

attorneys-at-law wrote the bailiff informing him of the claimants' interest under a bill of sale in certain of the goods taken in execution. The bill of sale did not secure the motor cars, finished goods and raw materials and certain items of office equipment, furnishings and fixtures; it covered the furniture in the chairman's office and the factory machinery, equipment and fittings. The bill of sale was executed on the 1st December, 1983 and was duly registered in accordance with S93(1) of the Companies Act.

The bailiff did not release to the claimants the goods falling under the bill of sale, but he did not remove them from the premises of the defendants. However, the motor cars were removed, but they were not put up for sale for quite some time.

On the 12th December, 1986, the claimants presented a petition under the Companies Act to the Court to wind up the defendants' affairs. That petition came before the Court on the 9th February, 1987 and was adjourned to the 26th March, 25th April and finally to the 25th May 1987. Since then, the petitioners have not applied to proceed with the matter and it remains on file.

The bailiff, in due course, advertised some of the goods taken in execution for sale by public auction, and on the 28th March, 1987, he sold the three motor vehicles referred to above.

On the 30th March, 1987, the claimants' attorneys-at-law wrote a letter to the bailiff with regards to the sale on the 28th March, and I shall refer again to that letter in greater detail .

By notice dated the 26th day of May, 1987, the bailiff informed the plaintiffs/judgment creditors of the claimants' claim and requested them to admit or dispute the title of the claimants to the goods. The plaintiffs did not admit the title of the claimants, and consequently, the bailiff issued the instant interpleader summons.

On the matter coming on for hearing, the applicant, in accordance with the provisions of S548 of the Judicature (Civil Procedure Code) Law, satisfied the Court by his affidavit:-

- (a) that he claims no interest in the subject matter in dispute, other than for charges or costs and
- (b) that he did not collude with any of the claimants.

The matter proceeded as if the claimants, Jamaica Export Credit Insurance Corporation Limited were the plaintiffs and Alcron Development Limited the defendants. The parties agreed that the facts, as outlined above, were not in dispute, and that the only issue was a question of law.

The claimants contended that the goods seized and not covered by a bill of sale and all proceeds of sale are to be held and applied for the benefit of all creditors of Antillean Food Processors Limited (In Receivership) as a petition for winding up that company under the provisions of the Companies Act was presented prior to the completion of the execution. The claimants were not claiming that any of the goods taken in execution were their property. A quantity of those goods were covered by a bill of sale, but not all. The judgment creditors and the claimants agreed that the bill of sale was legally binding, and thereupon, the judgment creditors relinquished all prior claims to those items taken in execution and covered by the bill of sale. The parties agreed that the question of law to be resolved is as follows:-

"Where goods belonging to a judgment debtor company are seized under a writ of seizure and sale at the instance of a judgment creditor, and the sale of such goods has not taken place when a petition under the companies Act is presented to wind up the affairs of the judgment debtor company, does an unsecured creditor of the judgment debtor company have a claim to such goods on the presentation of the petition to wind up?"

Mr. Wood for the claimants referred the Court to S299 of the Companies Act, which reads as follows:-

299(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:

Provided that -

- (a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the foregoing provision be substituted for the date of the commencement of the winding up;
- (b) a person who purchases in good faith under a sale by a bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and
- (c) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.

(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt and an execution against land shall be deemed to be completed from the date of the order for sale or by seizure as the case may be, and, in the case of an equitable interest, by the appointment of a receiver.

(3) In this section and in section 300 the expression "goods" includes all chattels personal, and the expression "bailiff" includes any officer charged with the execution of a writ or other process."

Mr. Wood recited the agreed facts thus:-

- (1) The creditor issued execution against the goods of the company.
- (2) The company has not been subsequently wound up.
- (3) Prior to the completion of execution as defined in S299(2), the winding up commenced i.e. on 12/12/86 when the petition for winding up was presented under the terms of S210 of the Companies Act.
- (4) The bailiff had been notified of the commencement of the winding up by letter dated 30/3/87.

