

ROSAHAMY *et al.* v. DIAGO.1898.
August 12.*D. C., Negombo, 1,965.**Application by third party dispossessed of property in execution of a decree—Investigation thereon—Matters in issue—Possession—Civil Procedure Code, s. 328—Form of order of Court.*

The investigation on an application numbered and registered as a plaint under section 328 of the Civil Procedure Code should be limited to the question as to whether the applicant is entitled to be restored to possession of the property claimed by him. The question of title to the property should not be gone into.

The final order on such application should not be in the form of a decree in a regular suit, but one merely directing that the applicant be restored to possession.

THIS was an appeal by the respondent to a petition which was filed under section 328 of the Civil Procedure Code by a person in possession of certain property, who had been dispossessed of that property in execution of a decree in a suit to which he was not a party.

The District Judge held that the only question for him to try upon that petition was as to the right of possession. He declined to go into the question of title, and he found in favour of the petitioner.

The respondent appealed on the ground that the District Judge was wrong in thus confining the scope of the litigation.

Wendt, with *Jayawardana*, for appellant.

Van Langenberg for petitioner, respondent.

12th August, 1898. BONSER, C.J.—

The respondent to the petition relies on the words of section 328, which are as follows: "The court shall proceed to investigate the matter in dispute in the same manner and with the like power as if an action for the property had been instituted by the applicant against the decree-holder;" and he says the words "action for the property" point to a proprietary action. In my opinion that is not their meaning: that is shown by the language used in the same section describing the nature of the order which the Court is empowered to make upon the application in case the application is successful, and that is to be "an order restoring the applicant to possession." To my mind it is quite clear that the only question is the right to possession. I am therefore of opinion that the District Judge was right, but the order which he made is

1898. not quite correct. It began by a recital that "this action coming
August 12. "on for final disposal, &c." It is not an action, but an application.
BONSER, C.J. Then it proceeds "It is ordered, declared, and decreed that
"the petitioner is entitled to the portion of land therein
"described." That is incorrect. The words "declared and
"decreed" are inappropriate. The order should be "that the
"petitioner be restored to the possession of the portion of land
"&c." The decree should go back to the District Judge to be
re-formed in the manner I have pointed out, but subject thereto
it is affirmed.

WITHERS, J.—

I have no doubt whatever about the meaning of section 328.
The words appellant's counsel relied on were introduced by
way of analogy. The nature of the dispute in this case is, who is
entitled to the immediate possession, and that is the question to
be determined.
