1906.
November 19.

[Full Bench.]

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

SILVA *v.* NONA HAMINE.

D. C., Kalutara, 4,714.

Fiscal's sale—Necessity for conveyance—Seizure—Claims—Action under s. 247—Right at the date of seizure—Ordinance No. 4 of 1867—Civil Procedure Code, ss. 241, 242, 247, *and* 289.

A Fiscal's sale held under the provisions of Ordinance No. 4 of 1867 cannot be proved except by the production of a conveyance duly executed by the Fiscal.

An unsuccessful claimant to property seized cannot maintain an action under section 247 of the Civil Procedure Code, if he had no right to such property at the date of seizure, even although he might have acquired title subsequently.

As a general rule, the claims of a litigant must be determined according to his rights and the law existing at the date of action brought.

THE facts and arguments sufficiently appear from the judgments. *Bawa* (with him *Akbar* and *V. M. Fernando*), for the plaintiff, appellant.

Wadsworth (with him *Elliott*), for the defendant, respondent.

Cur. adv. vult.

19th November, 1906. HUTCHINSON C.J.—

This is an appeal by the plaintiff from the judgment of the Kalutara Court of Requests.

The plaint stated that Dona Katherina and her son Don Simon Appu were owners of certain land; that under a writ of execution against Dona Katherina and the heirs of her said son (who are the defendants in this action) the property was duly seized and sold by the Fiscal in 1886 and was bought by Weerasinghe, who sold it to Weerakoon, who mortgaged it to the plaintiff; that the plaintiff sued Weerakoon on the mortgage and obtained a decree against Weerakoon, and thereupon took out execution and caused the property to be seized under the writ of execution; that the defendant then set up a claim to the property, which was upheld by the Court on 19th July, 1905; and that thereupon the plaintiff brought

this action, in which he asks that the defendant's claim be set aside and that Weerakoon may be declared entitled to the property, and that it may be sold in execution under the plaintiff's writ in his action against Weerakoon.

The seizure in the action against Weerakoon was in 1905. The present action was commenced on 1st August, 1905. Up to that time no Fiscal's conveyance had been obtained in pursuance of the sale to Weerasinghe in 1886, but in January orders were obtained confirming that sale, and a Fiscal's conveyance was executed to Weerasinghe.

The Commissioner held that the only question in this action is whether at the date of the seizure in the plaintiff's action on his mortgage the property belonged to the judgment-debtor (Weerakoon), and that so far as the documentary title was concerned it clearly did not.

The plaintiff's advocate therefore did not form the other issues which had been raised as to Weerakoon's prescriptive title by possession, and the Commissioner accordingly dismissed the action.

In my opinion the judgment was right. It was argued for the appellant that he had a good title, that Weerasinghe had a good title before the Fiscal's conveyance, and that that conveyance was a mode of proving his title; that under the Ordinance No. 4 of 1867, under which the sale took place, no conveyance was necessary; that the order upholding the defendant's claim may have been right on the evidence then before the Court, but that now the plaintiff on producing the further evidence of the Fiscal's conveyance is entitled to succeed. He would argue, if I rightly understand him, that the knocking down of the land to the highest bidder has the effect under the Ordinance of 1867 of vesting the property in him. I cannot find that that Ordinance gives such effect to a purchase from the Fiscal, and in the absence of any such provision in the Ordinance, I think a purchase from the Fiscal required to be perfected in the same way as any other purchase (except as regards the special statutory provisions as to the ordinary purchases which were declared not to apply to Fiscals' sales). In all cases a formal transfer was necessary to pass the property. This was so under the Roman-Dutch Law, and no enactment, so far as I can see, has dispensed with the requirement in the case of sales by the Fiscal.

It was there argued that on the execution of the Fiscal's transfer the purchaser's title related back to the date of the purchase. For some purposes that may be so, but I doubt whether it would affect the rights of third parties who may have intervened in consequence of the purchaser's delay in perfecting his title, and in any case it

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cannot affect the question in this case, which is, whether Weerakoon had a good title at the date of the seizure. Perhaps, if the purchaser had done all that he had to do in order to complete his title, and the delay in obtaining the transfer was merely the fault of the Fiscal, the Court might hold that that must be taken to have been done, which ought to have been done, and that the Ordinance should date from the sale, or at least from the date when the purchaser had done all he could to obtain it. But that is not so here.

