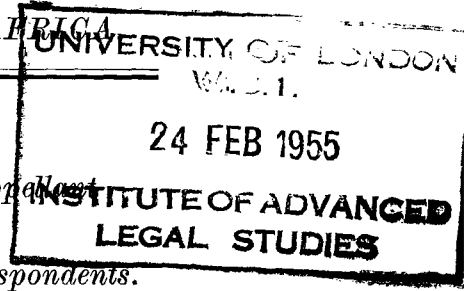


# In the Privy Council.

## ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN  
DYAL SINGH . . . . . Appellant  
AND  
KENYAN INSURANCE LIMITED . . . . . Respondents.



### Case for the Respondents.

37713

RECORD.

10 1. This is an appeal from a Decree, dated the 10th April, 1952, of the Court of Appeal for Eastern Africa (Nihill, P., Worley, V.-P., and Thacker, J.), dismissing an appeal from a judgment, dated the 14th June, 1951, of the Supreme Court of Kenya (Bourke, J.), declaring in answer to a question in a Case stated for the decision of the Supreme Court that the Appellant had not secured a clear title to a certain motor omnibus and the Respondents retained their interest and rights under a mortgage of that omnibus.

2. The following statutory provisions are relevant to this appeal:—

“ Bankruptcy Ordinance

20 Effect of Bankruptcy on Antecedent and Other Transactions.

44.—(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor.

30 (2) For the purposes of this Ordinance, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the bailiff shall, in all cases, acquire a good title to them against the trustee in bankruptcy.

45.—(1) Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the bailiff that a receiving order had been made against the debtor, the bailiff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.

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(2) Where, under an execution in respect of a decree for a sum exceeding four hundred shillings, the goods of a debtor are sold or money is paid in order to avoid sale, the bailiff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the bailiff has notice, the bailiff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution-creditor.

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(3) Where any goods in the possession of an execution-debtor at the time of seizure by a bailiff are sold by such bailiff without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to such goods, and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority, for any sale of such goods or for paying over the proceeds thereof prior to the receipt of a claim to such goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution-debtor.

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Provided that nothing in this subsection contained shall affect the right of any claimant, who may prove that at the time of sale he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff."

" Chattels Transfer Ordinance.

2. In this Ordinance, unless the context otherwise requires—

\* \* \* \* \*

'instrument' means any instrument given to secure the payment of money or the performance of some obligation and includes any bill of sale, mortgage, lien, or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or lease" [and certain other documents not material to this appeal].

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“ Registration.

4. All persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Ordinance :

Provided that if registration of such instrument is not renewed pursuant to the provisions of this Ordinance, prior registration shall not be deemed to operate as notice after the lapse of the period within which renewal is required by this Ordinance.”

\* \* \* \* \*

“ Effect of Non-Registration.

10 13.—(1) Every instrument, unless registered in the manner hereinbefore provided, shall, upon the expiration of the time for registration, or if the time for registration is extended by the Supreme Court, then upon the expiration of such extended time, be deemed fraudulent and void as against—

- (a) the official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in any such instrument ;
- (b) the assignee or trustee acting under any assignment for the benefit of the creditors of such person ;
- 20 (c) any person seizing the chattels or any part thereof comprised in any such instrument, in execution of the process of any Court authorizing the seizure of the chattels of the person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued ;

30 so far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument which, at or after the time of such bankruptcy, or of the execution by the grantor of such assignment for the benefit of his creditors, or of the execution of such process (as the case may be), and after the expiration of the period within which the instrument is required to be registered, are in the possession or apparent possession of the person making or giving the instrument, or of any person against whom the process was issued under or in the execution of which the instrument was made or given, as the case may be.

(2) So long as an instrument continues to be registered hereunder, the chattels comprised in that instrument shall not be deemed to be in the possession, order or disposition of the grantor, within the meaning of the Bankruptcy Ordinance.

40 14. No unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any bona fide purchaser or mortgagee for valuable consideration, or as against any person bona fide selling or dealing with such chattels as auctioneer or dealer or agent in the ordinary course of his business.”

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“ Sale of Grantor’s Interest.

39.—(1) Where legal process issues against the chattels of a judgment-debtor for the execution of a judgment of any Court, and the said chattels, or any of them, are comprised in any instrument under this Ordinance, the officer charged with the execution of the process may, in lieu of seizing and selling the chattels so comprised, sell the right, title and interest of the judgment-debtor in the same.

(2) The grantee of the instrument, on receiving notice of the purchase of that right, title and interest, may take possession of the chattels comprised in the instrument. 10

(3) A grantee so taking possession shall be deemed to hold the chattels in trust for the purchaser of the said right, title and interest, subject to payment of all moneys due under the instrument.

(4) If the chattels are afterwards sold under the power of sale expressed or implied in the instrument, and any surplus remains out of the proceeds of the sale after payment of all moneys due under the instrument, the grantee shall on demand pay over that surplus to the purchaser of the said right, title and interest.

(5) If the grantee makes default herein, the purchaser may bring an action against him to recover the surplus, as money 20 received to the use of the purchaser.”

