*Present :* Ennis A.C.J. and Jayewardene A.J. 1923.

MUTTIAH CHETTY *v.* MOHAMOOD HADJIAR.

*85—D. C. Colombo, 3,904.*

*Paulian action—No presumption of fraud—Claim to property seized—Claim rejected as being too late—No action instituted under s. 247 of the Civil Procedure Code—Is claimant barred from asserting title to property as against purchaser at Fiscal's sale ? —Paulian action instituted nine years after sale—Prescription.*

Plaintiff sued defendants for declaration of title to a certain property, and to set aside a deed of 1913 by which the first defendant sold the property to second defendant on the ground that it was executed in fraud of creditors. The plaintiff obtained judgment and seized the property in September, 1916. In March, 1917, the second defendant claimed the same. The claim was rejected in October, 1919, on the ground that it was made too late. The second defendant did not institute an action under section 247 of the Civil Procedure Code.

*Held*, that the second defendant was not barred by his failure to institute an action under section 247 from asserting his title to the property.

*Held, further*, that a Paulian action must be instituted within three years from the cause of action. Though plaintiff was aware of the transfer in 1916, yet inasmuch as the claim proceedings were before the Court till 1919, prescription did not run during that period. The three years should be calculated from 1919, when the claim was rejected.

There is no presumption of fraud, and when it is alleged it must be fully proved.

THIS was an action for declaration of title to and possession of premises bearing assessment No. 81 in Hospital street, Colombo.

The plaintiff's title was based on a Fiscal's transfer No. 18,758 dated October 26, 1920. The premises were sold by the Fiscal in execution of a writ issued by the plaintiff against the first defendant in case No. 37,003.

The first defendant had transferred the premises to second defendant by deed No. 3,602 of May 3, 1913. The second defendant by deed No. 316 of May 7, 1920, transferred the premises to third defendant.

The plaintiff alleged that deed No. 3,602 was executed fraudulently and collusively and to defraud his creditors. He also alleged that deed No. 316 was executed fraudulently and without consideration. The District Judge entered judgment for plaintiff. Third defendant appealed.

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*Samarawickreme* (with him *B. F. de Silva*), for the appellants in No. 85.

*E. W. Jayewardene, K.C.* (with him *H. V. Perera*), for the appellant in No. 85A.

*Elliott, K.C.* (with him *Hayley, Keuneman,* and *Schokman*), for the respondent.

July 27, 1923. ENNIS A.C.J.—

This was an action for a declaration of title to a certain property in Hospital street, and to set aside two deeds, namely, P 13, No. 3,602 of May 3, 1913, which was registered on May 7, 1913, by which the first defendant sold his property to the second defendant, and P 14, No. 316 of October 7, 1920, which was regitered on October 9, 1920, by which the second defendant sold the property to the third defendant. The plaintiff in his plaint alleged that the first document was executed in fraud of creditors, and that the second document was tainted with fraud, and that both were executed without consideration. The learned Judge accordingly allowed the plaintiff's action, and the three defendants appeal. Clearly, the first question for consideration on the appeal is the question of fact as to whether the learned Judge was right in holding that the fraud was proved. There is no presumption of fraud, and when it is alleged it must be fully proved. Now, in this case the plaintiff sought to prove that the first defendant was practically insolvent at the time he alienated the property to the second defendant. On this point the learned Judge, relying upon the evidence of the plaintiff and his kanakapulle, and the list of actions P 11, against the first defendant, which was filed by the plaintiff, came to the conclusion that the e was no doubt that in 1913 and onwards the first defendant was in a hopeless condition financially. He then held that because the second defendant was the son-in-law of the first defendant, these two facts together were sufficient to establish fraud. The question as to what was sufficient to establish fraud in a Paulian action was discussed by Hutchinson C.J. in the case of *Saravanai Armugam v. Kanthar Ponnambalam.*[1] There it was laid down that the evidence from which a fraudulent intention can be inferred is usually some or all of the following circumstances :— (1) That there was no consideration ; (2) that the transfer was secret ; (3) that the transferor had continued in possession notwithstanding the transfer ; (4) that the transfer left him without any other property ; and (5) or without enough to pay the debts which he owed at the time or was about to incur. Now, of these items of evidence, we find that the transfer on the face of it purports to be a conveyance for consideration. It recites that the second