The appellant also contended that the plaintiff in such an action as this, which is under section 247 of the Civil Procedure Code, may claim " to have the property declared liable to be sold in execution of the decree in his favour, " and that at the date of the trial this plaintiff proved that the property was then so liable. The answer to that is that the judgment can only declare the right which the plaintiff had at the date of the commencement of the action, and even assuming that the words " declared liable " means " declared to be liable at the time when the action is brought " and not " declared to have been liable at the date of the seizure, " this action must fail, because the plaintiff had no title at the time when the action was brought.

I think therefore the appeal must be dismissed with costs.

WENDT J.—

This case has been reserved for the consideration of three Judges upon a question relating to the effect of sales in execution and of the Fiscal's conveyances granted in pursuance of them. The facts material to the question are shortly as follows. In execution against one Dona Katherina and her son Don Simon, the Fiscal on the 24th September, 1885, sold the right, title, and interest of Dona Katherina in and to one-third of the garden Kiriammawatta, and on 22nd April, 1886, he sold two-thirds of the garden. The purchaser in each case was the execution-creditor (substituted plaintiff) Don David Weerasinghe, to whom the Fiscal allowed credit for the prices bid at the sale in reduction of his judgment amount. In the year 1887 the District Court of Kalutara, being the Court out of which the writ of execution issued, made order that the substituted plaintiff had a right to a conveyance of the right, title, and interest of the debtor (*sic*) in the property sold, and that " a conveyance ought to issue to him. " But no conveyance was in fact executed. The purchaser, however, in 1889 sold and conveyed the land to one Weerakoon, who in 1896 mortgaged it to the present plaintiff. In March, 1905, plaintiff got a decree against Weerakoon for the mortgage debt and caused the Fiscal to seize

the land in execution, as also one-third of another land named Mahasekandewatta, which plaintiff alleges was also sold in execution against Dona Katherina and Don Simon and dealt with by the subsequent deeds, but as to which there is as yet no proof. Upon the seizure the present defendant preferred a claim, which after inquiry was upheld by the Court on 19th July, 1905. Thereupon the present action was brought on 1st August, 1905, by the plaintiff, under the provisions of section 247 of the Civil Procedure Code, to have it declared that the property was liable to be sold under his writ of execution. The defendants (who are the children of Don Simon, one of them being also wife of Weerakoon) in their answer dated 11th October, 1905, admitted the title of Dona Katherina and Don Simon, but denied Weerasinghe's purchase and his transfer to Weerakoon. They also pleaded that they "are the owners of the properties, and have always been in possession of them, and that the debtor never had right, title, or possession." At the trial on 12th April, 1906, plaintiff produced two Fiscal's conveyances dated 23rd January, 1906, in favour of Weerasinghe for the shares of Kiriammawatta. To each of them is attached copy of an order made by the Court on 5th January, 1906, on the footing that the sales had been already confirmed, and allowing Weerasinghe credit for the purchase money and directing the Fiscal to execute the necessary conveyances. The Commissioner held that it was incumbent on plaintiff to show that at the date of the seizure under the writ the property belonged to his judgment-debtor, and that the execution at a later date of the Fiscal's conveyances, which related back to the date of the Fiscal's sales, might afford ground for a fresh seizure, but could not establish a title in the grantee as at the date of the existing seizure. The plaintiff not being prepared to prove prescriptive title in Weerakoon, the action was dismissed with costs. Plaintiff now appeals.

