MATADIN MAHARAJ *v.* MUNNALAL MAHARAJ & OR.

[Civil Jurisdiction (Corrie, C. J.) December 21, 1936.]

Bill of Sale—Chattels removed from premises by grantor—no allegation that removal fraudulent—whether a breach of covenant conferring right of seizure and sale—conflicting clauses in document—partly written, partly printed—construction—ownership of goods—whether plaintiff in tort estopped by Bill of Sale.

The plaintiff and one Ram Narain, had executed a Bill of Sale over furniture in favour of Munnalal, the defendant. The plaintiff removed the furniture from the house he occupied at the time of executing the Bill of Sale and within seven days of such removal the defendant, Munnalal, seized and sold the chattels. The Bill of Sale contained conflicting clauses as to when the power of seizure and sale became exercisable—a printed clause provided for exercise at any time after default and a typed clause for exercise " upon—such default continuing for the space of seven days ".

The plaintiff sought to establish that he was in fact the sole owner of the chattels, which was contrary to the tenor of the Bill of Sale.

[**EDITORIAL NOTE.**—Ram Narain was originally a co-plaintiff in this action but on his application his name was struck out as co-plaintiff. He was then joined as a co-defendant against whom no relief was sought.]

HELD.—(1) In case of conflicting parts of a document which is partly printed and partly typed the printed part must be rejected in construing the document.

(2) A party to a deed is not estopped by the recitals of the deed if his action is not founded in the deed (though the recitals would be evidence).

Obiter Dictum.—In Fiji any removal of goods by the grantor of a Bill of Sale in breach of covenant, even though not fraudulent, confers upon the grantee the right to seize and sell.

Cases referred to :—

(1) *Robertson v. French* [1803] 4 East 135 ; 102 E.R. 779 ; 17 Dig. 249.

(2) *Glynn v. Margetson & Co.* [1893] A.C. 351 ; 62 L.J.Q.B. 466 ; 69 L.T. 1 ; 9 T.L.R. 437 ; (1892) 1 Q.B. 337 ; 17 Dig. 350.

(3) *North & South Insurance Corporation Ltd. v. National Bank Ltd.* [1935] 52 T.L.R. 71.

(4) *Carpenter v. Buller* [1841] 8 M. & W. 209 ; 10 L.J. Ex. 393 ; 151 E.R. 1013 ; 21 Dig. 280.

(5) *Carter v. Carter* [1857] 69 E.R. 1265 ; 27 L.J.Ch. 74 ; 21 Dig. 208.

ACTION for damages for trespass, wrongful seizure, detention and sale of goods. The facts fully appear from the judgment.

R. D. Bagnall for the plaintiff.

S. Hasan for Munnalal Maharaj the first defendant.

No appearance by the second defendant.

CORRIE, C.J.—This is an action for damages for trespass, wrongful seizure, detention and sale of the goods and chattels of the plaintiff, Matadin Maharaj.

The objection set up by the defendant Munnalal Maharaj—who is the plaintiff's brother—is that the acts complained of were done in exercise of powers conferred upon the defendant by clause 7 of a Bill of Sale executed on the 26th July, 1935, to which the parties were the plaintiff and the defendant Ram Narain (therein described as the mortgagors) of the one part and the defendant Munnalal (therein described as the mortgagee) of the other part.

The defendant Ram Narain has not entered an appearance.

The grounds upon which the defendant Munnalal claims that his powers under clause 7 of the Bill of Sale have become exercisable are :—

(1) That the plaintiff removed his furniture from the house in Spring Street where he was residing when the Bill of Sale was executed without the defendant's permission in breach of clause 9 of the Bill of Sale.

(2) That a table subject to the security created by Bill of Sale has disappeared.

In reply the plaintiff maintains :—

(1) That he was compelled to leave the house in Spring Street, which was the property of the defendant Munnalal, as the defendant on the 21st August, 1935, gave him notice to quit by the 1st September.

(2) That the table subject to the Bill of Sale was a marble topped table which was at all material times and still is in the plaintiff's possession.

The defendant Munnalal denies that he gave the plaintiff notice to quit : and alleges that the table subject to the Bill of Sale was a dressing table.

On both these issues of fact there is a conflict of evidence.

It is to be noted that the defendant does not allege that the removal by the plaintiff of the goods was fraudulent.

The law of this Colony, however, does not contain any equivalent to s. 7 of the English Bills of Sale Act (1878) Amendment Act 1882: and hence any removal of goods by a grantor under a Bill of Sale in breach of a covenant to the contrary, even though not fraudulent, confers upon the grantee the right to seize and sell the goods included in the Bill of Sale.

In his closing address counsel for the plaintiff advanced the further argument that the seizure was unlawful in that it was not made in conformity with clause 14 of the Bill of Sale.