[1] *2 Leader L. R. 11.*

defendant gave a consideration of Rs. 10,000 for the property, as the attestation clause recites that Rs. 1,000 was paid by cheque in the presence of the notary, and that the remaining Rs. 9,000 was set off against an obligation incurred by the first defendant to give a dowry to his daughter at the time of her marriage with the second defendant in 1904. There is no evidence to show that no consideration was in fact paid; nothing to show that the cheque for Rs. 1,000 was a bogus one, or that no money whatever passed. All that was asserted was that there was an obligation under the rules of evidences on the defence to show that the statements in this deed were true; in other words, that the onus of proof had shifted without some proof of fraud.

With regard to the next point, we find that there was nothing secret about the conveyance to the second defendant in 1913, for the document was registered four days after its execution. We find, moreover, that the second defendant was in possession of the property from the time of the conveyance. In the result, we find that the second defendant has three of the circumstances mentioned by Hutchinson C.J. strongly in his favour. With regard to the evidence that the first defendant was in a hopeless condition financially at the time of this conveyance, we find merely the evidence of the plaintiff and his kanakapulle that the first defendant was being hard pressed by creditors. But an examination of the document P 11 shows that in 1912 there was only one case against him, and in 1913 there were only three cases against the first defendant, and that the bulk of the pressure against the first defendant came in 1915, two years after the alienation. We have no evidence as to the result of any of these cases, or when the cases in 1913 were instituted, or whether they related to obligations incurred after the execution of the conveyance to the second defendant, or prior to that conveyance. We find, moreover, that the plaintiff seized some property of the first defendant in 1914, and released the seizure at the request of the first defendant. The evidence, therefore, does not seem to establish either that the first defendant was hard pressed by creditors at the time of the execution of the deed P 13, or that he was without other property to meet the demands of his creditors. It would seem, therefore, that the plaintiff has not sufficient evidence to establish any of the points laid down in the judgment of Hutchinson C.J. already referred to as necessary to establish the presumption of fraud. Moreover, it appears from the plaintiff's evidence that he made no attempt to have the first defendant examined under section 219 of the Civil Procedure Code as to his property when he was seeking to execute his judgment. The plaintiff appears to have concentrated his attention to a fact mentioned in the attestation to deed P 13. The first defendant alleged that Rs. 9,000 was to set off against an obligation entered into in 1904. It seems that the plaintiff put in

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evidence the document P 13 and commented upon the attestation. It would, therefore, seem to be out of place to assert that none of the facts set out in the attestation had been proved, particularly when the onus of proof of fraud was on the plaintiff, who has thrown no doubt upon the good faith of the statement. The defendant put in the dowry deed D 11, which showed that the first defendant and his brother Abdul Raheem undertook to convey the lands to the first defendant's daughter, on her marriage, within six months of the execution of the dowry deed, or in default to pay Rs. 15,000. The two properties mentioned were a property in Prince street and a property in Dam street, and the document D 12 shows that Abdul Raheem duly performed his undertaking under D 11, and conveyed the property in Prince street. It is said that the first defendant did not carry out his obligation, and we find by the document D 13 that the first defendant in fact dealt with the Dam street property in June, 1912, and mortgaged it. It was, therefore, out of his power to convey this property intact to his daughter until he had redeemed the mortgage. So we find the first defendant in 1913 executing the document D 13, and conveying, not only the property in Hospital street, but other properties in 2nd Cross street and in Bambalapitiya, to the second defendant. It appears that these properties were at the time subject to two mortgages, one for Rs. 100,000 to the Loan Board, executed in January, 1913, and another mortgaged to one Alim, which was executed in March, 1913, for Rs. 10,000. It would seem, therefore, that up till March, 1913, the first defendant had plenty of money. Now, the plaintiff bases his claim on the following facts. He was the holder of five promissory notes for Rs. 2,000 each, which were dated March 13, 1913. He put the notes in suit on August 21, 1913, obtained a decree on September 24, 1913, and after seizing certain property of the first defendant which he released, and making subsequent efforts to execute his judgment, he seized the property in Hospital street on September 29, 1916. The seizure was registered on January 11, 1917. On March 13, 1917, the second defendant claimed the land. The claim proceedings seem to have been drawn out until October 7 1919, when the second defendant's claim was rejected on the ground that the claim had been made too late. The plaintiff accordingly pleads that the rejection of the second defendant's claim in the claim proceedings operated as *res judicata* against him, and that the present claim is accordingly barred, because he did not file action under section 247. It was argued that the case is analogous to the case of *Meenachy v. Gnanaprakasam.*[1] In that case, however, it appears that the claim was not merely dismissed but was disallowed, because the claimant failed to appear on the day fixed for inquiry, and it was, therefore, an order made under section 245. It would seem that *primâ facie*