“ Civil Procedure (Revised) Rules, 1948,O. XXI, r. 53.

Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of Court of the proceeds of sale of such property give notice in writing to the Court of his objection to the attachment of such property.”

3. On the 22nd August, 1950, the Appellant and the Respondents, pp. 1-3. in accordance with certain provisions of the Civil Procedure Rules of Kenya, 30 stated a Case for the decision of the Supreme Court of Kenya. This Case set out the following facts : On the 3rd February, 1948, the Court Broker at Nairobi sold by public auction a certain passenger body International lorry. The sale was held under an order made by the Supreme Court in civil case No. 212 of 1947. The Appellant bought the lorry at the sale for Shs.2,000/-. He subsequently spent about Shs.7,000/- on putting it in running order, got a Passenger 'Bus Licence, and ran the omnibus between Nairobi and Limuru. On the 29th April, 1950, the Respondents seized the omnibus, claiming to be entitled to do so under a chattels mortgage in their favour dated the 12th October, 1946, made by the 40 judgment debtor in civil case No. 212 of 1947. This mortgage was duly registered in accordance with the Chattels Transfer Ordinance, and the Respondents alleged that the loan of Shs.3,600/- and interest secured by it remained unsatisfied.

4. The contentions and question set out in the Case were as follows : p. 2, ll. 21-34. The Respondents alleged, relying on s. 4 of the Chattels Transfer

Ordinance, that the Appellant must be presumed to have constructive notice of the mortgage because of its registration; furthermore, the Court Broker could not pass a better title to the omnibus than the judgment debtor had. The Appellant alleged that he had acquired a perfect title to the omnibus because he had bought it, not the judgment debtor's right, title or interest in it, at a public auction conducted under an Order of the Court; he could not be presumed to have constructive notice of the mortgage, because the sale was conducted under that order after due publication; the Respondents could have moved the Court for a stay of the execution proceedings, and by failing to do so had waived their right to enforce their security against the omnibus; the Appellant relied on s. 39 (1) of the Chattels Transfer Ordinance and O. XXI, r. 53 of the Civil Procedure Rules. The question before the Court was whether the Appellant had secured a clear title to the omnibus, or the Respondents had an enforceable security against it.

5. The Case was argued in the Supreme Court before Bourke, J., on the 13th April, 1951, and the learned Judge delivered a reserved judgment on the 14th June. He said that Counsel for the Appellant had based his case on s. 45 (3) of the Bankruptcy Ordinance. The Respondents relied on ss. 4 and 39 of the Chattels Transfer Ordinance. It was evident from *Curtis v. Maloney* [1951] 1 K.B. 736—a decision on the English section equivalent to s. 45 (3)—that the Respondents could not have established a claim against the Appellant if they had been the original true and legal owners of the omnibus. It was argued that s. 45 (3) must *a fortiori* have the same effect against the holder of an interest under a charge, and that would be so if there were no relevant statutory provision. The object of s. 45 (3) was to protect a purchaser for value without notice against the legal owner, but in the present case it was not a matter of protecting an innocent purchaser, because under s. 4 of the Chattels Transfer Ordinance the Appellant had to be deemed to have had notice of the charge. Section 39, moreover, provided for the sale of a judgment debtor's interest in a chattel. The learned Judge decided that the Appellant had not received a clear title, and the Respondents retained their interest and rights under the mortgage.

6. The Appellant appealed to the Court of Appeal for Eastern Africa. His memorandum of appeal, dated the 4th August, 1951, raised the following grounds—

(i) that the Respondents were the true and legal owners of the omnibus, their ownership being only defeasible by condition subsequent, and the learned Judge erred in restricting the meaning of s. 45 (3) of the Bankruptcy Ordinance to "original," as distinct from "derivative," true and legal owners;

(ii) that s. 45 (3) required proof of actual notice, not notice imputed by a statute; s. 4 of the Chattels Transfer Ordinance, in so far as it imputed to everybody notice of a registered charge, was in conflict with the Bankruptcy Ordinance, and the Bankruptcy Ordinance, being the later enactment, prevailed.

7. The appeal was heard on the 18th March, 1952, and judgment was delivered on the 10th April. Worley, V.-P., set out the relevant

p. 14, l. 26-  
p. 15, l. 24.

p. 15, l. 25-  
p. 16, l. 42.

p. 16, l. 43-  
p. 17, l. 27.

p. 17, l. 28-  
p. 18, l. 5.

p. 18, ll. 6-23.

p. 18, ll. 24-48.

p. 19, ll. 1-11.

p. 19, ll. 12-18.

p. 19, ll. 19-37.

p. 19, ll. 38-46.

p. 19, l. 47-  
p. 20, l. 44.

