Present: De Sampayo and Dalton JJ. 1925.

THE ATTORNEY-GENERAL *v.* DE CROOS *et al.*

1—D. C. (Inty.) Colombo, 11,341.

Crown Debtors Ordinance, No. 14 of 1843—Seizure of property subject to mortgage—Is "libel" or "information" referred to in section 3 equivalent to "plaint"—Issue of warrant of sequestration—Should it be before the filing of such action? Intervention of mortgagee—Right of intervention.

Certain lands were mortgaged by the defendants as security for the payment of money due to Government on the purchase of arrack rents. The defendants having committed default in payment, the Crown sued them on February 22, 1924, and obtained decree on February 29, 1924. Thereafter, on March 19, 1924, and April 8, 1924, the Government Agent caused to be seized certain other properties of the judgment-debtors, as the security covered by the bond was not considered sufficient to satisfy the claim. In effecting the seizures the Government Agent purported to act under section 2 of Ordinance No. 14 of 1843. In compliance with the further provisions of the Ordinance contained in section 3, certificates were filed in Court and warrants of sequestration were issued and executed on April 28, 1924, March 2, 1924, and May 5, 1924. At this stage of the proceedings the present respondent, as purchaser of the lands seized on conveyances dated July 4, 1924, obtained in execution of mortgage decrees of December 19 and 30, 1923, entered in his favour, sought to intervene and moved that the orders for sequestration be vacated and the properties sequestered be released from seizure, on the ground that the seizure should have preceded the filing of the action.

Held, that the respondent was not entitled to intervene in the action.

Per DE SAMPAYO J.—That the proceedings were regular. The "libel" mentioned in section 3 of the Ordinance of 1843 is merely the formal complaint to the Court, and is not meant to be a plaint.

The further proceedings contemplated in the section refer only to the warrant of sequestration, and not to any action supposed to be instituted with the filing of the libel.

Per Curiam.—An objection with regard to the status of a party may be taken for the first time in appeal, subject to an appropriate order as to costs.

APPEAL from an order of the District Judge of Colombo allowing the respondent to intervene and vacating the orders for the issue of warrants of sequestration made under the circumstances set out.

1925.

The Attorney-General v. De Croos.

L. H. Elphinstone, K.C., A.-G., and *Akbar, K.C., S.-G.* (with *M. W. H. de Silva, C.C.*), for the Crown, appellant.—The Ordinance of 1843 gives the Government Agent authority to seize the property of a Crown debtor on his knowledge of the existence of a debt. The section does not limit the powers given in any way. The mere existence of an action against the debtor does not take away this right which exists for the protection of the revenue. This provision is of similar effect to the tacit hypothec under Roman-Dutch law for all moneys due to *Fiscus*.

Section 2 of the Ordinance gives the authority to seize, and section 3 goes on to say that a libel or information should be filed within seven days. The libel or information is only required to state the nature and amount of the debt. There is no provision requiring the Crown to ask for judgment, thereby clearly indicating that the libel or information here referred to is not to be taken as a plaint. It is merely the formal notice or complaint to the Court. The short space of time, viz., seven days, makes it quite clear that it is not a plaint that is required, for in most cases it takes many days more than seven for the Crown or any party litigant to state their claim.

It has been held that the provisions of the Civil Procedure Code, chapter XLVII, apply to sequestrations under this Ordinance. There is, therefore, sufficient protection for the respondent under section 660, if his contention that he is not affected by the proceedings is good. He should, therefore, have never intervened in this action.

There is one objection, however, which entirely puts the respondent out of Court. He is only a mortgagee of the properties seized, and has, therefore, no right to intervene in the present action between the Crown and its debtor. He has no *locus standi*.

[Dalton J.—Why was this point not taken in the Court below ?]

We are entitled to take this point which goes to the root of the case even here in appeal. It is purely a point of law, and may be taken at any time (*Benaim & Co. v. De Bono* [1]); (*Cole v. Govt. of the Union of S. A.* [2]).

Drieberg, K.C. (with him *Samarawickreme*), for the respondent.—Dealing with the question of the status of the respondent, it must be conceded that the point was not taken in the Court below, and must be deemed to have been waived. The appellants are not entitled to take the point now.

[Dalton J.—How did you come into Court ?]

With an affidavit.

The sections of the Civil Procedure relating to sequestration before judgment cannot certainly apply in this case, as judgment was entered in March, and the present proceedings were taken in April and May.

[1] (*1924*) *App. Cas. 514.* [2] (*1910*) *S. A. Law. Rep., App. Div., 273.*

[De Sampayo J.—The learned Attorney-General's argument I understood to be that it has been held that proceedings under Ordinance No. 14 of 1843 are to be conducted on the same basis as section 658, and that it is, therefore, only a further point that section 660 applies.]

