1902.
*February 10.*

## SILVA *v.* MENDIS.

*D. C., Galle, 5,342.*

*Civil Procedure Code, ss. 247, 363—Action by claimant in execution—Refusal of Court to stay sale pending result of trial—Sale of property before trial of claimant's action—Proper course to follow when claimant's title is good.*

Where plaintiff's immovable property has been wrongfully seized under a writ, in execution of a judgment in favour of a third party, and the plaintiff sues the execution-creditor, but before the case comes on for trial the property is sold under the defendant's writ,—

*Held*, that plaintiff is entitled to a declaration that at the date of the action the property was not liable to be sued and sold in execution of the defendant's writ, so as to leave the plaintiff to have such benefit from the declaration as he could.

*Abdul Cader v. Annamalay*, 2 *N. L. R.* 166, explained.

ACTION that four-fifths of a house be declared not liable to be sold in execution of defendant's writ, and for damages. It appeared that the house belonged to one Andris, who died intestate, leaving him surviving his widow and five children, one of whom was Carolis *alias* Kaluappu. The widow died intestate, and each of her children inherited one-fifth of the house. All of them, except Carolis, by deed dated 6th February, 1896, purported to convey nine-tenths of the house to Andris, who, by deed dated 12th June, 1896, conveyed the same to plaintiff.

Defendant, having obtained judgment against Carolis in suit No. 3,820 of the District Court of Galle, pointed out for seizure and sale in execution four-fifths of the house as the property of Carolis. Plaintiff, having unsuccessfully claimed it, sought now to establish his title to it under section 247 of the Civil Procedure Code, and to recover damages consequent upon the disallowance of his claim.

The District Judge (Mr. F. J. de Livera) held as follows:—

"Though at the date of the cause of the present action plaintiff was entitled to four-fifths of the house, yet after plaintiff's claim was disallowed and before the trial of the present case, the property claimed by plaintiff was sold in execution under defendant's writ in D. C., 3,820, notwithstanding the institution of this suit. In these circumstances, what order am I to make?

"Bonser, C.J., in D. C., Kandy, 7,816 (*2 N. L. R. 166*), held that the words in section 247—'the right which he claims to the property in dispute'—means not his right to the property, but the right which he claims in the execution proceedings, namely, the right to have the property released from seizure. Bonser, C.J., further held that the prayer in an action under section 247 should be that

plaintiff is entitled to have the property released from seizure and to have an order on the Fiscal to release the same.

" But the seizure being now merged in the sale, how can I declare plaintiff entitled to have the property released from seizure and order the Fiscal to release the same ?

" I therefore dismiss this action. Parties will bear their own costs. "

The plaintiff appealed, praying for judgment in his favour. The defendant also appealed for payment of his costs.

*H. Jayawardene*, for plaintiff.—The District Judge ought to have declared that the seizure and sale complained of was bad. In such a case the purchaser would get nothing (*Bellamy v. Sobine, 1 De G. & J. 566; Hukm Chund on Res Judicata, p. 682*). [BONSER, C.J.—The decree would not bind the purchaser.] Without such a declaration, plaintiff cannot sue the Fiscal or the purchaser. [BONSER, C.J.—I am inclined to think that you are entitled to a declaration for what it is worth.]

*Van Langenberg*, for defendant,——Plaintiff cannot have such a declaration. *Abdul Cader v. Annamalay* (*2 N. L. R. 166*) bars such a course. Plaintiff's only right was to have the property released from seizure, which however did not exist at the time of the trial of this action, because the property had then been sold. It is now impossible to give him the relief he prays for. As regards the sale of movables, it has been held in *James & Co. v. Natchiappan* (*3 N. L. R. 257*): " If an unsuccessful claimant to movables does not apply for a postponement, etc.—" [BONSER, C.J.—In that case, the sale took place before the institution of the action. Here it is different.]

10th February, 1902. BONSER, C.J.—

This case raises one of the many difficult questions with which that part of the Civil Procedure Code relating to the execution of decrees teems. The plaintiff in this action, which is an action under section 247, was the unsuccessful claimant of property which had been seized in execution at the instance of the defendant, who was the execution-creditor of a third person. The claimant alleges that his property was seized by the Fiscal at the instance of the defendant in order that it might be sold to pay the third person's debt, as being the property of the third person. He put in a claim, which was investigated and decided against the claimant. He thereupon, within the fourteen days limited by section 247, commenced this action for a declaration that the property was

1902. *February 10.*

BONSER, C.J.

not liable to be seized in execution of the defendant's writ. After commencing his action he applied to the judge to make an order to stay the sale, which was fixed for three days later. But the District Judge said that he could not do this, and that it was the duty of the plaintiff to apply for and obtain an injunction to stay the sale. As the plaintiff did not apply for and obtain an injunction, the sale was proceeded with, and the house which was seized was sold. The plaintiff then applied to the judge to refuse to confirm the sale, but he declined to do so on the ground that this present action was pending. While he declined to do this, the sale was confirmed.