Briefly the argument is that while by clause 7 the mortgagors authorise the mortgagee after default by the mortgagors to seize and sell the mortgaged chattels—

> " and for that purpose to *at any time after such default* enter into
> " and upon and take possession of any premises in which the same
> " or any part thereof may be ;"

Clause 14 declares that the mortgagee shall be entitled to exercise the right of seizure and sale in the event of the mortgagors making default—

> " in the observance or performance of any of the covenants herein " contained *and such default continuing for the space of seven* " *days* ".

Now the defendant Munnalal does not allege any default by the plaintiff earlier than the 1st September, 1935, and it is common ground that seizure was effected on the 4th September.

Hence, if the plaintiff's contention is well founded, the seizure was unlawful. So far as they relate to seizure and sale upon breach of a covenant, other than one for the payment of instalments the provisions of the two clauses of the Bill of Sale are clearly irreconcilable.

The Court has therefore to decide which of the two clauses is to be held to govern the other.

The Bill of Sale is drawn up on a printed form, in clause 7 of which the printing stands unaltered. Clause 14, however, does not form part of printed matter, but has been typewritten at the end of the print.

It would appear therefore that clause 14 was inserted by the parties with the intention that it should govern the earlier provisions of the Bill. And there is authority for adopting this construction of the Bill of Sale.

The rule which was laid down by Lord Ellenborough in 1803 in *Robertson v. French*, (4 East at p. 135) in relation to a policy of assurance and cited and relied upon by Lord Halsbury in relation to a Bill of Lading in *Glynn v. Margetson* [1893] Appeal Cases 351 at p. 357 has recently been stated by Branson J. in *North & South Insurance Corporation Ltd. v. National Provincial Bank Ltd.* [1935] 52 Times Law Reports 71 in the following words:—

> " Where a document was partly written and partly printed, if the " printed and written parts were not consistent with one another, " the printed part must be rejected in favour of the written part ".

Applying this rule, it follows that the provisions of clause 14 must be observed ; and as the plaintiff's alleged default could not have continued for the period of 7 days prescribed by that clause, the defendant's right of seizure and sale had not arisen: there is thus no occasion for the court to determine whether the plaintiff had or had not made default in the fulfilment of his obligations under the Bill of Sale.

It is a matter for comment that plaintiff's counsel did not advance this argument at an early stage of the proceedings : had he done so the Court and the parties would have been spared the necessity of hearing lengthy evidence and a considerable saving of time would have been effected.

There remains the question of the measure of damages.

Arguments have been addressed to the Court and evidence has been tendered to show that the plaintiff was the sole owner of all the chattels sold and that the defendant Ram Narain joined in the Bill of Sale merely on the ground that the motor lorry was registered in his name.

The defendant Munnalal, while admitting in the first paragraph of his defence that the chattels comprised in the Bill of Sale belonged to the plaintiff and the defendant Ram Narain jointly, argues that the plaintiff is estopped from alleging anything contrary to the Bill of Sale.

The rule as to estoppel by deed, however, laid down in *Carpenter v. Buller* (8 Meeson and Welsby 209) cited and followed in *Carter v Carter* (69 English Reports at p. 1268), is thus laid down:—

> " But there is no authority to show that a party to the instrument " would be estopped in an action by the other party not founded in " the deed and wholly collateral to it to dispute the facts so admit- " ted, though the recitals would certainly be evidence ".

In the present action the plaintiff is not suing under the Bill of Sale but in tort : and hence cannot be estopped by the terms of the instrument.

The defendant, however, can rely upon the Bill of Sale as evidence ; although it contains no recital as to ownership, he is entitled to ask the Court to hold that no evidence has been led for the plaintiff sufficient to rebut the presumption that where two persons mortgage chattels as security for a loan they own the mortgaged chattels in equal shares.

I hold that the plaintiff has not established that he was sole owner of the chattels in question ; and I therefore find for the purposes of this action that the plaintiff was owner of one half of the lorry and of the other chattels comprised in the Bill of Sale and sold under instructions from the defendant.

Upon the evidence before the Court I further hold that the prices realised at the auction sale fairly represented the value of the chattels.

The total amount realised was £57 6s. od.; and hence the plaintiff is entitled as special damages under this head to one half of that sum, namely £28 13s. od.

The plaintiff also claims as special damages £7 for loss of profits on the lorry from the 4th to the 12th September.

In the absence of evidence as to his earnings before the seizure, I am not prepared to award the plaintiff more than £2 under this head.

The plaintiff further claims £25 as general damages.

It is clear that the plaintiff is entitled to be compensated for the inconvenience he suffered by being deprived of the use of the furniture. No principle has ever been laid down governing the award of such damages.

Taking all the circumstances into consideration, I hold that the plaintiff should be allowed the sum of £5 as general damages.

Accordingly I find in favour of the plaintiff for £35 13s. od.

The defendant, Munnalal, will pay the costs of these proceedings.