

Present : Pereira J. and Ennis J.

1913.

SILVA *v.* FERNANDO.

226—D. C. Negombo, 9,102.

Hypothecary action against purchaser at Fiscal's sale before he gets a Fiscal's conveyance.

A hypothecary action can be brought against a person who has purchased the property mortgaged at a Fiscal's sale held in execution of a writ against the mortgagor, but who has not yet obtained the usual Fiscal's conveyance in his favour.

THE facts appear from the judgment.

H. A. Jayewardene, for plaintiff, appellant.

E. W. Jayewardene; for second defendant, respondent.

Cur. adv. vult.

August 27, 1913. PEREIRA J.—

In this case the simple question is whether an hypothecary action can be brought against a person who has purchased the property mortgaged at a Fiscal's sale held in execution of a writ against the

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mortgagor, but who has not yet obtained the usual Fiscal's conveyance in his favour. An *actio hypothecaria* (also called *actio quasi serviana*) under the Roman-Dutch law is no more than an action whereby a creditor follows up a pledge or hypothec bound to him expressly or by implication of law when satisfaction is not made to him by the debtor or any other party interested in the property pledged or mortgaged. Voet in 20, 4, 2 mentions certain persons against whom the action may be brought, but the list is by no means exhaustive. The object of the action is to bind by an order for the sale of the property for the satisfaction of the amount advanced to the debtor all those who have or claim to have an interest in the property acquired through the debtor. Of course, a person having or claiming to have no such interest may not be sued in such an action, but the question of interest is not to be too narrowly scrutinized, because the defendant is in no way prejudiced by the action so long as no costs are claimed against him, except in the event of an unreasonable contest by him of the plaintiff's claim.

In the present case, although the second defendant cannot be said to have title to the property mortgaged by the first, the provisions of our Code of Civil Procedure vest him with such an interest in the property as to give the mortgagee a right to require him to show cause, if any, why the property should not be declared bound and executable for the recovery of the debt due to him by the mortgagor. The property has been sold by the Fiscal to the second defendant; the sale has been duly confirmed by the Court; and the second defendant may at any moment, by applying and obtaining the usual Fiscal's conveyance, make himself the owner of the property as from the date of the actual sale to him by the Fiscal. To say the least, it is, in such a case, in the highest degree expedient to allow the mortgagee to have the second defendant's objections, if any, to his prayer adjudicated upon at the earliest opportunity.

I would set aside the judgment appealed from with costs and remit the case for further proceedings.

ENNIS J.—I agree.

Set aside.