He submitted that by virtue of S299, the bailiff cannot ignore the winding up proceedings and proceed to sell the assets for the benefit of the execution creditor, "because S299 specifically says that upon the subsequent winding up, the judgment creditor shall not be entitled to retain the benefit of the execution as against the liquidator who will be duty bound to distribute the assets of the company for the benefit of all creditors ranking pari passu."

Mr. Wood admitted that the motor vehicles had been sold on the 28th March, 1987, and that was at a time before the bailiff was notified of the claimants' claim by the letter dated March 30, 1987. He said, however, that the winding up petition had been advertised in the "Daily Gleaner" newspaper and the Jamaica Gazette prior to the sale of the motor vehicles, and that constituted sufficient notice to the bailiff of the commencement of the winding up.

He referred to the case of Re Memco Engineering Limited [1985] 3 ALL ER 267. In that case the Customs and Excise levied distress on the goods of a company on 20th October 1982. On 13th December, a winding up petition was presented and on the 28th February, 1983 a winding up order was made. On the 18th May, the goods levied on were sold by agreement between the liquidator and Customs and Excise and the proceeds were put into a joint

account. The question arising was what was to be done with the proceeds of sale of the goods levied on before the commencement of the winding up, but not sold until after winding up. The short answer to that question was that when the winding up order was made, the Companies Act required the Customs and Excise not to sell the distrained goods without the leave of the Court, and accordingly, the Customs and Excise were not entitled to the proceeds of the distress.

Counsel submitted finally that pursuant to S299 and S279 of the Companies Act, "the winding up having commenced before the completion of execution by the bailiff, the proceeds of sale cannot be simply distributed out to the judgment creditor, but ought to be held for the benefit of all creditors of the company to abide the making of the order for winding up. S299 gives any creditor a right to insist that the proceeds be held for the benefit of all the creditors once the winding up has begun. The status quo should be preserved pending determination of the winding up petition or the money paid into Court. He asked the Court to protect all creditors of the company bearing in mind the grounds of the petition that the company is insolvent and unable to pay its debts.

Mr. Miller, for the execution creditor pointed out that the petition had been presented on the 12th December 1986, and to date, no winding up order has been made, and consequently, no liquidator has been appointed. He urged that S299 confers rights on a liquidator exercisable against a creditor who had levied distress on a company, and that company is subsequently wound up. He stressed that the appointment of a liquidator is a condition precedent to the restriction of the creditor's rights under S299. He submitted that the Memco case is easily distinguished from the present case, since no winding up order has been made in this case.

Counsel referred the Court to S300 of the Companies Act which prescribes the duties of the bailiff after he has taken in execution the goods of a company, and before the sale or the completion of the execution, winding up of the company commences. The section reads as follows:-

"300-(1) Subject to the provisions of subsection (3), where any goods of a company 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 provisional liquidator has been appointed or that a winding up order has been made or that a resolution for voluntary winding up has been passed, the bailiff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

(2) Subject to the provisions of subsection (3), where under an execution in respect of a judgment for a sum exceeding forty dollars the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution is passed, as the case may be, for the winding up of the company, the bailiff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.

(3) The rights conferred by this section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit."

He contended that the provisions of the section cast a duty on the bailiff only after notice is served on him that one of the events mentioned in the section has taken place and

a request has been made to deliver up the goods or proceeds of sale. No such notice or request has been made in this case.

He submitted that in this instant case, "the bailiff was armed with a writ of seizure and sale which he has executed and the proceeds of the sale recovered. No notice in accordance with S300(1) was served - there was nothing to bind the bailiff from proceeding in the ordinary course of his duties. The money from the sale must enure to the benefit of the execution creditors".

