that he was entitled to have them released from seizure.

Held, also, that a judgment-creditor is not the representative in interest of the judgment-debtor within the meaning of section 92 of the Evidence Ordinance; and that it is competent for a judgment-creditor under section 99 of the Evidence Ordinance to give evidence of any facts tending to show a contemporaneous agreement varying the terms of a written contract entered into between the judgment-debtor and a third party.

ACTION under section 247 of the Civil Procedure Code. The facts are set out in the following judgment of the District Judge (F. R. Dias, Esq.) (July 27, 1908):—

"This is an action under section 247 of the Code, wherein the plaintiff (Colonel Byrde) sought a declaration that he was the owner of certain articles seized in execution under the defendant's writ in case No. 17,883 against one Pless Pol, and prayed for their release. The plaintiff has since died, and the executor of his will has been substituted in his place.

"The defence is that Colonel Byrde was never the owner of the property but only a mortgagee, and that the instrument under which he claims is null and void, as it was executed with his knowledge for the purpose of defrauding this defendant and other creditors of Pless Pol. For our present purposes the latter point is not in issue, and the only question before us is whether Colonel Byrde was the absolute owner of the goods or only a mortgagee.

"The facts were these. Pless Pol was the owner of a large quantity of hotel furniture and fittings which were deposited at a place called the 'Savoy Hotel,' a new hotel he was preparing to open. He was indebted to the defendant and several other creditors, including Colonel Byrde, and on July 2, 1906, by a notarially executed deed (P 1) he professed to grant, bargain, sell, assign, and set over unto that gentleman nearly all the things on the premises, including several valuable billiard tables, pianola, organ, electroliers, bevelled mirrors, iron safe, chairs, bar counter, &c. The schedule value of these goods was Rs. 13,641, while the consideration for the deed was an alleged debt of Rs. 6,500 due from Pless Pol to Colonel Byrde, but which at that date was not in fact due.

"Admittedly Rs. 5,000 out of that sum was only paid by Colonel Byrde nine months after the date of the deed to another creditor of Pless Pol in case No. 17,801 of this Court, Colonel Byrde having stood security for Pless Pol in that case. Although Colonel Byrde was ostensibly the purchaser of these goods, he never got possession of them. They continued to be where they were, and in Pless Pol's possession, until the date of seizure by the Fiscal. In spite of these facts, it is contended that the title of Colonel Byrde to the goods under his deed is unquestionable, as it operated as an out and out transfer of the goods to him from the very moment that it was signed. I am unable to accept that contention. It cannot for a moment be denied that, no matter what the phraseology used in this deed may be, it was a bill of sale within the meaning of our Ordinance No. 8 of 1871, and registered as such.

"Now, the purpose of this Ordinance was 'to amend in certain respects the Law of Mortgage and Hypothec' so far as it relates to movable property, and not to prescribe the mode of transferring movable property from a seller to a buyer. It lays down two modes of effecting a valid mortgage of movable property: (1) By

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actual delivery, and (2) by hypothecation or bill of sale in writing, signed by the owner of the goods, and registered in the local Land Registry within fourteen days. In the present case there was no actual delivery, and so the parties entered into this bill of sale and duly registered it. It was argued that in this Ordinance the expression ' bill of sale ' has not the same meaning that it has under the English Law, namely, a hypothecation of movable property retained in the possession of the grantor of the bill, inasmuch as in section 6 that expression is made to include ' bills of sale, assignments, transfers,' &c. The inclusion of this word ' transfers ' in our local Act does not differentiate an English bill of sale from what was intended by the framers of our Ordinance to be a bill of sale in Ceylon, because that word appears in the English Act also, from which this section of our Ordinance has been bodily taken over. (See 41 and 42 Vict., ch. 31, s. 4.)

" The transfers referred to are not out and out transfers, giving the transferee an immediate right to remove and appropriate the goods to himself, but they are nothing more than transactions in the form of a contract of sale intended only to operate by way of mortgage, pledge, charge, or other security for a debt. Such transactions are not unknown to our law, and they are recognized by our Sale of Goods Ordinance, No. 11 of 1896, section 58 (3).

