APPELLATE CIVIL.

(19)

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

GOMA MAHAD PATIL, PLAINTIFF, *v.* GOKALDAS KHIMJI AND TAPIDAS KHIMJI, DEFENDANTS.*

1878
September 10.

Liability of Execution-creditor in Damages for wrongful Seizure—Attachment of Stranger's Property—Measure of Damages.

Certain unthreshed rice belonging to the plaintiff was wrongfully attached by the defendants under a mony decree obtained by them against a third party. The attachment had been made under a warrant which specified the rice in question, and which had been issued upon a *darkhast* presented by the defendants, in which they prayed for the attachment of this particular rice as their judgment-debtor's property. The rice, while in the custody of a bailiff of the Court *nazir* in the place where it had been attached, was clandestinely threshed and carried off by thieves, who left the straw. In a suit brought by the plaintiff to recover the value of the unthreshed rice from the defendants, both the lower Courts dismissed the plaintiff's claim, on the ground that the theft was not the immediate or probable result of the attachment, and that the conduct of the defendants had not in any way conduced to the loss of the rice.

Held by the High Court, reversing the decrees of the lower Courts, that the defendants were liable. When the wrongful seizure was made at the instance of the defendanst, the plaintiff's cause of action was complete, and was independent of the subsequent occurrence. The theft might have rendered the defendants unable to restore the rice *in specie*, but could not purge, and was no satisfaction of the previous trespass which rendered the defendants liable for the full value of the rice.

The measure of damages should be the value of the rice as it stood at the time of the wrongful attachment made at the instance of the defendants. If, however, the plaintiff accepted the straw left by the thieves, the value of the straw as it stood at the time of such acceptance should be deducted from she value of the straw and rice when unsevered from each other.

Musamat Subjan Bibi v. *Sheikh Sariatulla* (1) commented upon, and partially differed from.

THIS case was referred for the opinion of the High Court by W. M. P. Coghlan, District Judge of Thana, as follows :—

"This action was instituted by plaintiff Goma Mahad Patil to recover from the defendants Rs. 56-4-0, being the value of 75 bundles of unthreshed straw.

"Plaintiff alleged that the said bundles were caused to be attached by the defendants as belonging to their judgment-debtor,

* Civl Reference, No. 4 of 1878.

(1) 3 Beng. L. R. A. J., 413.

one Daya, and that as he *(the plaintiff)* was about to apply to the Court to raise the attachment, the defendants threshed the straw, carried away the rice, falsely stated that it had been stolen, and withdrew the attachment, and that the straw only was afterwards made over to plaintiff by the Court.

"The defendants replied that the rice attached by them belonged to their judgment-debtor, Daya, but that it was forcibly taken while in the possession of the Court's bailiff, and that, therefore, they were not responsible for the claim, and that the rice was worth only about Rs. 25.

"The Subordinate Judge of Alibag (Rav Saheb Narayan Balwant Bhisay) held that the stack belonged to the plaintiff, that the defendants were not responsible to the plaintiff for the loss caused to him by reason of the rice having been stolen, and rejected the claim.

"The Subordinate Judge, however, directed that the defendants should pay all the costs, as they had attached the plaintiff's stack.

"Plaintiff appeals, urging that the lower Court has erred in rejecting his claim for damages sustained by him through the defendants having wrongfully attached his stack.

"The issue for decision is, whether the defendants (respondents) are responsible for the loss consequent on the robbery.

"No other issue is sought. It has been admitted by the pleader for the appellant that the defendants did not make away with the rice, as alleged in the plaint, but that it was stolen, the rice having been threshed by the thieves while it was under attachment and in the custody of a bailiff. I have allowed the plaint to be amended accordingly. This amendment cannot prejudice the respondents (defendants), since it only brings the plaint into accord, as to facts, with their defence.

"I have admitted fresh evidence (exhibits 7 and 8) in order to ascertain whether the attachment was general or special. It appears that it was special.

"I find on the issue that the defendants (respondents) are not responsible for the loss consequent on the robbery.

1878

GOMAMAHAD PATID v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

"The robbery cannot be taken as an immediate or probable result of the attachment; it was the immediate result of failure in due custody for which the *nazir* or other officer of the Court is responsible under section 233 of Act VIII of 1859.

