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

1909.
November 12.

DE ALWIS *v.* MURUGAPPA CHETTY.

D. C., Kandy, 18,985.

Wrongful seizure of a person's goods—Liability for damages—Malice—Mistake—Writ—Civil Procedure Code, s. 226.

Where a judgment-creditor procures the seizure of property belonging to a third party against whom there is no writ or warrant, he is liable in damages, whether he acted maliciously or not. It is no defence that the judgment-creditor acted under a mistake.

APPEAL by the defendant from a judgment of the District Judge of Kandy (F. R. Dias, Esq.).

The defendant (appellant) caused the Fiscal to seize the goods belonging to the plaintiff (respondent) under a writ of execution against the plaintiff's father-in-law (Abeyratna). The plaintiff preferred a claim to the goods to the Fiscal, who released the goods on instructions from the defendant. The plaintiff then brought this action against the defendant for damages for the wrongful seizure. Judgment was entered for plaintiff.

The defendant appealed.

Bartholomeuz, for the appellant.—This action must fail, as the plaintiff has not proved malice on defendant's part. Malice cannot be presumed; it must be clearly proved. Counsel cited *Meedin v. Mohideen*.[1] *Moss v. Wilson*.[2]

E. W. Jayewardene (with him *H. A. Jayewardene*), for the plaintiff, respondent.—Plaintiff need not prove malice (*Damodhar Tuljarano v. Lallu Khusaldas*[3]). This being a real injury malice will be presumed (*Voet 47, 10. 7; De Villiers, De Injuriis 73, 76*).

Cur. adv. vult.

November 12, 1909. HUTCHINSON C.J.—

The defendant was a judgment-creditor of D. A. K. Abeyratna, and under a writ of execution against his debtor's goods caused the Fiscal to seize some goods belonging to the plaintiff. The plaintiff preferred to the Fiscal a claim to the goods, and on the same day the goods were, on the defendant's instructions to the Fiscal, released from seizure. The plaintiff then brought this action for damages for the wrongful seizure.

In the plaint he alleged that the defendant had caused the seizure maliciously, and with the object of bringing disgrace on the plaintiff (who was the Interpreter Mudaliyar of the Police Court of Kandy),

[1] *(1897) 3 N. L. R. 27.* [2] *(1906) 8 N. L. R. 368.*
[3] *8 Bom. H. C. 177.*

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well knowing that his debtor (who is the plaintiff's father-in-law) had no property, and that the goods seized belonged to the plaintiff. The defendant admitted the seizure, the plaintiff's claim to the goods, and the release from seizure at the defendant's request, but denied that he knew the goods to be the plaintiff's, or that he acted maliciously and with the object of disgracing the plaintiff and without reasonable and probable cause, or that he suffered any loss or damage in consequence of the seizure; he said that in getting the seizure made he acted *bona fide*, in the well-founded belief that the goods were the property of his debtor, and he asserted that in point of fact the goods belong to his debtor and not to the plaintiff.

Issues were proposed by the defendant's proctor, which included issues as to whether the defendant knew that the goods did not belong to his debtor, and whether he acted maliciously and without reasonable and probable cause; but the issues which the Judge settled were these :—

(1) Did the defendant wrongfully seize the plaintiff's goods under the decree in his action against Abeyratna ?
(2) Was the seizure calculated to disgrace the plaintiff ?
(3) Damages.

There was, therefore, no issue as to malice or as to the defendant's belief that the goods belonged to his debtor; and there was no evidence of malice, except the circumstance that it seemed that he had no reason to believe that the goods were his debtor's. The goods were the furniture in the plaintiff's house, in which he and his wife lived, and the debtor did not live; the defendant had previously had the debtor examined by the Court as to his means; the debtor had sworn on that examination that he had no property, and the defendant had then prosecuted him for obtaining money from him on the false representation that he had property.

The District Judge found that the seizure was wrongful, and that it was calculated to disgrace the plaintiff. He says nothing about malice; but it is evident that he thought that the defendant did not believe that the goods seized belonged to his debtor; he says that there was not the slightest pretence of a justification for the defendant's conduct, and that the plaintiff was entitled to "substantial and vindictive" damages, and he awarded him the full amount of his claim, Rs. 1,000.

The defendant's counsel contends that the action would not lie without proof of malice, and that there was no issue and no evidence and no finding as to malice; that there is no right of action against an execution-creditor who, having a writ of execution against his debtor, by mistake procures the Fiscal to seize goods which belong to some one else.

By section 226 of the Civil Procedure Code the Fiscal, on receiving a writ of execution, is to seize and sell such property of the debtor as

may be pointed out and surrendered to him by the debtor, or, in default thereof, as may be pointed out by the creditor, or as is specified in the writ.

If one seizes A's goods wrongfully and without having any writ or warrant, he makes himself liable to an action for damages. No evidence of malice is necessary, and it is no defence that he acted under a mistake. Does it make any difference if he had a writ for the seizure of B's goods or person and by mistake seized A's ? On principle I should say no. Where A's goods or person are seized under a writ or warrant which authorizes it, the seizure is lawful; there is no right of action for it; but if the writ or warrant was wrongfully obtained from the Court by means of a false representation made maliciously and without reasonable or probable cause, A has a right of action against the person who so obtained it for the wrongful obtaining of it. Where, however, there was no legal authority or justification for the seizure of A's goods or person, it would seem right that he should have an action for damages for the wrongful seizure.