If the old Ordinances leading up to the present are followed up, it becomes apparent that the whole purport is to initiate proceedings against the debtor. Under the old law all his property then became liable to seizure, and the seizure of one property put a constructive seizure on all the properties of the debtor. By this Ordinance the scope is limited to the properties actually seized. The oldest Ordinance is the regulation No. 7 of 1809. Then come rules and orders of 1833. The next Ordinance is No. 2 of 1837, which was continued until 1842.

In No. 1 of 1843 the procedure in the previous regulations was dropped out because the new rules under the Charter of 1833 were in force. That is the procedure that ought now to apply.

The words in section 3 " the further proceedings thereon " refer clearly to the action in view.

[De Sampayo J.—The words refer to the sequestration to follow and not to any further action.]

There is one only question: Did the sequestration issue rightly ?

The Crown has already instituted an action for its claim. It has a certain security, and it cannot now, after the institution of the action, increase the value of the security by seizing other lands. If after execution of the decree there is still a balance due, it can then, like any other creditor, seize other available assets of the debtor.

The further proceedings in section 3 clearly indicate that the Ordinance contemplates the filing of an action.

[De Sampayo J.—Why does the section not go on to say that on the filing of the libel summons should issue and so forth ?]

Because it contemplates that the ordinary provisions of the Civil Procedure Code will apply.

With reference to the provision of the Code under which the respondent might come into Court, the application of the respondent might well come under section 344.

[Elphinstone, K.C., A.-G. (in reply).—There is no provision in the Code by which the present respondent can justify his coming into the present action. Even section 344 does not allow a person not a party to the action to come in and file a motion.]

This is no case to interpret one Ordinance by a prior one for two reasons: First, there is no ambiguity, the words are clear and plain; secondly, the prior Ordinances were not the subject of construction, there is hardly any case-law interpreting them.

1925.

The Attorney-General v. de Croos

With respect to the status of the respondent, it is clear law that such an objection can be taken at any time. The fact that it was not taken at the earliest opportunity may perhaps affect the question of costs.

May 28, 1925. DE SAMPAYO J.—

In this case the question for decision is new and is not easy of solution. It depends upon the true construction of section 3 of the Crown Debtors Ordinance, No. 14 of 1843. The action is one brought by the Attorney-General on two mortgage bonds, on which a sum of Rs. 110,289.27 was claimed from the defendants as balance purchase money due to the Crown in respect of certain arrack rents purchased by the defendants. The action was instituted on February 22, 1924, and decree was entered on February 29, 1924. It being apparently considered, as it in fact eventually proved, that the property mortgaged was insufficient to cover the amount of debt, the Government Agent, purporting to act under section 2 of the Ordinance No. 14 of 1843, caused on March 19 and April 8, 1924, respectively, two seizures to be made of certain other property of the defendants. After those seizures the certificates contemplated by section 3 were filed in Court, and the Court issued the necessary warrants of sequestration which appear to have been executed on April 28 and May 2 and 5, 1924.

Up to this point the proceedings were not questioned by any party. It appears, however, that the property seized was subject to a mortgage in favour of the respondent on this appeal. The mortgage had been effected on July 29, 1922, and decrees had been obtained thereon on December 19 and 30, 1923. The sales under those decrees were carried out on May 2, 3, and 5, 1924. The respondent himself became purchaser and obtained conveyance on July 4, 1924. In this state of facts the respondent intervened in this action on September 26, 1924, and moved that the orders for sequestration above referred to be vacated and the property sequestered be released from seizure. The District Judge after inquiry allowed the motion on the ground which will be presently mentioned, but the Attorney-General at the outset of his argument raised the question whether the respondent had any right to intervene. Counsel for the respondent objected to this question of status being raised, as no objection had been taken in the District Court or in the petition of appeal. But the question not being dependant on the ascertainment of any new facts, but being purely one of law, I think that the Attorney-General is within his rights in raising this question and that we should consider and decide it. The respondent is not a party to the action, and there is no express provision of the law on which a person in his position can rely. If sections 658 and 659 of the Civil Procedure Code, relating to claims to property sequestered before judgment in ordinary civil

actions, are in any way applicable, the respondent can derive no help from them. In the first place, his motion does not amount to a claim, it only raises a question of procedure. Even if it were a claim, it is clear from the above sections that a claim could be preferred only by a person who is or alleges himself to be owner at the time of the sequestration, and from the respondent's own statement of facts we know that at the time of the sequestration in this case the defendants and not himself were the owners. The respondent was then only mortgagee, and there is no provision anywhere enabling a mortgagee to make a claim. Moreover, section 660 expressly conserves the rights, existing prior to the sequestration, of persons not parties to the action. General considerations likewise show that the respondent's intervention is uncalled for. If the sequestration was justified in law, the respondent is not in a position to move to vacate the order, but if it was not, the respondent's remedy must be sought in some form of action against the Crown. On the question of status, I think we must hold against the respondent.