"The defendant (respondents) ought not to be answerable for a remote and unnecessary effect of their act. This is the doctrine laid down in *Mussamut Subjan Bibi* v. *Sheikh Sariatulla*(1) in which the plaintiffs sued for damages consequent on the wrong seizure of cattle and for the value of three bullocks which had died under attachment. It was held (by Norman and Jackson, JJ.) that the plaintiffs were entitled to damages, but not to the value of the dead cattle, because it was not shown that the defendant had caused their death. The loss of the bullocks' services was a necessary consequence; but their unexplained death was not a necessary consequence of the attachment.

"In this case, if the detention of the rice had caused loss to the plaintiff, he might recover damages; but he cannot make the defendants answerable for the loss by the robbery, unless he show (as he has not shown) that their conduct in some way conduced to the robbery. In *damodhar* v. *Lallu*(2) damages were awarded which distinctly resulted from the act of attachment. *Vana* v. *Hata*(3) was also a suit for damages directly consequent on the judgment-creditor's action.

"These cases differ in principle from the present case, in which there is not a necessary connection between the attachment and the loss. When the bundles of rice-straw underwent the form of attachment, they were not moved from the place where plaintiff had put them. All that happened to them was, that they were transferred from the possession of the plaintiff to the custody of the officer of the Court. If may be that if the plaintiff had remained in possession by reason of his care and vigilance, the rice would not have been stolen; but the defendant ought not to be answerable for the bailiff's failure in diligence. I understand Mr. Govind Baba for the plaintiff (appellant) to urge that the attachment having been wrongful, the defendants

(1) 3 Beng. L. R. A. J. 413. (2) 8 Bom. H. C. Rep. A. C. J., 177.
(3) 11 Bom. H. C. Rep. 46.

(respondents) as tort-feasors are liable for the loss from the robbery, because the robbery might not have taken place but for the attachment.

"This argument appears to confuse the *post hoc* with the *propter hoc*. The point in this case must frequently arise in cases before Subordinate Judges which are not carried on appeal to the District Courts, and in others in which no second appeal lies. A reported decision on it by the High Court would be of great convenience.

"I shall, therefore, refer this case to the High Court under section 617 of the Code of Civil Procedure, 1877. Contingent on the opinion of the High Court, I reject the appeal, with costs on the appellant."

Ghanasham Nilkanth Nadkarni appeared for the plaintiff.

Manekshah Jehangirshah appeared for the defendants.

The arguments of the pleaders on both sides, and the authorities bearing on the question referred, are stated in the following judgment of the Court delivered by

WESTROPP, C. J.—The facts of this case are as follow:—Unthreshed rice, the property of the plaintiff, was wrongfully attatched by the defendants under a money decree obtained by them against their debtor Daya. The rice, while in the custody of a bailiff of the Court *nazir*, in the same place in which it had been attached, was clandestinely threshed and carried off by thieves, who left the straw. The attachment had been made under a special warrant naming the rice, which warrant was founded upon a *darkhast* presented to the Court by the present defendants, and which prayed, not the attachment of the moveable property at large of the judgment-debtor, but of the rice, in particular as his property: so the seizure was made at the direct instance of the present defendants.

This action having been brought under those circumstances, the Subordinate and District Judges have held that the defendants are not liable to make good to the plaintiff his loss, but the latter learned Judge has done so subject to the opinion of this Court on the question whether the defendants are so liable or not.

1878

GOMA MAHAD PATIL v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

The parties have not instructed pleaders to argue the point before us; but we are much indebted to Mr. Ghanasham Nilkanth and Mr. Manekshah, who have voluntarily, the former for the plaintiff and the latter for the defendants, addressed to us valuable arguments which have much aided the Court in its consideration of the case.

The argument on behalf of the defendants is that the theft was not a necessary or even probable consequence of the attachment; that the rice was *in custodia legis*, and not in the charge of the defendants at the time it was stolen, and they have not, by any negligence on their part, occasioned the loss, which might have occurred, in the same manner as it did, if the seizure had never been made and the rice had remained in the care of the plaintiff up to the moment of the theft.

To us, however, it appears that the argument for the plaintiff —that, when the wrongful seizure was made at the special instance of the defendants, his cause of action was complete (*Vana* v. *Hata* (1)) and is independent of the subsequent occurrence, seems to be well founded. The theft may have rendered the defendants unable to restore the rice *in specie*, but cannot purge, and was no satisfaction of the previous trespass, which rendered the defendants liable for the full value of the rice, and, therefore, no question of remoteness of damage seems to us, as it did to the learned District Judge, to arise here.

