1895.
Sept. 17.

TERUNNANSE *v.* MENIKE.

D. C., Badulla, 746.

Civil Procedure Code, s. 247—Action by execution-creditor—His incompetency to prove prescription—Title of execution-debtor—Ordinance No. 22 of 1871, s. 3—Meaning of "possession" therein—Roman-Dutch Law as to prescription.

It is not competent for an execution-creditor, who in an action under section 247 of the Civil Procedure Code was seeking to have it declared that certain immovable property, which had been released by order of Court from seizure under a writ of execution of a judgment held by him, was available for levy as his judgment-debtor's property, to lay a foundation of title in his debtor to the property sought to be so levied, by proving ten years' adverse and uninterrupted possession by his debtor of the property, immediately previous to the seizure in execution, in accordance with the requirements of the Ordinance No. 22 of 1871.

The "possession" contemplated in section 3 of Ordinance No. 22 of 1871 is that of a party to a suit, or of his predecessor in title, but not that of a third party.

The effect of the Ordinances 22 of 1871 and 8 of 1834 is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription, except as regards the property of the Crown.

THE facts of the case are stated in the judgment of their Lordships.

Bawa and *Van Langenberg*, for appellant.

Sampayo, for respondent.

17th September, 1895. BONSER, C.J.—

In this case the plaintiff brought an action under section 247 of the Civil Procedure Code claiming, (1) to have an order made by the District Court on a claim inquiry set aside; (2) that one Johannis Fernando might be declared the owner of a certain field, and that such field might be liable to be seized and sold under a writ of execution issued by the plaintiff against the said Fernando; (3) that the defendants might be ejected from the field and the

plaintiff put into quiet possession thereof ; and (4) Rs. 50 damages. For the third claim there was obviously no foundation.

It appears by the evidence that the plaintiff purchased "one amunam" of this field on the 26th of June, 1871, when it was sold by the Grain Tax Commissioners for default by the then owner, the husband (now deceased) of the first defendant, in payment of the tax.

No conveyance, however, was ever made to the plaintiff, nor a certificate of sale under Ordinance No. 5 of 1866 given to him, so that the plaintiff did not obtain a legal title to the land.

It further appears that by a deed of the 16th July, 1890, the plaintiff conveyed the land to the said Johannis Fernando for a sum of Rs. 150, which was not paid, but for which the said Johannis Fernando the same day mortgaged the land to the plaintiff. The plaintiff alleges that Johannis Fernando went into possession, but never paid the purchase money or any part thereof.

The defendants, who are the widow and daughter of the late owner of the land, seem to have been continuously asserting their right to this land ever since his death.

It is a significant fact that they were admittedly in possession of and cultivating this land on one occasion after the purchase by the plaintiff for a whole year. The plaintiff explains this by saying that they went in as his tenants. Considering that these people had been all along asserting a right to this land, this explanation is in the highest degree improbable, and I am by no means satisfied that the plaintiff has ever had possession of this land for such a period or of such a character as satisfies the requirements of Ordinance No. 22 of 1871.

But, assuming that the plaintiff has shown that he had possession of this land for ten years uninterruptedly before his sale to Fernando, I do not think that this can avail him in the present action.

What he has to prove in this case is that the land is Fernando's, but apart from Ordinance No. 22 of 1871, Fernando had no title. Can the plaintiff set up prescription to prove Fernando's title ? In my opinion he cannot.

It was held in the case of *Punchirala v. Andris Appuhami* (*3 S. C. R. 149*) that it is not competent for a plaintiff or defendant to set up a third person's title under section 3 of Ordinance 22 of 1871, but that the possession to be proved must be that of a party to the suit or of his predecessor in title, and that the judgment to be given under that section must be declaratory of the right of a party to the action, not of a stranger. I agree with that decision.

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The Ordinance was passed, as I venture to think, to protect actual possessors only, and was intended to be used as a shield only, and not as a weapon of offence.

If the person in possession were sued by the true owner, he could plead the Ordinance, or he might take the initiative if his possession was disturbed or threatened, and apply for a decree establishing his title and quieting him in possession. The Ordinance differs essentially from the English Statute of Limitations, which at the expiration of the statutory period transfers the ownership to the possessor, and extinguishes the title of the original owner.