The construction of the Crown Debtors Ordinance, No. 14 of 1843, is a more difficult question. Section 2 authorizes the Government Agent, upon his own knowledge or notice to him of any debt due to the Crown, to seize all and every property of the debtor to an amount sufficient to cover the debt, and section 3, which creates the present difficulty, provides that within seven days after such seizure—

> " A libel or information setting forth the nature and amount of the debt so due to Her Majesty shall be filed in any Court having jurisdiction in the case, and every such Court, upon any such libel or information being filed, together with the certificate of the property seized, signed by the person making the seizure, is hereby required to deliver to the Fiscal warrant to sequester the property of the said debtor, and any further proceedings which may be had thereon shall be according to such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court."

In this case the proctors for the Attorney-General (plaintiff) on March 24, 1924, filed, together with the certificate of the officer who made the seizure, an " information " in the following form:—

> The information of the plaintiff above named . . . . states as follows:—
>
> " 1. The defendants are indebted to His Majesty in the sum of Rs. 110,289.27, with interest thereon . . . . as shown in the plaint filed in this action, being the balance purchase price of the privilege of selling arrack by retail . . . .

1925.

DE SAMPAYO J.

The Attorney-General v. de Croos

"2. Certain property belonging to the first defendant has been seized under section 3 of Ordinance No. 14 of 1843, and certificate of seizure is herewith filed.

"Therefore the plaintiff prays that the Court may be pleased to issue a warrant to the Deputy Fiscal of Negombo under section 3 of the said Ordinance to sequester the said property of the first defendant."

The "information" with regard to the other seizure was in similar form, and both "informations" were filed within the time limited. It will be seen that the Attorney-General's action against the defendants on the two mortgage bonds was instituted, and even decree obtained, before the filing of the information and before the issue of the warrant of sequestration. The intervenient respondent raised the objection, which the District Judge upheld, that the issue of the warrant should have preceded the institution of the action, that the libel or information referred to in section 3 of the Ordinance was in fact to be the pleading which is now generally called the plaint, that the action so commenced should be a preliminary to the sequestration, which in effect amounts to a sequestration before judgment in an ordinary civil action. This objection was maintained before us in appeal and was sought to be reinforced by reference to the earlier enactments providing for the recovery of Crown debts. The earliest enactment was Regulation No. 7 of 1809. It provided for the Collector (corresponding to the Government Agent) seizing property of the Crown debtor, and filing in the Court of Revenue or Provincial Magistrate a certificate of the amount of the debt, and it required the Court or Provincial Magistrate to issue a warrant of sequestration "with a clause of citation to be inserted in such warrant setting forth the said demand and calling on the defendant to show cause why the same should not be decreed against him and the sequestered property sold in satisfaction thereof." There is no doubt that under this enactment the filing of the certificate of the Collector is the commencement of the action and amounts to a "demand," or as we may call it a prayer for relief, and that the warrant itself contains a summons to the defendant upon which a decree for the debt may follow.

This regulation was repealed by the Ordinance No. 2 of 1837, which contained provisions similar to those of the regulation. But after providing for the warrant with a clause of citation, it added "and such further proceedings shall then be had thereon as is now or hereafter may be ordered by any general rule of practice of the Supreme Court relative to revenue cases." Under this Ordinance also the proceedings are of the same nature as under the regulation. This Ordinance was in its turn repealed by the Ordinance No. 1 of 1843, which, as regards the provisions with which we are now concerned, is similar to the existing Ordinance No. 14 of 1843. An important change in the nature of the