The case of *Keene* v. *Dilke*,(2) although it was an action against a sheriff and not against an execution-creditor, is an important authority in favour of the plaintiff. It was there held that if a sheriff wrongfully seizes the goods of *A*, under a writ of *fieri facias*, upon a judgment against *B*, but does not remove them from the house in which the seizure took place, and while the goods are still in the sheriff's possession they are taken from him by other wrong-doers, *A*, the owner of the goods, may recover, as damages from the sheriff, the amount which she (*A*) was forced to pay to the other wrong-doers in order to get back the goods. For the sheriff his council said: "Though sheriff,

(1) 11 Bom. H. C. Rep. 46

(2) 4 Exch., 388; S. C., 18 L. J. (N. S.) Exch. 440.

the defendant is in this case under no liability as sheriff." Alderson, B., observed that "The case is the same as if the defendant were merely a private person." (1) The sheriff's counsel continued: "The Gas and Water Companies" (the other wrong-doers)"came on the premises, and there seized the goods against the defendant's will. There is no connexion between their wrongful act and the defendant's. The defendant did not cause the goods to be put into their hands. The payment to them was a voluntary payment, and made by the plaintiff in her own wrong as against the defendant. She ought to have brought her action against them, and may still recover the £5-19 from them." But Alderson, B., said: "If the sheriff had not taken the goods, possibly the Gas and Water Companies might never have seized. If you wrongfully take my goods out of my possession, and they are stolen from you, you are bound to recoup me, and recompense me for all the injury occasioned by the taking." And Rolfe, B., added: "If a rich man seizes my goods, and a pauper takes them from him, and runs off with them to America, have I no other remedy than to go to America and sue the pauper there?" Counsel for the sheriff proceeded: "The goods were not removed from the house. The plaintiff was living there all the time, and they were in the defendant's possession only figuratively." Alderson, B., said: "If you remained in the house, and would not let the plaintiff have the goods, it is the same thing as if you had removed them. The sheriff was in possession of them there, and might have maintained an action against a second wrong-doer." Counsel for the sheriff: "It is not because a man is a wrong-doer that he is liable for all consequences. *Vicars* v. *Wilcocks* (2) and *Ward* v. *Weeks* (3) show the principle of law to be that a wrong-doer is not liable for consequences of his act which he has not himself procured." Alderson, B.: "Those cases were cases of slander, and the question was whether the special damage alleged, afforded any cause of action. Here it is only a question as to the amount of damages. You ought to have restored the goods you wrongfully took." (4)

(1) 18 J. L. (N. S.), Exch. 440.
(2) 8 East, 1.
(3) 7 Bing., 211; S. C., 9 L J., C. P., 6.
(4) 18 L. J. (N. S.), Exch. 440, 441.

1878

GOMAMAHAD PATIL v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

The learned District Judge, referring to *Musamat Subjan Bibi* v. *Sheikh Sariatulla*, (1) relies on the circumstances that, although the High Court at Calcutta in that case gave damages for the detention of cattle (bullocks) wrongfully seized, it refused to hold the execution-creditor liable for the value of three of the cattle which had died; and he observes that "the loss of the bullocks' services was a necessary consequence" (of the wrongful seizure at the instance of the judgment-creditor), "but their *unexplained* death was not a necessary consequence of the attachment." In so much of that decision as awarded damages for the detention of the illegally-seized cattle, all of which, with the exception of the three bullocks which died while *in custodia legis*, were restored to the rightful owners, we, as already observed in *Vana* v. *Hata*,(2)fully concur. But, now that our attention has, by the District Judge, been specially directed to the refusal of the High Court of Calcutta to award also to the plaintiffs in that case the value of the three bullocks which died, we feel compelled to say that we respectfully differ from that portion of the decision. The High Court appeared to regard it as a burden cast upon the plaintiffs to show that those bullocks met their death in such a manner as to render the defendants responsible for their value. To us, however, it seems to be clear that the High Court having been satisfied that the original seizure was wrongful, and made at the instance of the defendants, the cause of action of the plaintiff was complete, and the burden lay upon the defendants to show, if they could, how they became exonerated from their liability, either in part or in whole, in respect of that cause of action. The circumstance, that the bullocks were in the custody of the officer of the Court at the time of their death, did not relieve the defendants from that burden. It was at the instance of the defendants that the cattle had been taken out of the custody of the rightful owners and placed in that of the officer of the Court. Norman, J., seemed to think that, inasmuch as the bullocks died after the owners had preferred a claim under section 246 of Act VIII of 1859, and the plaintiffs might have obtained an order under section 92 of the same Act for the safe custody of the cattle pending the decision of their claim, the custody of the officer