Mr. Wood admitted that the claimants had not complied with the provisions of S300(1) (supra), but since goods had been sold, the money in the hands of the bailiff must be paid into Court. Under S299, any right of the judgment creditors to that money will be lost when a liquidator is appointed. The Court should act (before the money is paid out) for the benefit of all creditors and to ensure that they are protected. He referred to the right of any creditor to apply to the Court for relief under S207 of the Companies Act.

In my judgment, the date of the commencement of winding up of a company affects many matters. Winding up is deemed to commence:

- (a) at the time of the presentation of the petition for the winding up
- (b) at the time of the passing of a resolution by the company for voluntary winding up.

The commencement of winding up affects the rights of creditors by placing certain restrictions on those rights. A creditor who has obtained a judgment against a company has a right to recover the fruits of his judgment. That right may be exercised by the issue of a writ of seizure and sale directed to the bailiff of the Court to take in execution the goods and chattels of the company sufficient to satisfy the judgment debt, costs and interest. When he sells the goods, the bailiff is

commanded to pay the money into Court to be paid to the judgment creditor in pursuance of the said judgment. (See S609 of the Judicature (Civil Procedure Code) Law.)

Pursuant to the provisions of S608 of the Judicature (Civil Procedure Code) Law, interpleader proceedings may be instituted when goods seized in execution are claimed by a third party. The section reads:-

"608. Where any property of any kind is seized in execution, under any judgment or order in any suit or proceeding, which is claimed by any person other than the judgment debtor, such claim may be determined by the Court in a summary way upon an interpleader summons to be taken out by such claimant against the party prosecuting the judgment or order, or by the bailiff against such claimant and such prosecuting party:

Provided that the Court may, on the hearing of such summons, make such order for the trial and determination of the rights of the parties as it thinks expedient, and for the custody in the meanwhile of the property in dispute and the costs thereof; and where some third person claims to be entitled, under a bill of sale or otherwise, to any property so seized as aforesaid, by way of security for a debt, the Court may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as it thinks fit, and may direct the application of the proceeds of such sale in such manner, and upon such terms, as to such Court may seem just.

Title 44 of the abovementioned Law (Ss.547-564) makes provisions for and regulates the proceedings by way of Interpleader. By virtue of S.558 where a claimant alleges that he is entitled under a bill of sale or otherwise, to the goods seized by way of security for debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner, and upon such terms, as may be just. In the instant case, the claimants have alleged that they are entitled under a bill of sale to certain goods listed in the schedule thereto, and the judgment creditors

have, in these proceedings, relinquished claim to those goods so listed. In the circumstances, I will order a sale of the whole of those goods, and direct that the proceeds of sale be applied in the following manner:-

Firstly, for the payment of all fees charges and expenses incurred by the bailiff in taking possession keeping and selling the goods covered by the bill of sale. The bailiff is authorised to deduct the amounts mentioned above in accordance with the prescribed scale of fees.

Secondly, the net proceeds of sale shall be paid into the Treasury to the credit of this suit,

- (a) to be applied in satisfaction of the defendants' indebtedness to the holder of the bill of sale, Jamaica Export Credit Insurance Corporation Limited, the claimants, and
- (b) the surplus, if any, to be applied in satisfaction of the defendants' indebtedness to the plaintiffs herein, Alcron Development Limited.

I turn now to the goods and chattels seized by the bailiff which are not covered by the bill of sale referred to above. In particular, I refer to the 3 motor vehicles which were seized and have been sold, the proceeds of sale being in the hands of the bailiff. It is clear that the claimants did not claim these items by the letter dated November 28, 1986. That letter reads in part:-

"Our client has a Bill of Sale over certain assets of Antillean Food Processors Limited, same having been made on the 1st December 1983.

A list of the items secured under the Bill of Sale are shown in the schedule to the Bill of Sale.

We note from the list supplied by you that of the items levied upon some of these are included in the items to the Bill of Sale.

We repeat the claim made by us on behalf of our client this morning....."