It was argued for the appellant, first, that the conveyance by the Fiscal is not necessary to constitute a valid sale of land, but is merely evidence of the sale, and that therefore the production of the document at the trial is sufficient to show that the purchaser was vested with title from the date of the action; and secondly, that, assuming the title must be referred to the date of the conveyances, plaintiff was still entitled to judgment, as it was open to him, in this form of action, to show that on the day of trial the land was liable to be sold under his writ, although it might not have been so liable at the date of seizure. The first position, it was admitted, could not have been maintained under the law embodied in the Civil Procedure Code, because section 289 expressly

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enacts that the title of the judgment-debtor is not divested until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance. The absence of a similar provision in " The Fiscals' Ordinance, 1867 " (under which the present sales took place), while it leaves an opening for Mr. Bawa's arguments, does not, in my opinion, indicate any difference in the law. It is within my recollection that the argument was more than once addressed to this Court, but in every instance the Court refused to accede to it. Certainly no decision recognizing the suggested state of the law has been produced, and I do not believe any exists. On the contrary, there are decisions the other way. In D. C., Matara, 34,265 (1), where the plaintiff claimed title by purchase at an execution sale against the defendant, but no Fiscal's transfer had been executed, the Full Court consisting of Clarence A.C.J., Dias and Lawrie J.J., held that parol evidence of the sale had been rightly rejected, and that plaintiff's title under the alleged sale failed. In C. R., Galagedara, 36,818 (2), Lawrie J. refused to assent to the view of the Commissioner, " that the mere fact that the highest bidder at a Fiscal's sale of land is declared the purchaser vests the property in him, " and added " to create title he must get a transfer."

By the Roman-Dutch Law private sales of immovable property were null and void unless made " before the Court " and the transfer registered and duty paid thereon (*Grotius Introd.* 2, 5, 13; 2 *Kotze's Van Leeuwen* 137), and I gather that sales in execution equally required the written transfer (*Juta's Van der Linden*, 2nd ed., 335). To come to our own legislation, Regulation No. 6 of 1824, section 24 (the earliest enactment I can find on the subject), and Regulation No. 13 of 1827, which repealed it, no doubt required that the Fiscal shall, upon being furnished by the purchaser with the necessary stamp, " make out the usual certificate of sale, " but no form is prescribed and nothing stated as to the effect of it. Then came the Ordinance No. 9 of 1836, which dealt with the duties of Fiscal in greater detail, and which enacted (section 24) that when the price had been paid in full, " the Fiscal, on being furnished by the purchaser with stamped paper of the proper amount by law required on conveyances of immovable property, shall make out, execute, and deliver to the purchaser a conveyance of the property according to the Form C hereunto annexed. " The Form C is substantially that now in use. After reciting the sale and the payment of the price, it witnesses that the Fiscal, in consideration of the sum so paid, " hath sold and assigned, and by these presents doth sell and assign unto the purchaser, his heirs, &c.," the land in question. The Rules of Court of 11th

(1) *Civ. Min., September* 7, 1888. (2) *Civ. Min., September* 28, 1888.

July, 1840 (which replaced the Ordinance of 1836 when repealed by Ordinance No. 1 of 1839), and the Ordinance No. 4 of 1867, which in turn replaced the rules, re-enact the provision almost verbatim. Although the Ordinance of Frauds and Perjuries (No. 7 of 1840), section 2, apparently refers to Fiscals' conveyances as "certificates," that must be due to inadvertence and forgetfulness of the terms of the Ordinance of 1836. The Ordinance No. 11 of 1847, passed to remove doubts as to the validity of instruments executed by Deputy Fiscals, speaks of them as " transfers of immovable property. "

For these reasons I hold that even prior to the enactment of the Code the execution of the conveyance by the Fiscal was an essential ingredient of the sale of land, and that until such execution the judgment-debtor remained vested with the title. It is true that upon the execution of the conveyance the purchaser, by the doctrine of relation back, became vested with the title as from the date of seizure; but that does not help plaintiff in this case.