The plaintiff's action therefore fails, and should be dismissed with costs.

WITHERS, J. —

The only point discussed before us was whether an execution-creditor, who in an action under the 247th section of the Civil Procedure Code was seeking to have it declared that certain immovable property, which had been released by order of Court from seizure under a writ of execution of a judgment held by him, was available for levy, as his judgment-debtor's property could lay a foundation of title in his debtor to the property sought to be so levied, by proving ten years' adverse and uninterrupted possession by his debtor of the property immediately previous to the seizure in execution, in accordance with the requirements of Ordinance No. 22 of 1871.

It has been laid down and constantly acted upon by this Court that the governing Ordinance No. 22 of 1871, and the previous Ordinance No. 8 of 1834, kept alive the repeal by regulation No. 13 of 1822 of "all laws heretofore enacted or customs existing "with respect to the acquiring of rights and the barring of civil "actions by prescription," and that the consequence of that regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown.

Hence the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance No. 22 of 1871.

That section determines the mode of acquisition of a prescriptive title.

It has been held over and over again by this Court that a decree of title to such immovable property can be granted under the circumstances set forth in that section.

The immovable property, however, it is clear, must be the subject of litigation between contesting parties, a plaintiff and a defendant.

If a plaintiff solicits the decree provided for by that section, he must prove that he has had adverse and uninterrupted possession of the immovable property for ten years previous to the bringing of the action ; and if a defendant solicits such a decree, he must prove that he has had a similar possession of the immovable property.

The judgment-debtor not being either a party plaintiff or a party defendant to the present action, it is clear that the execution-creditor cannot put forward proof of the statutory possession in his judgment-debtor for the purpose of supporting his present claim.

This very point was determined in the case of *Punchirala v. Andris Appuhamy* reported in *3 S. C. R. 149*, and we were invited to re-consider that decision.

In my opinion that was a good decision, and so far as this point is concerned I would give judgment against the plaintiff.

BROWNE, A.J.—

In this action the case for the plaintiff is that he on the 26th June, 1871, purchased one amunam of a field at a sale held under the provisions of the Ordinance No. 5 of 1866 ; that he held possession thereof till the 16th July, 1890, when he sold it to Johannis Fernando for Rs. 150 to be paid in three instalments, and his purchaser gave him on the same date a mortgage bond to secure such payment; that on the 19th January, 1893, plaintiff put this bond in suit in the action No. 532, and on the 14th March, 1893, obtained *ex parte* a *decree nisi*, which was made absolute on the 9th May ; that in the interval between these last two dates, viz., in April, 1893, defendants entered into and took possession of the field, and thereafter, when in July plaintiff issued writ of execution and seized the field, defendants laid claim thereto, which claim was upheld on the 19th September ; and that plaintiff thereafter, under the provisions of section 247, Civil Procedure Code, instituted this action on the 27th September, and in the 8th paragraph of his plaint specially averred that the defendants have entered into and held possession for five months before the institution of his action.

Now plaintiff admits he did not get from the Government Agent the certificate which section 9 of Ordinance No. 5 of 1866 made sufficient to vest the property in him, nor a transfer of the land. The title of his execution-debtor thereto—the seizable interest

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therein [which by a mistake in paragraph 4 of the plaint, that finds repetition throughout the proceedings, is termed a seizable interest of the plaintiff instead of belonging to the plaintiff's execution-debtor]—can therefore be one resting only on the quiet and undisturbed possession of plaintiff and his vendee by adverse title for over ten years previous to the institution of any action which puts in question the sufficiency of fact of such an alleged statutable possession. The learned Acting District Judge has held that such possession has been satisfactorily established. I think it is open to question whether it has been so, for though I believe the fact of the original auction sale, and though the defendant thereafter, on some date not given by her deed No. 4,965, gave as the northern boundary of her other two amunams this one and described it as the property of the plaintiff, it is in evidence that there have at different times, the dates of which are not clearly given, been disputes actually culminating in Gansabáwa litigation respecting plaintiff's rights to the rents and revenues of the field. We have not the records of those litigations before us to say how far they disputed plaintiff's title to the land, or only raised some question as to fact or amount of rent or share due to him; and it is for plaintiff under section 3 of Ordinance No. 22 of 1871 (assuming at present he has right here to do so) to give full proof that his possession was undisturbed and uninterrupted; and next it must be observed that from plaintiff's evidence that he would not have put his mortgage bond in suit had not defendants taken possession of the land, and the fact that he paid no tax for 1893, it can only be concluded they had so taken possession prior to the 19th January, 1893, when he instituted his suit No. 535, and hence that the defendants had been in possession for at least eight months before he instituted this suit. Now, assuming as before that plaintiff would have right to sue to establish his mortgagor's title by prescriptive possession, and that under the decisions in *Rámanáthan, 1860–1879*, and *II. C. L. R. P. 45*, he would, despite the decision in *8 S. C. C. 31*, not be debarred by his waiting for those eight months from bringing his action, yet it is clear he could in January, 1893, have instituted either a separate *actio hypothecaria* against the defendant as those then in possession of the mortgage, or else have joined them as co-defendants in his action against her mortgagee instead of waiting for the improbability that on his issuing writ they would not dispute his right to make the mortgage exigible.