" The whole tenor of the Ordinance No. 8 of 1871, and particularly the last few words of section 6, indicate sufficiently clearly what the bills of sale, assignments, transfers, &c., therein referred to are, namely, transactions for the purpose of securing a debt. Coming to the facts of the case, I think it would be absurd to suppose that on July 2, 1906, Pless Pol was capable of selling outright to Colonel Byrde nearly all his new and expensive hotel furniture and fittings worth Rs. 13,641 for a sum of Rs. 6,500, which he had not received, and it is equally impossible to believe that a private gentleman in the position of Colonel Byrde could for a moment have intended to buy for himself all this paraphernalia, or that he at any time thought it to be in his power to send carts to the Savoy Hotel whenever he liked and remove the stuff to his own house. That was certainly not the way in which Colonel Byrde and Pless Pol intended their contract of July 2 to operate. We need not speculate as to what that intention was, as the best evidence of it is furnished by Colonel Byrde himself. He gave evidence in two cases (No. 17,805 and No. 17,883), in which he claimed goods covered by the deed in question and seized by Pless Pol's creditors. This is what he stated in the former case in September, 1906 :—' The goods were transferred to me in this way on the advice of some third party for greater security. As a matter of fact, when I am paid the amount due to me, I am to return the goods to defendant (Pless Pol).' In the other case he admitted that he had only paid Pless Pol Rs. 1,500 in cash, but stood security for him for a further sum of Rs. 5,000, and

that he was to return the goods to Pless Pol on being repaid the money actually paid by him. He added further :—'I took these goods as security for my money, and not as a purchase.'

"After such unequivocal admissions it is idle to contend that Colonel Byrde was ever the owner of these goods. He was a mortgagee, and nothing more. A mortgagee of movable property, who is not in possession, has no right to claim it when seized under an unsecured creditor's writ so as to prevent a sale thereof in execution, or to bring an action under section 247 of the Code when his claim is disallowed. (See *Wijewardene v. Maitland.*[1]) I dismiss the plaintiff's action with costs."

The plaintiff appealed.

H. A. Jayewardene, for the plaintiff, appellant.

Seneviratne, for the defendant, respondent.

Cur. adv. vult.

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I think that the plaintiff is entitled to the relief which he claims, and that the appeal should be allowed. The deed on which he relies was not a mere charge on the goods; it was an absolute transfer, by which the ownership was vested in Colonel Byrde. By the contemporaneous verbal agreement Pless Pol had the right to call for a re-transfer on payment of the sum which he had received from Byrde; the property, however, was vested in Byrde, and he was the owner, and was as such entitled to possession until he was repaid.

The District Judge says that he cannot believe that Byrde thought that it was in his power to send carts and remove the stuff to his own house. But surely he had that power, the very object of taking the deed in this form was that he might have that power. Its object was to give him better security than he would have had from a mere charge; so he said himself, and clearly that was so. And there was nothing unlawful in the transaction, and no evidence of any fraudulent intention.

If Byrde had sued Pless Pol or any one claiming under him to recover possession of the goods, there would have been no defence to the action, but at most a claim in reconvention to enforce the verbal agreement and to have a re-transfer on repayment. If the judgment of the District Court stands, the goods will be sold and the plaintiff's rights will be lost, although the ownership of the goods is vested in him. The ownership being still vested in the plaintiff, he should be declared entitled to the goods. This will leave Pless Pol's creditors at liberty to take any steps which they may think fit to recover the goods under the verbal agreement.

[1] *(1893) 3 C. L. R. 7.*

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In my opinion our order should be that the decree of the District Court be set aside, and that a declaration be made in accordance with the prayer of the plaint, and that the defendant pay the plaintiff's costs in both Courts.

