1906.

December 13.

[Full Bench.]

Present: Sir Joseph T. Hutchinson, Mr. Justice Wendt, and Mr. Justice Middleton.

SILVA *v.* IBRAHIM RAWTER *et al.*

D.C., Kandy, 17,281.

Action under s. 247—Movable property—Sale of the property before action—Maintainability of action—Civil Procedure Code, ss. 227, 240, 241, 242, *and* 245.

An unsuccessful claimant is entitled to maintain an action under section 247 of the Civil Procedure Code, notwithstanding the fact that at the date of such action the property, which is the subject of seizure and claim, has already been sold by the Fiscal under the execution-creditor's writ.

The Fiscal has no power to stay execution of a writ without an order of Court to that effect; he is not bound to stay a sale whenever a claim is made to property seized in execution.

THE plaintiff, claiming to be the owner of certain movable property, alleged that the Fiscal, at the instance of the defendants, seized the same on 8th April, 1905, under writ in D. C., Kandy, 16,672, against one James Peter; that he (plaintiff) preferred a claim on 11th April, 1905, which was rejected by the Court on 10th June, 1905; and the plaintiff prayed that the goods be declared not liable to seizure and sale under the said writ. The defendants pleaded, *inter alia*, that it was not competent for the plaintiff to maintain the action, as the property, which was the subject of seizure and claim, was sold by the Fiscal on 19th April, 1905, prior to the investigation of the plaintiff's claim by the Court.

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On this point the District Judge (J. H. de Saram, Esq.) held as follows:—

"The next objection is that this action cannot be maintained, because the property was sold by the Fiscal after the plaintiff preferred his claim, and before the claim was investigated.

"Mr. LaBrooy, citing *James & Co. v. Natchiappen* (1), argued that the plaintiff (claimant) having failed to apply to the Court to stay the sale pending the investigation of his claim, and the Fiscal having sold the property before the investigation of the claim, this action cannot be maintained.

"When the claim was before me, I treated the sale as a nullity, and after hearing the evidence disallowed the claim.

"In *Avitchi Chetty v. Ibrahim Natchia* (2), which was a case in which, in spite of the reference to the Court of a claim to property seized in execution the Fiscal proceeded to a sale, Bonser C.J. remarked: 'I do not understand how it was that the Fiscal proceeded with the sale, having received a claim which he had referred to the Court. It seems to me quite clear that his duty was to stay his hand until it had been decided by the Court whether the signature was legal or not.' Moncreiff J. took the same view in *Gordion Appuhamy v. Maria Culas* (3). It was following the decision in that case—that a Fiscal's sale held without excuse or authority does not pass title to the purchaser, but is a nullity—that I proceeded to make an order on the plaintiff's claim.

"I do not know why the Fiscal proceeded to a sale after the claim was preferred. It may be because his fee for staying the sale had not been paid.

"The invariable rule in this Court is for a claimant, if the sale of the property he claims is fixed, to move that it be stayed pending the investigation of the claim. The motion is always allowed, and the claimant ordered, in the first instance, to pay the Fiscal's fees and charges. If he eventually succeeds and the seizure is released, the judgment-creditor has to pay him those fees. If, when a claim is preferred the Fiscal *mero motu* stays the sale and reports the fact to the Court, with the amount due for his fee, an order would be made, when the claim is investigated, for the payment of the fee.

"The present case is different from those cited at the argument, for here the sale took place before the claim was investigated. The natural consequence of my having held that the sale is a nullity is that I hold the plaintiff is entitled to maintain this action. He is

(1) (1898) 3 *N. L. R.* 257. (2) (1900) 5 *N. L. R.* 19.
(3) (1902) 6 *N. L. R.* 279.

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entitled to have his right declared as at the date of seizure, and, if he succeeds, to enforce such a right as he may have on that footing against the judgment-creditor or the purchaser or the Fiscal. "

The defendants appealed.