Then arises the question which I have hitherto assumed in plaintiff's favour—whether under section 3 of Ordinance No. 22 of 1871, and his right thereby to bring his action "for the purpose

"of being quieted in *his* possession of lands ....., or to establish "her claim in any other manner to such land," he can sue here to have established his mortgagor's title thereto by prescriptive possession of the mortgagor and his predecessors in title, which in this instance "includes plaintiff himself." The question must be asked as of any writ holder who had to sue under section 247, Civil Procedure Code, and after hearing the further argument addressed to us I consider such writ holder has no such right. The words are limited to *his* claim and *primâ facie* relating to his own personal claim in and for his own personal rights have no words added thereto, which would give them this larger effect of establishing a claim for another, although in its other parts the section is so suggestive of and helpful to establish a claim *through* another. It was urged on us this would baffle many a creditor and help many a slippery debtor by debarring the former from contesting in a section 247 action a false claim preferred so plausibly as to be upheld by the Court, but it will be remembered that a creditor can by an examination of a debtor under section 219, before issue of writ, ascertain what prescriptive rights he has, so as to forestall any collusive claim, and that success in such an expedient may only result in an arrest and insolvency of the debtor.

But all these considerations indicate to me that plaintiff's entire procedure has been erroneous, and that under the objections taken in the answer and pressed at the trial the plaintiff is not entitled to sustain this action against the defendants.

He should have instituted the hypothecary action against defendant in the first instance as part of, or concurrent with, his action against his mortgagor; and if he elected to proceed with the latter alone under the circumstances that (as he both alleges and admits) his mortgagor's residence was unknown to him, he should have followed the procedure specially directed for such a contingency by section 645 *et seq.* of the Civil Procedure Code, for section 648 makes special provisions for such a contingency as has here occurred, simplifying procedure and securing litigation more prompt and less costly than that which has been here adopted of action against mortgagor, claim, and this *quasi* hypothecary action under section 647.

Not having conformed to the sequestration procedure against the absent mortgagor, I cannot regard the plaintiff to have established as against these defendants that he ever obtained any mortgaged decree. Moreover, the formal decree both fixes as the date for payment one anterior to the date of decree absolute, viz., a date between those of *decree nisi* and *decree absolute*, but

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also does not at all conform to the requirements of section 201. It does not show *ex facie* that the property decreed to be sold was mortgaged by the defendant to the plaintiff by his bond dated 16th July, 1890, and it gives no directions whatever for sale. It never empowered the Fiscal to seize the lands. The authority to him to be valid should have been given in the decree itself, and not in any writ or subsequent order. If it can be held that the decree obtained in his abortive or irregular mortgage action is good for aught as a money decree, and we could regard this as an ordinary case of a section 247 action by creditor against claimant, I can only say that I regard the proof of ten years' uninterrupted and undisturbed title as insufficient, and hold plaintiff is not entitled to succeed herein. But I am not disposed to allow the result of an action to be good for a purpose other than that to which it was originally directed. It would be plainly unjust to the defendants that we should do so, and thereby give plaintiff a general writ against all his property in the first instance instead of allowing to the debtor the shield of the value of the mortgage so far as it should prove effectual.

I would dismiss plaintiff's action with costs.