1896.
October 6.

ABDUL CADER *v.* ANNAMALAY.

D. C., Kandy, 7,816.

Civil Procedure Code, s. 247—Action thereunder—What plaintiff should prove and pray for—Court in which action is to be brought—Form of order in claim inquiry.

Where property seized in execution is claimed, and the claim after investigation is disallowed, and the claimant brings an action under section 247 of the Civil Procedure Code, his prayer in the plaint should be for a declaration that he is entitled to have the property released from seizure, and for an order on the Fiscal to release the same accordingly. If he proves that he was in possession of the property at the time of the seizure, he will be entitled to the declaration and order prayed for, unless the defendant counterclaims for a declaration that he is entitled to have the property seized and sold for payment of his judgment debt, and proves that his judgment debtor is the owner of the property.

Per BONSER, C.J.—The action under section 247 of the Civil Procedure Code need not necessarily be brought in the Court which held the inquiry into the claim. If the value of the property seized does not exceed Rs. 300, the action should be brought in the Court of Requests, although the original action in which execution issued was in the District Court.

Per WITHERS, J.—The order in a claim inquiry, being an order like a judgment, should contain a concise statement of the case, the points for determination, the decision, and the reasons. The claim or objection should be clearly defined, and the facts on which the decision is based clearly found.

1896.
October 6.

THE plaintiff in this case claimed certain property seized in execution of a writ sued out by the defendant against a third party. The claim was inquired into and disallowed. He brought the present action under section 247 of the Civil Procedure Code to establish his right to the property seized. He pleaded title acquired by prescriptive possession, but failed to prove such possession, and the District Judge entered judgment against him. The plaintiff appealed.

Sampayo and *Wendt*, for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

6th October, 1896. BONSER, C.J.—

I am of opinion that the District Judge rightly decided the issue agreed on by the parties, viz., "whether the plaintiff is entitled to the lands claimed." The plaintiff failed to establish a prescriptive possession.

We sent for the proceedings on the claim inquiry to ascertain who was then found by the District Judge to have been in possession of the property at the time of seizure. They do not assist us.

The District Judge seems to have rejected the plaintiff's claim without assigning any reasons. The question who was in possession at the time of seizure is all important in claim inquiries. If the plaintiff was in possession either by himself or another, the property ought to have been released from seizure, and the plaintiff ought not to have been driven to an action to assert his rights. He was entitled to retain possession of the property until he was evicted by some one with a better title.

In this case the plaintff has misconceived his rights and placed his claim too high. The "right which he claims to the property in dispute" (section 247) has been held—and in my opinion rightly held—by the Calcutta High Court (*15 Calc. 674*) to mean not "his "right to the property," but the right which he claims in the execution proceedings, viz., the right to have the property released from seizure.

The prayer therefore of a plaintiff in an action such as this under section 247 should be for a declaration that he is entitled to have the property released from seizure, and for an order on the Fiscal to release the same accordingly.

If the plaintiff proves that he was in possession of the property at the time of the seizure, and that therefore the Court ought not to have refused to release the property, he will be entitled to the

1896. *October 6.*

BONSER, C.J.

declaration and order he prays, unless, indeed, the defendant counterclaims for a declaration that he is entitled to have the property seized and sold for payment of his judgment debt, and proves that his judgment-debtor is the owner of the property.

The action under section 247 will not necessarily be brought in the Court which held the claim inquiry, for, if the value of the property seized does not exceed Rs. 300, it will be brought in a Court of Requests, even though the original action was brought in a District Court. But in such a case there will be no conflict between the two courts, for the District Court will, of course, recognize the adjudication of the Court of Requests as being the adjudication of a competent Court, and will govern itself accordingly.

The appeal will be dismissed.

WITHERS, J.—

I concur in thinking that the decision appealed from is right and should be affirmed.

The plaintiff invited an adverse judgment by his change of front.

In the case of *Wijeyawardene v. Maitland*, reported in *3 C. L. R. 7*, I observed: "I have no doubt that under section 247 of the "Civil Procedure Code a claimant or objector can only seek to "establish in the action thereby permitted to him the very same "right in the property under seizure as was the subject of the "adverse order, within fourteen days of which he is compelled "to take the action allowed him." I remain of that opinion.

What was the plaintiff's claim when the property was seized? This should, I think, have been stated in the plaint in the action, but it was not so stated.

We had to send for the proceedings in the claim inquiry to ascertain what the plaintiff's claim was, and what the Judge who inquired into the plaintiff's claim found and decided.

Section 243 of the Civil Procedure Code is of importance in this connection. It enacts that the claimant or objector must, on such investigation, adduce evidence to show that at the date of seizure he had some interest in or was possessed of the property seized.

The claim which the petitioner put forward to the property seized was two-fold: he claimed to have purchased it by a notarial act from a third party, and also to be in actual possession of the property at the time of seizure. His interest as distinguished from possession was his interest under the notarial conveyance.

No doubt the Judge who inquired into his claim could not pronounce upon his title by purchase, but proof of purchase and right in the vendor, if any, might have assisted the Judge in deciding whether the property was in possession of the judgment-debtor or not, for if it was not in the judgment-debtor's possession or in the possession of another on the judgment-debtor's account, the Judge would have been bound to release the property from seizure. *A fortiori* was he bound to release the property from seizure if it was in possession of the claimant or of some one on his account.

Judging from the Fiscal's report of this claim to the Court it looks as if at least one of the properties seized was in the possession of one Rawter on account of the claimant. Be this as it may, the plaintiff, as I said, changed front in this action and claimed a decree under the Prescription Ordinance in his favour.

The necessary proof of adverse and uninterrupted possession for ten years previous to action was not forthcoming, and the consequence was failure.

The order in the claim inquiry lacks some of the constituents of a proper order. An order, like a judgment, should contain a concise statement of the case, the points for determination, the decision, and the reasons. Investigation into claims and objections under section 241 and following sections cannot be too carefully conducted.

The claim or objection should be clearly defined, and the facts on which the decision was based should be clearly found.

The ultimate fact is in most cases possession, and possession is a right which deserves to be carefully protected.

The popular saying that possession is nine-tenths of the law marks the value set upon possession.

If a person is in possession he should be maintained in his advantageous position. He should be the defendant, and he who, like an execution-creditor, asserts that property of which a claimant is in possession belongs to his judgment-debtor, should be made to prove it, *melior est conditio possidentis et defendentis.*

If a claimant is in possession of property seized, it is very hard that he should be compelled to take the initiative and prove his title, and have only fourteen days to prepare his proofs.

I say possession is in most cases the ultimate fact to be determined in claim inquiries. It may not be so in all cases, for the interest of a claimant who is not in possession may have to be protected, such as a mortgage or lien, for which provision is made in section 246.