sections, and said the question was whether the notice imputed by s. 4 of the Chattels Transfer Ordinance was notice for the purposes of s. 45 (3) of the Bankruptcy Ordinance; alternatively, whether on a sale by a bailiff, no claim having been made to the goods sold, this notice put a purchaser upon his inquiry as to the existence of a registered instrument affecting the goods. The learned Vice-President then summarised the contents of the Case stated, the judgment of Bourke, J., and the grounds of appeal. He showed, by referring to the history of the legislation, that s. 45 (3) of the Bankruptcy Ordinance was in fact an earlier enactment than s. 4 of the Chattels Transfer Ordinance. A serious consequence of Bourke, J.'s decision was that the statutory notice, if it was to be imputed to a purchaser, must likewise be imputed to the bailiff. This would cast an exceptional burden on the bailiff, and an interpretation leading to such a consequence would require very careful consideration. It might be thought that the proviso to s. 45 (3) would protect the bailiff even if he had notice, but that this was not so appeared from the words of McCardie, J., in *Jones Bros. (Holloway) Ltd. v. Woodhouse* [1923] 2 K.B. at p. 126—a decision on the corresponding English section, i.e. the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15. Passing to the first ground of appeal, the learned Vice-President said Bourke, J., had not fully appreciated the position of a grantee under a chattels mortgage. Such a grantee was the true owner for the purposes of s. 45 (3) of the Bankruptcy Ordinance. This, however, had not affected the learned Judge's decision, because his real *ratio decidendi* was that s. 4 of the Chattels Transfer Ordinance fixed the purchaser with notice. This was the real issue. Counsel for the Appellant had argued that s. 4 of the Chattels Transfer Ordinance only affected that Ordinance; further s. 45 (3) of the Bankruptcy Ordinance specifically protected a purchaser, and the words "no person" in that subsection must cover a grantee under an instrument. Section 39 of the Chattels Transfer Ordinance was of little help, because it applied only when the bailiff had actual notice of a registered instrument. It had also been said that in the absence of express provision the Bankruptcy Ordinance was intended to prevail over the Chattels Transfer Ordinance, but an examination of the Ordinances showed that this view was fallacious. Counsel for the Respondents had argued that the expression "all persons" in s. 4 of the Chattels Transfer Ordinance must receive its ordinary meaning; there was no repugnance between the two Ordinances, because proof of a registered instrument was proof that notice had been given. The learned Vice-President concluded that the Respondents' point of view should prevail. One of the main purposes of the Chattels Transfer Ordinance was to facilitate loans on the security of chattels by giving a very high degree of security to a lender who registered his instrument. To limit s. 4 to matters arising under the Ordinance would tend to defeat the purpose of the section. The general rule of common law was that nobody could give a better title than he had; s. 4 did not weaken that rule, but strengthened it. Section 45 (3) of the Bankruptcy Ordinance created an exception to the rule, but the legislature must have had that in mind in enacting the Chattels Transfer Ordinance. If an exception to s. 4 in favour of the purchaser of the goods of a judgment debtor had been intended, it would have been specifically enacted. Accordingly, the appeal should be dismissed with costs.

8. Nihill, P., and Thacker, J., both said that they agreed with p. 21.  
Worley, V.-P., and had nothing to add.

9. The Respondents respectfully submit that s. 45 (3) of the Bankruptcy Ordinance, even without its proviso, would give no protection to a person buying goods from a bailiff with knowledge that they were not the property of the execution debtor. The qualification, "unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution-debtor," relates to the provision that the purchaser shall acquire a good title as well as to the provision that no person shall be entitled to recover against the bailiff, etc. ; the purchaser is affected by notice just as the bailiff and his agents are. The section is interfering with rights of property, and any other construction would lead to a greater interference with such rights than the clear meaning of the words requires. The section read complete with the proviso leads yet more plainly to this result ; for the effect of the proviso is that anyone with a title to the goods sold, such as the Respondents had in this case, retains his remedies against any person except the bailiff unimpaired by the operation of the section.

10. The Respondents respectfully submit that the natural meaning of s. 4 of the Chattels Transfer Ordinance is that registration of an instrument is to operate as notice to everybody, and such notice is to be just as effective as actual notice would be. There is no reason for cutting down the ordinary meaning of the words, and this construction is supported by ss. 13 and 14 of the Ordinance.

11. The Respondents respectfully submit that the decree of the Court of Appeal for Eastern Africa is right and ought to be affirmed, and that this appeal should be dismissed with costs, for the following, amongst other

### REASONS

- (1) BECAUSE on a sale or purported sale by a bailiff of goods alleged to be the goods of an execution debtor a purchaser with notice that the goods are not the property of the execution debtor acquires no title thereto.
- (2) BECAUSE the Appellant when he purported to buy the Respondents' omnibus from the bailiff had notice or must be deemed to have had notice that the omnibus was not the property of the execution debtor.
- (3) BECAUSE of the other reasons set out in the judgments of Bourke, J., and Worley, V.-P.

FRANK GAHAN.

J. G. LE QUESNE.

In the Privy Council.

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ON APPEAL

*from the Court of Appeal for Eastern Africa.*

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BETWEEN

DYAL SINGH . . . *Appellant*

AND

KENYAN INSURANCE  
LIMITED. . . *Respondents.*

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**Case for the Respondents**

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