proceedings is to be observed in both these latter Ordinances. The warrant of sequestration is no longer to include a clause of citation, nor is the defendant called upon to show cause why a decree should not be entered against him for the amount of debt, nor is the certificate of seizure constituted as the commencement of the action. Was there a change of purpose in the Legislature ? Was it intended to give to the Crown larger privileges for the purpose of recovering debts ? Was the Crown now enabled to seize and sequester the debtor's property at any time, whether before or after the commencement of the action ? The Attorney-General contends that this was the purpose and effect of the later legislation. The District Judge's attention was concentrated on the words " libel or information," which the Crown is to file and after which the warrant of sequestration is to issue. He construes these words to mean what we now understand as the plaint in a civil action. The meaning of " libel " under our old procedure and of " information " is, of course, well known. But are these words used in their technical sense ? There is a good deal in the argument of the Attorney-General that all that was intended was to provide for a formal complaint which was to be the basis for the exercise of the Court's power to issue a warrant of sequestration, and that the case against the Crown debtor was not necessarily to commence with the filing of such a complaint. It is noticeable that as distinguished from the provisions of the regulation No. 7 of 1809 and of the Ordinance No. 2 of 1837, section 3 of the Ordinance No. 14 of 1843 contains nothing relating to the trial of an action on the basis of the " libel " or " information." It merely provides for the issue of a warrant of sequestration without any clause of citation. The section no doubt concludes with the provision that " any further proceedings which may be had thereon shall be according to such general rules of practice as now are or hereafter may be framed by the Judges of the Supreme Court." This is vague, and would be a curious way of saying that the case shall be proceeded with further as in an ordinary civil action. I am inclined to think the proceedings to be had " thereon " refer only to the warrant of sequestration and not to any action supposed to be instituted by the filing of the libel or information. It appears to me that the Ordinance No. 14 of 1843, section 3, contemplated nothing beyond the sequestration of property and any questions arising therefrom.

I would allow the appeal, but without costs, and set aside the order of the District Judge vacating the orders for the issue of warrants of sequestration.

DALTON J.—

An objection has been taken by the appellant that the petitioner (respondent) not being a party to the proceedings, in which the orders for sequestration were made, has no *locus standi*, and cannot

1925.

DALTON J.

The Attorney-General v. de Croos

be heard in the way he has chosen to come. I do not propose to detail the history of the proceedings in the action and sequestrations, which has been fully set out in the judgment of my learned brother, but it seems that after those proceedings the respondent filed a motion, giving notice thereof to the plaintiff in the action (the present petitioner), and asking that the orders for sequestration be vacated, and the properties sequestered be released from seizure.

Now, for the respondent to come into this action in that way, it seemed to me that he must have been acting, as I think he only could act, under some procedure laid down by the Courts Ordinance or Civil Procedure Code or some other Ordinance. After argument I think it was admitted that he had not so acted. He does not rely on any of the provisions of sections 650-661 of the Civil Procedure Code, but we were referred to section 344 as possibly justifying his action. This section clearly does not apply here. We were then told that he was a mortgagee, a mortgage decree holder, and had purchased the property in question. That may well be so, but I am quite unable to see how that entitles him in the absence of any specific authority laid down in rule or Ordinance under the circumstances set out in his affidavit to file a motion in an action to which he is no party as he has done here, nor can I see how the Court had any power to make the order he sought to obtain. Even if this motion can be said to have been made " in the course of an action," just as order LII of the English rules dealing with motions and other applications only applies to motions and applications, which are allowed by the rules or by Statute, so the provisions of section 91 of the Civil Procedure Code can only apply to motions authorized by some section in the Code, or by an Ordinance or other authority. If his rights have been infringed, as his counsel allows, he has ample remedy which he can pursue in the proper way, but nothing I have heard during the course of the argument satisfies me that he had authority or power to act as he has done here.

It is argued, however, on his behalf that no such objection as has been now raised was taken in the Court below, and as this is merely a matter of procedure this Court in its discretion should not now give effect to the objection. If by the use of the words " a matter of procedure " it was sought to be made out that respondent had a right to come to the Court on the proceedings then before the Court, but had chosen the wrong procedure, then I think there might have been some substance in the argument put forward. But respondent was no party to that action; nor has any right that he might have by law to intervene, or any authority of the Court to deal with any such intervention, been brought to our notice. The powers of this Court on appeal are, I understand laid down in section 773 of the Civil Procedure Code, and section 40

of the Courts Ordinance, 1889. Those powers appear to me to be as wide, if not wider than the powers set out in order LVIII, section 41, of the English rules which apply in England, and under the circumstances here I consider reference may be had to English authority. In the often cited case of *Mayor of Norwich v. Norwich Electric Tramways Co.*,[1] it is laid down that a point of this kind can be taken at any time; no question of waiver by the appellant arises. (See also *Civil Procedure Code in British India* by Woodroffe and Ameer Ali, at p. 67.) The case of *Appuhamy v. Nona*[2] does not apply here. The facts are entirely different. It is a case in which a party in the suit wished on appeal to put forward a fresh ground, which had not been put forward when the issues were framed in the Court below.

The objection to the proceedings taken by respondent is, in my opinion, a good one. and the trial Judge should have struck out his motion. This appeal should, in my opinion, be allowed on that ground, and it is not therefore necessary to consider the further questions raised.

In view of the fact that this objection was not raised in the Court below, I would make no order as to the costs of this appeal.

Appeal allowed.