

SILVA v. DINEKEHAMY.

D. C., Galle, 3,285.

*Civil Procedure Code, s. 247—Plaint presented within time, but rejected—Irregularity of accepting fresh plaint as amended plaint, though out of time.*

No action solely and exclusively under section 247 of the Civil Procedure Code can be maintained if instituted more than fourteen days after the date of the order upholding the claim to the property seized in execution.

If a plaint is rejected, and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

THIS action, which purported in the body of the plaint to be raised under section 247 of the Civil Procedure Code, prayed as follows:—"Wherefore the plaintiff, claiming the benefits of the 3rd clause of Ordinance 22 of 1871, prays that his judgment-debtors be declared entitled to the said premises, and that the said property be declared executable under the said writ."

It appeared that the order of Court releasing the property and allowing the defendant's claim was made on the 28th September, 1894. The plaint was presented on the 10th October following, which was within the period of fourteen days allowed by the section. The District Judge rejected the plaint on the 12th October, "because it was not clearly written, and the value of the property was in the wrong place." A new plaint dated 10th October was presented on the 19th October, and was accepted on the 22nd October, the Court holding that its "order of rejection must be taken as an order for amendment, and the new plaint must be treated as amended and as presented on the 10th."

The Proctor for defendant, ere filing answer, moved that the action be dismissed with costs, on the ground that it was instituted too late. The District Judge disallowed the motion.

The defendant appealed.

*Blazé* appeared for appellant, and contended that the Court below should have dismissed the action.

*Dornhorst, contra.* An amended plaint is a substitution of the original one (2 C. L. R. 187). The present order is not appealable, on the ground that there is sufficient material on the record to make the action in the alternative an *actio hypothecaria*. If so, it is not touched by the Code.

*Blaze*, in reply. By section 46 of the Code the time must be limited for amendment. But in this case the Court fixed no time. So, the order must be taken as directing the plaint to be amended then and there.

21st March, 1895. WITHERS, J.—

We think it proper to affirm this order, refusing to dismiss the action on a motion made by the Proctor for the defendant on the date appointed for his client to appear and answer to the summons issued on the accepted plaint.

It has been argued before us that this plaint is not one exclusively within the provisions of the section 247 of the Civil Procedure Code, but contains an alternative claim, one being independent of those provisions. But this point was not taken before the Court below, and we come to the conclusion that the defendants should answer this plaint in such a way as they may be advised. What we do now decide is, that if this is an action solely and exclusively under section 247, it cannot be maintained, inasmuch as the action has been instituted more than fourteen days after the date of the order upholding the defendant's claim on the property seized in execution.

A plaint was submitted to the Judge within the requisite time, but the Judge rejected the plaint for the reasons which he has recorded on the record at page 24. Not till the 22nd October, 1894, and therefore long after the prescribed time, was the present plaint submitted and accepted.

If a plaint is rejected and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

It is because of the way the Judge intended to deal with the rejected plaint and of the concluding paragraph of section 46 of the Civil Procedure Code, which says that the rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, that we allow this judgment to stand with the limitation mentioned before.

We cannot allow a fresh plaint in respect of an action under section 247, but only in respect of an action that lies outside that section.

Costs to abide the event.

LAWRIE, A.C.J.—

I agree. This is an action under section 247, which cannot be entertained, as the plaint was presented too late. In agreeing to send the case back for further proceedings, I express no opinion whether the plaint contains any other cause of action. That is a matter not yet dealt with by the District Court, and will be dealt with on the defendant's answer.