(1) 3 Beng. L. R., 113. (2) 11 Bom. H. C. Rep., 46, 58.

of the Court ought to be taken as that of a person to whom the cattle were entrusted for safe keeping pending the decision of the claim under section 246 ; and, therefore, that the defendants could not be made responsible for any damage to the cattle while in such custody after the claim had been preferred, unless occasioned by negligence or improper conduct of the officer of the Court, and referring to *Walker* v. *Olding*(1) expressed a doubt as to the liability of the defendants even if there were such negligence or misconduct of such officer.(2) However, whether such an order under section 92 for safe custody, as Norman, J., mentioned, could properly have been made at the instance of an intervenient under section 246, is in itself a questionable proposition. That section is conversant of property in dispute in a suit. The suit there was ended ; the dispute arose in the course of execution of the decree made in it, and, as a matter of fact, the intervenient, the owners, had not obtained or applied for any order under section 92, and, so far as we can gather from the report, no order had been made or warrant issued in relation to the custody of the cattle other than the original order and warrant under which the wrongful attachment had been made at the instance of the defendants, and we do not know of any authority for saying that the Court is at liberty to presume that any fresh order had been made where there is not any basis of fact for such an assumption. The bullocks where, at and after the making of the claim under section 246, in custody under the same order and warrant at the attachment had been made, and no other. The nature of the custody had not undergone any change from what it was before the claim under that section had been made. The case of *Walker* v. *Olding*, referred to by Mr. Justice Norman, does not appear to us to lend any support to the decision as to the three bullocks which died. In *Walker* v. *Olding*, after the wrongful seizure of the goods and after the true owner had given notice of his title to the sheriff, the execution-creditors and their attorney, and after the sheriff had taken out a summons of interpleader under the Interpleader Act,(3) which is an enactment for the protection of sheriffs and their officers, the Judge made an order of the 21st June, 1861,

(1) 1 H. & C. 621 ; S. C., 32 L. J. Exch., 142.

(2) 3 Beng. L. R., 419.

(3) 1 & 2 Wm. 4, c, 58, s. 6.

1878

GOMA MAHAD PATIL v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

that if the claimant of the goods paid a certain sum into Court, or gave security to that amount within a specified time, the sheriff should withdraw from the possession of the goods; but, in default of such payment being made or security given, he should proceed to sell the goods and pay the proceeds of sale into Court.[1] The same order contained the direction that the claimant of the goods and the execution-creditors should interplead. The claimant of the goods neither paid the money into Court, nor gave the security. The sheriff thereupon sold the goods, and paid the proceeds into Court. Ultimately, the claimant having established his title to the goods in the interpleader matter, those proceeds were paid over to him, but were less than the real value of the goods. The question, then, was whether the execution-creditors were liable to pay to him, as damages, the difference between the proceeds of sale and the real value of the goods. Pollock, C.B., said: "Now up to the time of the interpleader order" (*i.e.*, the order of the 21st June, 1861), "all the damage sustained by the plaintiff" (the owner) "is caused by the defendants, who up to that time are, with the sheriff, joint trespassers and wrong-doers. But on the making of the interpleader order the case is different. That order, and what is done under it, are the consequence of the claim of the plaintiff, the interpleader summons of the sheriff, and the decision of the Judge thereon," and, accordingly, it was held that the plaintiff was entitled to damages only up to the time of the interpleader order, and, therefore, not to the difference between the proceeds of sale and the full value of the goods. It should be observed that the direction to sell, contained in the interpleader order, is one which the Judge was expressly authorized by the then recent Stat. 23 and 24 Vic., c. 126, s. 13, to make in interpleader matters. It is not very easy to perceive how the execution-creditor in the Calcutta case could properly have escaped either wholly or partially from liability to compensate the owner of the three bullocks in respect of their value, except by showing either that some act of the owner, while those bullocks were *in custodia legis*, occasioned their death—an improbable occurrence, or that, at the time of the wrongful seizure, they were already stricken by the fatal disease of which they afterwards died. This latter supposed circumstance could

only be given in evidence as affecting the value of the bullocks, and so in mitigation of damages; and the execution-creditor would still remain liable to pay damages equal to the value at the time of the seizure, very much reduced as much value would, no doubt, no be in such a state of facts.