Bawa, for the defendants, appellants.

Van Langenberg, for the plaintiff, respondent.

Cur. adv. vult.

13th December, 1906. HUTCHINSON C.J.—

This is an action under section 247 of the Civil Procedure Code, in which the plaintiff claims certain movable property which was seized and sold by the defendants in execution of a decree obtained by them against one James Peter.

The seizure was on the 8th April, 1905. The plaintiff made his claim under section 241 on 11th April, 1905. The sale was on 19th April, 1905. The plaintiff's claim was investigated on 9th June, 1905, and was disallowed. No application was made to stay the sale. The defendants contended that this action was not maintainable after the property had been duly sold by the Fiscal in pursuance of the writ of execution.

The District Judge held that when the claim was made it was the Fiscal's duty to stay the sale, and that the sale was a nullity, and that the plaintiff is entitled to have his right declared as at the date of the seizure. The defendants now appeal against that ruling. When a claim is made to the property seized in execution, the sale may, if it appears to the Court necessary, be postponed (section 242). But if it does not appear necessary, the Court is not therefore debarred from investigating the claim. Or if the property seized is " subject to speedy and natural decay, " and the Fiscal for that reason sells it at once, as he is authorized by section 227 to do, a claim could still be investigated. It would be right for the Court in most cases to postpone the sale, if the claim could not be adjudicated upon before the date fixed for the sale. But it would not be right or possible in every case. And where the sale is not postponed, the Court can still decide which of the parties was entitled to the property at the date of the seizure, and can direct the application of the purchase money in accordance with its decision.

The appeal should be dismissed with costs.

WENDT J.—

I agree. I would supplement the Chief Justice's recital of the facts by stating that the defendants admit they caused the Fiscal to make the seizure in question, and that they became themselves

the purchasers at the sale, though they add that they have now in turn sold and delivered the goods to others.

The property in question being movables, the seizure (under section 227 of the Code) was manual and amounted to a dispossession of the owner. He was therefore obliged to take proceedings to assert his title. He might perhaps have sued the defendants at once in a regular action regarding the Fiscal as their agent, but he was also entitled to resort to the shorter and simpler remedy of a claim. Once the claim was made, plaintiff was bound, if it was disallowed, to sue under section 247, as otherwise he could in no possible way have obtained relief on the footing of his ownership against other persons relying on the seizure, the order disallowing the claim being final as to the liability of the property to seizure and sale under the particular execution [*Meenachy v. Gnanapracasam* (1); *Ismail Lebbe v. Omer Lebbe* (2)]. I remain of the opinion I expressed in *Adrian v. Weerakoon* (3), that (notwithstanding the fact that, when the Court comes, at the trial of the section 247 action, to determine the rights of the parties the property being movable has irrevocably passed out of the possession and ownership of the plaintiff) he is entitled to have the liability or otherwise of that property to the seizure which was made settled by the Court in a final judgment binding the decree-holder. That point having been determined in his favour, he would, if he did not obtain full redress in the section 247 action itself, as he conceivably might where the creditor has himself purchased the goods, pursue his remedies by *rei vindicatio* or claim for damages against the present possessor or the creditor or the Fiscal. I do not see why in principle the fact that the creditor has pushed on the sale in spite of the claim should prejudice the rights of the claimant. Ordinarily, a plaintiff who sues when his defendant threatens injury to his property or has partially injured it would not be precluded from recovering damages for greater injury done pending action because he did not take out an injunction. The defendant is apprized of plaintiff's rights, and thereafter proceeds at his peril. I do not see why it should be different in the claim procedure prescribed by the Code. No question of estoppel by standing by and letting the sale go on can arise in view of the pendency of the proceedings ordained by law for the assertion of the claimants' rights.

I feel some difficulty in assenting to the position that when the Fiscal receives a claim and refers it to Court, he is bound to refrain from carrying out the sale until he is apprized of the Court's decision.