The only other letter sent by the claimants to the bailiff is exhibited in the affidavit of Audrey Welds, the Corporate Secretary of the claimants and it is dated 30 March, 1987. In my view, it does not lay claim, either specifically or by inference, to the three motor vehicles taken in execution. The relevant paragraphs of that letter read as follows:-

"In so far as three (3) motor vehicles are concerned, which we understand you have purported to sell on March 28, 1987, we wish to inform you that any disposition of the funds of the sale constitutes a breach of the Companies Act, as a Petition to wind up the Company was presented to the Court by our clients on December 12, 1986. The law is quite clear on the point that any execution after the commencement of winding up shall be void to all intents. The law further provides that execution is not completed until there has been seizure and sale."

I hold that the only proper construction to be put on the paragraphs of the claimants' letter stated above is that it purports to advise the bailiff of his duties and that it does not purport to lay claim to the motor vehicles in question. Accordingly, the bailiff should proceed, in respect of the sale of those vehicles, as S609 directs, Viz:- "All moneys payable under a judgment levied by execution, or otherwise under the process of the Court, shall be paid into the Treasury to the credit of the suit, unless the Court otherwise directs."

The bailiff, however, construed the letter to contain a claim to all the goods taken by him in execution; and this is evidenced by his notice to the execution creditors dated 20th May, 1987. The matter has proceeded on the understanding that the claimants did make claim to the proceeds of sale of the motor vehicles for the benefit of all the creditors (of which it is one) of the Antillean Food Processors Limited (In Receiver-ship). The claimants based their claim under S299 of the Companies Act (Supra), but in my judgment, such a claim fails. That section provides, inter alia, that a creditor who has issued execution against a company which is subsequently wound up, cannot retain the benefits of his execution against the liquidator unless he has completed the execution before the commencement of the winding up, i.e. both the seizure and sale must have been so completed. The section places certain restrictions on the rights of an execution creditor of a company when the company is wound up, and those restrictions may then relate back to the commencement of winding up, i.e. the time of the presentation of the petition. The section confers a qualified right on the liquidator, but in my view, it does not confer any right at all on an execution creditor of the company unless the Court so orders. The claimants in this case are not execution creditors nor a liquidator - the company has not been wound up. The provisions of that section are not applicable to the facts in the present case, nor is the Memco case to which I was referred. Accordingly, the claimants' claim fails. On the agreed facts of this case and in answer to the question posed, I find that the claimants, as unsecured creditors of the judgment debtors, do not have a claim to the goods belonging to the judgment debtors and which were seized under a writ of seizure and sale at the instance of the judgment creditors, and not sold when a petition under the Companies Act was presented to wind up the affairs of the judgment debtors' company.

Counsel for the bailiff has suggested that the Court make an order protecting the bailiff from any action in respect

of the seizure and possession of the goods. I take that to mean seizure and possession of the goods which are covered by the bill of sale and were in possession of the bailiff.

The execution creditors did not admit the claim of the claimants before the hearing of this interpleader summons, and so the bailiff remained in possession of those goods. Consequently, no application was made by the bailiff for the order sought by Counsel, nor was it shown that notice was served on the claimants of such an intended application as is required by S563 of the Judicature (Civil Procedure Code) Law. In the circumstances I will not make such an order.

I come now to the question of costs. As regards the distress levied on the motor cars, the bailiff's fees, charges and expenses incurred in relation to those items shall be deducted from the proceeds of sale of those goods and thereafter, the net proceeds of sale shall be paid into the Treasury to the credit of the suit, to be applied in satisfaction of the plaintiffs' judgment.

As regards the costs of these proceedings, it is ordered that the claimants do pay the costs of the applicant and of the plaintiffs herein as are occasioned by these proceedings, such costs to be taxed if not agreed. Certificate for Counsel for the applicant and the plaintiffs.

(Special leave granted to the claimants to appeal in accordance with S557 of the Judicature (Civil Procedure Code) Law).