1898. *May 26 & 31.*

SUPPERAMANIAN CHETTY *v.* MOHAMMADU ALIAR *et al.*

D. C., Kegalla, 870.

Civil Procedure Code, ss. 242, 246—Claim by mortgagee to property seized in execution—Rejection of claim and sale of property—Failure of mortgagee to institute action for establishing his right under s. 247—Right of mortgagee to bring hypothecary action against his debtors and purchaser under sale in question.

A land being seized in execution as the property of A and B, C (the mortgagee) preferred a "claim" to the Fiscal. The District Judge rejected his "claim to the property," and the land was sold by the Fiscal to D. Thereafter C (the mortgagee) raised the present suit against his debtors A and B and the purchaser D.

On D's plea that C's action was barred by section 247 of the Civil Procedure Code, in that it was not instituted within fourteen days of the rejection of the claim,—*Held*, that the "claim" rejected did not affect the right of C to sue on the mortgage bond or to seize the land mortgaged, into whose possession soever it went.

LAWRIE, J.—Section 246 of the Civil Procedure Code is intended for the benefit of those whose liens or mortgages are not registered and whose rights would be extinguished by a sale in execution, unless their existence and validity were acknowledged by the Court.

THIS was an action for the recovery of Rs. 4,350, being principal and interest alleged to be due upon a mortgage bond granted by the first and second defendants to the plaintiff. The third defendant was the purchaser (in execution of a money decree

pronounced in case No. 784 of the District Court of Kegalla) of one of the lands hypothecated to the plaintiff. Plaintiff prayed that in default of payment by the first and second defendants the lands and movables hypothecated may be declared bound and executable for the sum claimed.

The first and second defendants did not appear, and judgment was entered against them. The third defendant filed answer. He pleaded that as the plaintiff had failed to institute an action under section 247 of the Civil Procedure Code within fourteen days of the rejection of his "claim" in case No. 784 aforesaid, he was barred from maintaining the present action against him.

The District Judge found that on 3rd May, 1896, the land called Harangahatennahena (being one of the lands mortgaged to plaintiff) was seized in execution on a writ issued in case No. 784 against the property of the first and second defendants; that on the 15th May, 1896, the plaintiff preferred a claim to the Fiscal based upon the bond now sued upon; that the District Judge rejected his "claim to the property" on 30th May, 1896; that the nature of plaintiff's claim as mortgagee was not rightly understood; that the effect of the order rejecting plaintiff's "claim" in case No. 784 was not that his claim as owner should be rejected, but that his claim as mortgagee to have the land sold subject to his mortgage should be rejected; and that the order so made was conclusive only as regards the proceedings had in case No. 784, and did not go beyond the limits of the execution affected in that case. He ordered that judgment be entered as against the third defendant, as well as against the first and second defendants.

The third defendant appealed.

Bawa, for appellant.

Sampayo, for respondent.

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The lands were mortgaged by the first and second defendants to the plaintiff. The mortgage bond was registered. On a writ by a third party against the first and second defendants the lands were seized.

It is recorded that the plaintiff claimed "the lands," but that probably is a mistake in fact, for in the claim he ascribed his title to the mortgage bond.

I think it is plain that what the plaintiff meant to do was to intimate to the Court and to any intending purchasers the fact of the existence of the mortgage. It may be that the plaintiff was under the belief that his mortgage gave him a right to prevent a

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sale in execution at the instance of an unsecured creditor. If that was the ground on which his claim was made, the order of the District Judge rejecting the claim on the 30th May, 1896, was undoubtedly right. The rejection of the claim, the refusal to release the lands from seizure, was conclusive, for the plaintiff did not bring action within fourteen days.

But in my opinion it was conclusive only on the claim as made: it was conclusive that the plaintiff was not the owner of the lands, and it was conclusive of the claim to have the seizure removed at the instance of a mortgagee. It seems to me impossible to carry the consequences of the conclusiveness of the order further, and to hold (as the appellant demands) that the question of the mortgagee's right to sue on the mortgage was, by the order of the District Judge, conclusively decided in the negative.

If the claim made by the plaintiff was not intended to be for an unconditional release of the seizure, but was virtually one under section 246 for a continuance of the seizure subject to the mortgage, the District Judge refused to make the order. It is not suggested that the validity of the mortgage was disputed. I do not know why the Judge did not continue the seizure subject to the mortgage; but whatever reason he had (short of deciding that the mortgage was invalid), it seems to me that the refusal did not touch the mortgagee's rights as against his mortgagor, nor against the land into whosoever possession it might afterwards come.

The 246th section is, I think, intended for the benefit of those whose liens or mortgages are not registered, rights which would be extinguished by a sale in execution, unless their existence and validity were acknowledged by the Court: and it was ordered that the sale be subject to these unregistered rights,—that is, that the purchaser took the property burdened by the lien or mortgage mentioned in the order.

In the case of registered mortgages the sale is by law subject to the mortgage, and no statement by a Court to the affirmative is necessary.

I would affirm with costs.

BROWNE, A.J.—

I agree. The facts of this case are exactly, *qua* the order made under section 246, the converse of those in the case reported in *2 N. L. R. 111*. In my judgment the Court can, in an application under that section, make only one of two orders: "Let the seizure "continue as it presently is," *i.e.*, unaffected by any consideration of whether the land is affected by the alleged mortgage or lien; or else "Let the seizure be continued subject to the mortgage

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" of the land affected by the bond No. ——, dated ————." I do not see that the Court could order that the seizure should continue, and the land should be sold free of liability to the alleged mortgage. It is not easy to anticipate the purposes for which the latter possible order might be sought or made to serve. As the seizure is to continue subject to the mortgage, it could not well be that the land should be sold clear of it and the proceeds applied to pay the mortgagee (with precedence) and the execution-creditor. But if the mortgagee were on the eve of obtaining his decree under section 201, or a sequestration under section 645, the Court might, after such recognition of his rights by some later order, stop the writ-holder from at once having the property sold by Fiscal, and might do so in the interests of the writ-holder, or even of the debtor himself, so that there should be but one sale, at which a purchaser, with no future sale in view, would be inclined to bid the full value as for a certainty.