Appellant's second point depended upon his establishing a distinction between the case of the decree-holder and that of the claimant when plaintiff in an action under section 247. He conceded that the right which the claimant-plaintiff has to make out is the same as that which he set up at the claim inquiry, which again was required by section 243 to be a right at the date of seizure. But he argued that the scope of the creditor-plaintiff's action was " to have the property declared liable to be sold." Concede for a moment that that does not imply a liability at the date of seizure: What is the date to which the inquiry must be directed ? Not, surely, the date of the trial of the section 247 action! If it be the date of the institution of the action, that is fatal to the present plaintiff, because at that date the property was not so liable. No reason whatever has been urged why the plaintiff in this form of action should be exempt from the fundamental rule, that an action has to be determined according to the rights of the parties as existing at the date of its institution. No exception to that rule is recognized by the Code, which contains no provision for the pleading or determination of matters which alter the rights of parties pending action. On the contrary, the sequence of the enactments which culminate in the action under section 247 renders it impossible to avoid the conclusion that the rights of the creditor as well as of the claimant must be considered as at the date of seizure. To begin with, section 218 limits the power of seizure and sale in execution to " all saleable property belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has a disposing power. " The creditor must first act within the powers so conferred on him.

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He may then be met by a claim, which may be upheld (consistently with the existence of such an interest in the judgment-debtor) on the ground that the claimant "had some interest in or was possessed of the property seized." Then follows the action of the creditor. In my opinion, it presupposes a liability to seizure, a rightful seizure, and a wrongful claim—using the term "wrongful" in the sense that the claim cannot be maintained as against the judgment-debtor's interest in the property. If one of these elements be negatived the action must fail. That is the view which I took in *Silva v. Kirigoris* (1), and further consideration has confirmed me in it. The Indian decisions support it. The difference between the wording of our section 247 and that of section 283 of the Indian Code does not, to my mind, indicate any intention on the part of our Legislature to enact a different law on the point, the words "or to have the said property declared liable to be sold in execution of the decree in his favour" having apparently been added simply in order to make the meaning clearer in regard to the remedy of the decree-holder.

I think the appeal should be dismissed with costs.

MIDDLETON J.—

In this case the question is whether the judgment-debtor's title to the possession as his own property of the land seized in execution has arisen so as to enable the judgment-creditor to have the property declared liable to be sold in his favour under the seizure he has made.

The defect in the judgment-debtor's title is that the Fiscal's conveyance to his predecessor in title was not granted until after his action under section 247 was brought.

Under the Roman-Dutch Law (*Grotius, bk. II., chapter V., section 13; Van der Linden* 490-492) formality of conveyance of immovable property was essential to give title. By Ordinance No. 9 of 1836, section 14, rule 24, the Fiscal had to give a conveyance. Ordinance No. 7 of 1840, section 20, speaks of certificate of sale by the Fiscal, and Ordinance No. 4 of 1867, section 56, contemplated Fiscal's conveyances.

I think therefore it is impossible to say that a legal title accrued to a purchaser under a Fiscal's sale in 1885 in the absence of some formal transfer by the Fiscal.

The judgment-debtor had therefore no legal title to the property seized until after the decision in the claim inquiry and after action brought, when in January, 1906, he obtained an order of the Court for a confirmation of the sale and a Fiscal's conveyance.

(1) (1903) 7 *N. L. R.* 195.

If this is so, is the Court entitled under the wording of section 247 to hold the property liable to be sold in execution on the strength of title accrued to the judgment-debtor pending action ?

This would be contrary to the general principle that a litigant's claims in an action must be governed by his rights and the law existing at the date of action brought.

The property was in the judgment-debtor's possession as his own property (which is the test under section 244 of the Civil Procedure Code at the time of the seizure), but the defendants put in a claim of title, which was upheld, and no superior title was obtained to it by the judgment-debtor till after action brought. At the date of seizure then the judgment-debtor had no title, and the action under section 247 was brought in effect to set aside the order declaring his want of title.

I think therefore that the action must be decided on the judgment-debtor's rights at the date of seizure, and as he had no title then, the Commissioner of Requests was right in dismissing this action, and I would join in dismissing the appeal with costs.

It was argued, however, that the Fiscal's conveyance then granted enured to the benefit of the judgment-debtor as and from the date of the actual sale to his predecessor in title, as laid down by Burnside C.J. in 9 *S. C. C.* 32, and I conceded to that reasoning before referring this case to the fuller argument it has received before this Court of three Judges.

Having, however, had the advantage of conferring with my Lord and my brother Wendt and hearing further argument, I feel bound to admit that the principle cannot be held to apply in a case like this, where a competing title was paramount at the date when the *contestatio* began

Appeal dismissed.