WENDT J.—

This is an action under section 247 of the Civil Procedure Code by an unsuccessful claimant of certain movable property seized by the defendant in execution of a writ against the property of S. de Pless Pol. Admittedly the property once belonged to Pless Pol, who disposed of it in favour of plaintiff's testator by deed dated July 2, 1906, duly registered as required by the Ordinance No. 8 of 1871. Defendant's seizure was on August 15, 1906. The plaintiff preferred a claim which the Court after inquiry disallowed, and he therefore brought the present action praying that he be declared entitled to the said property, and that the same be released from the seizure. The defendant in his answer denied that plaintiff had purchased the property, and averred that the deed in his favour was executed by Pless Pol by way of security for a sum of Rs. 1,500, lent him by plaintiff, and that it was only a mortgage of the property described therein (including the articles the subject of the present action), which was of the value of Rs. 13,641. Defendant further pleaded that the deed was executed with a view to defraud Pless Pol's creditors, including the defendant, and that plaintiff was well aware of this. At the trial the issue framed was whether at the date of seizure plaintiff was the owner or the goods in claim or only a mortgagee. The deed in plaintiff's favour was produced. By it Pless Pol, in consideration of a sum of Rs. 6,500, the receipt whereof he acknowledged, granted, bargained, sold, assigned, and set over unto the plaintiff, his heirs, executors, administrators, and assigns the property enumerated in the schedule, aggregating in value Rs. 13,641, to have and to hold the said property to the plaintiff, his heirs, &c. The deed A comprised a covenant to warrant and defend the plaintiff's title. It was admitted by plaintiff that of the Rs. 6,500 only Rs. 1,500 had been received by Pless Pol prior to its execution, and that the balance Rs. 5,000 was paid by plaintiff nine months later to another creditor of Pless Pol, plaintiff having become surety for that debt. The goods were never delivered to plaintiff, but remained in Pless Pol's possession until their seizure by the Fiscal.

At the trial there was no evidence of fraud. The defendant put in evidence the deposition of plaintiff at the inquiry into his claim, and his deposition upon a similar and earlier claim by him on the occasion of another creditor seizing certain other goods comprised in the deed of July 2, 1906 (D. C., Kandy, 17,805). In 17,805, plaintiff stated : "Defendant asked me to become his surety. I declined unless he gives me some sort of security. He then agreed to

sell the goods to me, and that was the form in which the security was given..... The goods were transferred to me in this way on the advice of some third party for greater security. As a matter of fact, when I am paid the amount due me, I am to return the goods to defendant." Upon the claim which gave rise to the present action plaintiff deposed: "There is nothing in the agreement as to a re-sale back to Pless Pol. I was, however, prepared to return the propert to Pless Pol on being repaid the money I had actually paid..... I took these goods as security for my money, not as a purchase." The District Judge dismissed the action, holding on the issue that the plaintiff was only a mortgagee; and plaintiff has appealed.

At the argument before us, the principal point discussed was whether parol evidence was admissible to contradict the written deed relied on by plaintiff, and section 92 of the Evidence Ordinance was much canvassed. Section 92, however, does not apply. The question here does not, of course, arise "between the parties" to the instrument, but it was sought to make out that defendant was a "representative in interest" of Pless Pol. I am clearly of opinion that he is not, and that not being such, he is entitled by the terms of section 99 of the Evidence Ordinance to give evidence of any facts tending to show a contemporaneous agreement varying the terms of the writing. It is true he is seeking to prove that at the date of seizure his judgment-debtor was possessed of certain saleable rights in the goods, but he has not himself acquired any "interest" in the goods under or through the judgment-debtor. Unless he has, he is in my opinion not a "representative in interest" of the judgment-debtor. "Interest" does not mean the kind of relation which is described in saying that defendant is "interested in proving his debtor's title," it means a right of property. Taylor, in stating the English Law, says (*Evidence, 10th Edition, section 1,149*) that the rule excluding parol evidence is applied only in suits between the parties to the instrument and their "representatives," a term which would include both a universal successor like an heir or executor or administrator, and a singular successor who had taken the particular property from a party to the instrument. I cannot see that the Indian Legislature by using the term "representatives in interest" meant anything different. The evidence tendered by the defendant, extraneous to the instrument, was therefore admissible. What, then, was the effect of it. In my opinion it clearly shows that, with the view of giving plaintiff greater security than he would have had if the goods were merely hypothecated, the parties agreed to make him in law owner of them, on the understanding that when plaintiff's advances were repaid the property should be re-transferred to Pless Pol. That intention was carried out in the deed, which made plaintiff the proprietor of the goods, with every incident attaching to the ownership, including the right of possession. Had plaintiff

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sued Pless Pol for the actual possession of the goods, I fail to see what defence there could have been to his claim. He is practically claiming that possession now, and it is admitted that the debt secured by the transfer is still due. It may be open to Pless Pol or his representative—perhaps to a creditor of his—in a properly constituted proceeding to tender payment of plaintiff's debt and claim the re-transfer of the goods, but that cannot be done by merely seizing the goods as if the property in them were still vested in Pless Pol.

I think the appeal should be allowed, and plaintiff declared the owner of the goods described in the plaint, which the Fiscal will be ordered to release from seizure and deliver to plaintiff. Defendant will pay plaintiff's costs in both Courts.

Appeal allowed.