(1) (1892) 2 *C. L. R.* 97. (2) (1889) 3 *N. L. R.* 303.
(3) (1902) 3 *Browne* 58.

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WENDT J.

It appears to me that section 241 leaves the Fiscal no discretion; every claim preferred he must refer to the Court. It is the Court which is given the discretion of postponing the sale (section 242). If the Fiscal was bound to stay the sale as soon as he received a claim, a premium would be put upon vexatious claims. False and collusive claims would arise on the very eve of the sale, and postponement would prejudice the creditor before the Court's interference could be invoked. Section 242, which gives the Fiscal power to " adjourn " a sale, refers, I take it, to a sale once commenced. Such adjournment may be made for want of time, or in order to have some question incidentally arising settled before the auction is concluded. It is not necessary for the support of the learned District Judge's decision that we should hold the sale to have been a nullity. I prefer to express no opinion on that point.

I think the appeal should be dismissed with costs.

MIDDLETON J.—

The question in this case was whether the plaintiffs, the claimants to movable property seized in execution by the Fiscal at the suit of the defendants against their judgment-debtor, can maintain an action under section 247 of the Civil Procedure Code after the sale of the property by the Fiscal.

The property was seized on the 8th April, 1905, and claimed under section 241 by the plaintiff on the 11th April, 1905. No order to stay the sale was made, and the Fiscal sold the property on the 19th April, 1905. The claim was inquired into on the 9th June, 1905, and rejected on the 10th June, 1905, and this action was brought on the 22nd July, 1905.

The District Judge held the action to be maintainable, but declared the sale by the Fiscal to be a nullity.

The appellant's counsel did not support the latter declaration of the learned District Judge, but maintained that where the property had been sold the action must be abortive, as the Court could give no effect to any declaration it was entitled to make under section 247, and that the execution-creditor would not be liable for damages unless he pointed out the property to be sold.

Where a claim is made it is the duty of the Fiscal to report it to the Court under section 241, and the Court can under section 242, if it appears necessary, postpone the sale for the purpose of investigation.

The Fiscal has no power apparently to stay a sale, but under section 342 a sale, presumably after commencement, may be adjourned by the Fiscal, the cause being reported to the Court.

Under section 343 the Court has a general power to stay execution or adjourn a sale.

It seems to me, therefore, that the Fiscal has no power to stay execution without an order of the Court, and that he is bound to continue the execution of the writ entrusted to him unless he receives order from the Court to the contrary. In the present case the Fiscal was acting under a writ issued by the Court, and the sale therefore, in my opinion, was not a nullity.

Provision is made under sections 242 and 343, which would enable parties making a *bonâ fide* claim to obtain a stay of execution from the Court, thus obviating any hardship which might arise.

If the Fiscal was bound to stay a sale on every claim made under section 241, the process of the Court might be entirely obstructed by the friends of a fraudulent defendant.

According to a decision of the Full Court in the case of *Meenachy v. Gnanapracasam* (1), an order made without investigation on default and permitted by section 242 was deemed to be an order on the merits, and to have the same effect as *res judicata*.

In *Silva v. Mendis* (2) Bonser C.J. and my brother Wendt held that a claimant whose property had been wrongfully seized and sold by the Fiscal pending action under section 247 before judgment therein was entitled to a declaration of his right at the date of seizure.

In the present case movables have been seized and sold, and the owner dispossessed was bound to claim or to be for ever debarred.

He has claimed, and his claim has been rejected; if he stops short of his action under section 247, any further claim for damages or *rei vindicatio* on his part might be met with the plea of *res judicata*.

In my opinion, therefore, the plaintiff has a right to maintain this action for a declaration as to his rights at the date of seizure, and the appeal should be dismissed with costs.

Appeal dismissed.

(1) (1892) 2 *C. L. R.* 97.

(2) (1902) 5 *N. L. R.* 252.