In due course the present action came on for trial. The District Judge held that the plaintiff had proved that the house was his own and was therefore not liable to be seized and sold under the writ, but he held that "the seizure being now merged in the sale, "how can I declare the plaintiff entitled to have the property "released from seizure and order the Fiscal to release same? I "therefore dismiss this action. Parties will bear their own costs." Both parties have appealed against this decree, the plaintiff on the ground that he ought to have had judgment, and the defendant against the order making him pay his own costs, and also on the ground that the judge had unreasonably refused to postpone the trial for the attendance of his witnesses who were not present on the trial day.

It seems to me that, when the Judge found that the plaintiff's immovable property had been wrongfully seized and sold to pay another's debt, he ought to have given the plaintiff judgment in the action; he ought to have given him a declaration that at the date of the action the property was not liable to be seized and sold in execution of the defendant's writ, and left the plaintiff to get such benefit from that declaration as he could. It seems to me that he might bring an action against the execution-creditor for wrongfully causing his property to be seized and sold, or he might bring an action against the Fiscal for wrongfully seizing and selling his property, for this is one of the cases expressly exempted by section 363 of the Code, which says that where the Fiscal sells a property other than that of the judgment-debtor under a writ requiring him to sell the property of the execution-debtor, such seizure and sale is not to be considered an act done in execution of his duty and protected by law. He might also bring an action against the purchaser at the sale to recover the property. Of course to each of these actions different considerations would apply. It might be that the conduct of the plaintiff might furnish defences to some of these actions and not to others. It might be, for

instance, that the purchaser might say: " You by your conduct led me to believe that this was a proper sale, and I purchased the property on that footing. You are estopped by your conduct from disputing the sale which took place in my favour. " In the same way the Fiscal might possibly be entitled to say: " You by your conduct allowed me to believe that this was the property of the execution-debtor, and in that *bonâ fide* belief I sold the property," in which case, if he could prove that, he would be protected by section 363 to which I have referred.

But I cannot conceive that any conduct of the plaintiff such as is alleged in the present case, or which can be alleged against him, could justify the execution-creditor in retaining his money, the proceeds of the sale of the property on which the execution-creditor had no lien, and to which he could not possibly have any claim. Mr. Van Langenberg referred us to a case of *James v. Nachiappen* in *3 N. L. R. 257*, and said that even if it were unjust that we should allow the execution-creditor to retain this money, yet we were bound by the decision in that case and must follow it; but it will be seen that the facts in that case are quite different from the facts in the present case. In that case the sale had taken place before the action under section 247 was commenced, and both the judges who decided that case laid great stress upon that point. But the present case is distinguishable from that. At the same time, if that case comes before a duly constituted Court able to over-rule that case, I hold myself quite at liberty to express an adverse view to the principle on which that case was decided. But it is sufficient to us for the present decision that it does not cover the present action.

I have no doubt the plaintiff would have been better advised if he had at the time of commencing his action applied for an injunction under section 87 of the Courts Ordinance for restraining the execution-debtor from proceeding with the sale, as being an act in violation of the plaintiff's rights in respect of the subject-matter of the action, or as tending to render the judgment ineffectual. He did not do so, but that, it seems to me, cannot affect his rights as between himself and this defendant.

The obvious result of our view would be to allow this appeal of the plaintiff, but we have also to consider the appeal of the defendant. There was no evidence called on behalf of the defendant, owing to reasons which are stated in an affidavit which was filed by him on the day of the trial in support of the application for a postponement of the trial. The District Judge, without giving any reasons, refused the application, and proceeded to decide the action forthwith. I do not say that, if proper

1902. *February 10.*

BONSER, C.J.

reasons had been given which we could appreciate, we should have interfered with the discretion of the judge, but no reasons were given why, in the face of this reasonable application of the defendant, it should not have been acceded to, and that it was reasonable would seem to be shown by the fact that the plaintiff was willing to consent to the postponement. The defendant was quite willing to pay the costs of the day. I think, therefore, that on his paying the costs of the day the case should be sent back for a new trial.

WENDT, J.—

I agree with the decision just pronounced by the Chief Justice, and I also agree in his remarks upon the case quoted from *3 N. L. R. 257*. The learned judge appears to have, as I think, misunderstood the effect of the Chief Justice's decision in D. C., Kandy, 7,816, reported in *2 N. L. R. 167*, in that he regarded that case as deciding that if there had been a sale of the property seized by the time the action under section 247 came on for trial, no effective judgment in the claimant's favour could be passed under that action. But I think the plaintiff is entitled to have his right declared as at the date at which he brings this action,—to have, in short, a declaration that the property seized is not liable to be sold in execution, but must be released from seizure. It may be that, owing to the sale of the property in the interval, the value of that declaration may be abridged or taken away altogether as against the creditor or the purchaser or the Fiscal, as the case may be, but he is entitled to have the declaration and to enforce such right as he may have on that footing against the parties I have mentioned, or some of them. And such a declaration I think the plaintiff is entitled to get, if he shows that he is the owner of the property and not the execution-debtor.