[1] *2 C. L. Rep. 97.*

an action under section 247 is only open to a party against whom an order under sections 244, 245, and 246 has been passed. But the order in the present case does not purport to have been made under any of these sections. It is expressly made under section 242, and the facts are not such as to show, as in the case of *Meenachy v. Gnanaprakasam* (*supra*), that it was in fact an order made after inquiry into the claim. There is, therefore, no analogy between the present case and the case of *Meenaichy v. Gnanaprakasam* (*supra*). In these circumstances, the case of *Perera v. Fernando*[1] shows that an action under section 247 need not be brought. I would hold, therefore, that the rejection of the second defendant's claim in the claim proceedings was not *res judicata*. But it was next urged that if not *res judicata* it operated as an estoppel and prevented the defendant from setting up his title now. No issue of estoppel was raised in the Court below, neither was there any assertion that the plaintiff acted upon any belief created by the second defendant's deliberate action. He was not bound to bring an action under section 247, as he was in possession of the land and had title. Such a procedure would appear to have been unnecessary. Estoppel is a matter of fact on the evidence, and no issue was raised, no evidence has been directed to that point. Consequently one must disregard this reference to estoppel at this stage of the proceedings, especially as there is no evidence to support it. There were further facts in this case which are really unnecessary to go into, but which may be briefly mentioned. It appears that the property in question was sold by the Municipal Council on May 7, 1917, for default of payment of rates. The property was purchased by the Municipal Council, and a certificate dated July 28, 1920, was duly issued. That certificate was registered on August 4, 1920. The Municipal Council then sold the property to the third defendant, who at the time was the registered owner, and issued a certificate to him on April 18, 1921, which was registered on April 26, 1921. So that the third defendant has title from two sources. But owing to some unfortunate circumstance, these certificates of sale were registered in the wrong folio, and it was urged by the plaintiff that that being so, they came second to his claim, because he had priority by virtue of registration. But in view of the fact that the second defendant had the title at the time, the Fiscal's conveyance to the plaintiff, therefore, conveyed nothing to him, and as we have found that no fraud has been established, we need not go into this question of registration. One other point must be mentioned in the case, and that is the appellant's assertion that the action has been prescribed. There is no doubt that a Paulian action must be instituted within three years from the cause of action, and in this case we find that the plaintiff states that he was aware of the second defendant's conveyance about the year 1916. But, inasmuch

[1] *1 C. W. Rep. 17.*

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as the second defendant made a claim in the claim proceedings which were before the Court until 1919, prescription would not run during that period, and, therefore, it would seem that the three years should be calculated if at all from 1919, when the claim was rejected. It would seem then that the action is not out of time. Inasmuch as we are of opinion that the deed to the second defendant is still good, it is unnecessary to go into the question relating to the deed from the second defendant to the third defendant or to the relations between the second and the third defendant, or the question of trust which the learned Judge has found in connection with the holding of the property by the third defendant.

I would accordingly allow the appeals, with costs, and dismiss the plaintiff's action, with costs.

JAYEWARDENE A.J.—I entirely agree.

*Appeal allowed.*