Meedin v. Mohideen [1] and *Moss v. Wilson*,[2] which were quoted to us, were cases of action for damages for wrongful issue of a search warrant; there the search was lawful, being made under the authority of the warrant, and the remedy of the person wronged was against him who procured the issue of the warrant, and he had to show that the defendant acted maliciously and without reasonable and probable cause. But if there was no warrant, or none which authorized the search of the plaintiff's premises, the search would be unlawful and actionable without proof of malice or absence of cause. This distinction is clearly stated in Nathan's *Common Law of South Africa, vol. III., s. 1655*, in a quotation from the judgment of De Villiers C.J. in *Hart v. Cohen*.[3]

The defendant in this case is therefore liable for the wrongful seizure, whether he acted maliciously or not. And in assessing the damages in such a case the Court will properly take into account the position in life of the parties, and the circumstances under which the seizure was made, and whether the defendant acted in good faith or not, and whether the seizure was likely to be an affront to the plaintiff's dignity or to damage his reputation. All this the District Judge has done. I do not think that the damages which he has awarded are excessive, and I would dismiss the appeal with costs.

MIDDLETON J.—

This was an action to recover damages for the wrongful seizure in execution of the plaintiff's goods in his house by a judgment-creditor under a writ of execution authorizing the seizure and sale of the goods of the execution-debtor, who was the father-in-law of the plaintiff.

[1] *(1897) 3 N. L. R. 27.* [2] *(1906) 8 N. L. R. 368.* [3] *16 S. C. 368.*

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Certain issues were proposed by the proctor for the defendant, but the Judge framed the following issues :—

(1) Did the defendant wrongfully seize the plaintiff's property under the decree in case No. 18,682 ?

(2) Was such act calculated to disgrace the plaintiff ?

(3) What damages, if any, is plaintiff entitled to recover ?

If the first issue is read in its etymological sense, it would appear to be unnecessary, for there can be no doubt on the pleadings that the seizure was admitted to be wrongful, but I think the sense in which the issue was framed and agreed to was that it was intended to raise the question whether the seizure was in point of law such a seizure as to make the defendant responsible to the plaintiff in damages.

The District Judge held that the seizure—I still think in the same sense—was wrongful, and on the second issue that it was calculated to disgrace the plaintiff, and entered judgment for the plaintiff for the full amount of damages claimed (Rs. 1,000) and costs.

The defendant appealed, and for him it was contended that the action would not lie without proof of malice, and that the damages in any case were excessive.

I think it is clear on the evidence (1) that the goods were the plaintiff's by virtue of his marriage with his wife, a daughter of the execution-debtor (section 19 of Ordinance No. 15 of 1876) ; (2) that the execution-debtor did not reside in the house in which the goods were seized ; (3) that the goods were seized in the plaintiff's house during his absence, in the presence of his wife ; (4) that the plaintiff's wife on the seizure protested to the judgment-creditor, the defendant here, and to the Fiscal's peon that the goods were the property of the plaintiff ; (3) that the judgment-creditor pointed out the goods to the Fiscal's peon as the property of the judgment-debtor ; (6) that the defendant, if he believed the property to be that of his judgment-debtor in his house, and that he was living here at the date of the judgment in 1907, was strangely and unaccountably blind to his own interest in not seizing the goods ; (7) that the execution-debtor was not present when the writ officer made his seizure.

In the first place, I think this case must be decided on the Roman-Dutch Law. The law as regards false imprisonment, malicious arrest, and malicious prosecution, as followed in the Courts of South Africa, is very fully discussed in Nathan (*vol. III., ch. V., sections 1641–1657*), and many authorities are here quoted. De Villiers, in his book *De Injuriis*, translating and commenting on Voet (*book 47, 10*), defines *injuriæ* (*pp. 23, 26, 27*), and specifies what are known as real injuries (*pp. 73, 76*). It does not seem necessary in every case there should be *animus injuriandi* proved, but if *culpa* is present, arising, for instance, from an aggression

upon a man's right of personal liberty, this would be sufficient. Amongst real injuries, as De Villiers C.J. said in *Hart v. Cohen*,[1] is execution against the goods of a person other than the debtor against whom judgment has been given.

In the present case the act of seizure was committed in effect without judicial process, as the process in the hands of the Fiscal's officer was against the goods of the judgment-debtor and not against the goods of the plaintiff, and as De Villiers C.J. said in the case *ubi supra*, here is on the face of it an illegality for which the owner has his remedy without proof of malice. I think, therefore, the present action can be sustained without proof of malice. In effect it is not only an aggression on the right of property, but it calumniates the character of the person whose goods are seized, and makes it wrongly appear to his neighbours that he is in the position of a debtor who is unable to pay his debts. The measure of damages for such *injuria* must be estimated by the owner's character, position, and dignity (*Nathan, vol. III., p. 1702*). I am by no means disposed to dissent from the learned Judge's inference that the seizure was made with a view to recover moneys due by putting indirect pressure on the relatives of the debtor, or his opinion as to the effect of the seizure on the feelings of a respectable man and his wife, who at this time was in a delicate state of health.

I would affirm the judgment of the District Court and dismiss the appeal with costs.

Appeal dismissed.