In the present case the *nazir* has not been sued. Even if he be responsible for the loss of the rice, it would not thence follow that the execution-creditors would not be so likewise. The authorities show that frequently both the sheriff and execution-creditors are open to suit in respect of a wrongful seizure and its consequences. In this case the execution-creditors are so, the seizure having been made at their instance. The learned District Judge has referred to section 233 of Act VIII of 1859 as fixing in this case the responsibility of due custody on the *nazir*. That section, however, speaks only of property seized when "in the possession of the defendant," *i. e.* the defendant in the suit under the decree in which the seizure was ostensibly made. The District Judge has not stated that the rice was in the possession of Daya, the defendant in that suit, at the time of the wrongful seizure.

We reverse the decrees of the Subordinate Judge and of the District Judge, except so far as those decrees awarded the costs of the suit to the plaintiff, and also except so far as the District Judge referred the case for the opinion of this Court. We direct the District Judge to assess the damages to be awarded to the plaintiff Goma Mahad Patil, and we order the defendants to pay the costs of the suit and appeal and of this reference, if any.

The measure of damages should be the value of the rice as it stood at the time of the wrongful attachment made at the instance of the defendants.(1) The plaintiff was not bound to accept the straw left by the thieves when the stole the rice, severed as that straw had been from the rice. If, however, he did accept the straw, that circumstance may be received in mitigation of damages, and the value of the straw as it stood *at the time of the such acceptance (if any)* should be deducted from the value of the rice and straw when unsevered from each other at the time of the laying on of the attachment.

(1) Mayne on Damages, 3rd ed., 362. 2nd ed., 308; and see *Reid* v. *Fairbanks*, 3 C. B., 692; S. C. 22 L. J. C. P., 206; and *Edmondson* v. *Nuttall*, 17 C. B. N.S. 280; 34 L. J. C. P., 102, which were actions of trover.

1878

GOMA MAHAD PATIL v. GOKALDAS KHIMJI AND TAPIDAS KHIMJI.

We may mention that the cases of *Khema* v. *Degumiya*(1) and *Tamizuddin* v. *Nyantulla*(2) do not conflict with our views, as those cases substantially rest upon the fact that in them one moiety of the undivided property, the whole of which was attached, belonging to the execution-debtor, and in such cases the whole of the property may be attached, although only the undivided moiety belonging to the execution-debtor may be sold.(3)

Decrees reversed.

(1) Civil Reference, No. 28 of 1872, unreported.

(2) Reng. L. R., Appx., 73.

(3) 4 Com. Dig. by Hammond, Tit, Execution, c. 4, p. 233 *et ibi* note *e*, and the authorities there cited.

APPELLATE CIVIL.

(20)

Before Mr. Justice West and Mr. Justice Pinhey.

1879
November 21.

PHATE SAHEB BIBI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DAMODAR PREMJI (ORIGINAL DEFENDANT), RESPONDENT.*

Mahomedan Law—Wakf—Mutawalli—Right to sue.

A Mahomedan of the Shafi sect by a deed of settlement executed in 1838, called a *wakfnama*, settled moieties of his estate on his two wives, their daughters, and the descendants of the donees in each line so long as it should subsist, with cross remainders, on the extinction of either line, to the representative of the other, with final remainders, on the extinction of both, to the heirs of the settlor. The settlor constituted himself the *nazar* or *mutawalli* (superintendent or trustee) of the estate during his life, and nominated *A* and *B* to act as much after his death with the consent of his wives. In 1840 the settlor died; *A* died in 1865; *B* survived. The wives and daughters of the settlor also died.

The representatives of one of the settlor's daughters sued the defendant to recover a part of the estate, which had been sold to him by the Civil Court, as the property of another of the daughters, on the ground that the estate on the death of that daughter passed as *wakf* to her surviving sister:

Held that supposing the *wakf* to have been validly created, the right to bring the suit belonged (according to Mahomedan law) not to the heirs or descedants of the settlor, but to the *mutawallis* (superintendents) jointly. On the death of one of the *mutawallis*, a successor to him should have been appointed in the first place by the settlor, and failing him by his executor, if he had appointed any; otherwise by the Court on the application of the parties beneficially interested in the estate.

Quære— Whether a *wakf* could be created for the purpose merely of confering a perpetual and inalienable estate on a particular family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries,

*Second Appeal, No. 279 of 1878.