1909.
July 8.

Present : Mr. Justice Middleton.

AHAMADU LEVVE MARICAR *v.* VELUPILLAI.

C. R., Batticaloa, 13,782.

Res judicata—*Order on claim without notice to parties—Effect of—Possessory suit—Estoppel—Civil Procedure Code, ss. 242 and 247.*

An order dismissing a claim to land seized in execution under section 242 of the Civil Procedure Code, without notice to the judgment-creditor, does not prevent the claimant from maintaining a possessory suit or an action *rei vindicatio* in respect of the land.

The claimant in such a case is in the same position as if he had made no claim.

Menachy v. Gnanapracasam[1] referred to and distinguished.

THE plaintiff instituted this possessory suit to recover possession of a garden called Kulathuvalavu, alleging dispossession by the defendant on August 19, 1908. The defendant alleged that he, as judgment-creditor in D. C., Batticaloa, 1,669, in which he obtained judgment against one Abubaker Levvai, seized the said land in execution, when it was claimed by the plaintiff; that the plaintiff's claim was dismissed on June 11, 1898, and he brought no action under section 247; and that the property was sold on June 14, 1898, and purchased by the defendant, who obtained Fiscal's transfer No. 114, dated May 28, 1906; the defendant pleaded that the plaintiff having failed to bring the statutory action under section 247 of the Civil Procedure Code was estopped from maintaining the present action.

The proceedings on the claim preferred by the plaintiff in D. C., Batticaloa, 1,669, were as follows :—

"June 11, 1898: Mr. Sheriff files proxy for the claimant and moves that the usual notices be issued for another date, as the claimant is laid up ill and unable to attend Court.

"Claimant absent, his Proctor reports him by letter to be sick.

"No steps having been taken since 1st instant to issue notice, I find the explanation in the motion unsatisfactory, and decline to postpone the inquiry; no evidence being tendered, the claim is disallowed."

Among the issues framed at the hearing was—

(3) Whether plaintiff can maintain this action in the face of the order in D. C., Batticaloa, 1,669, disallowing the plaintiff's claim to the land ?

The Commissioner of Requests (G. W. Woodhouse, Esq.) held as follows (October 29, 1908) :—

"This is a possessory action. The plaintiff says he was in possession of this garden Kulatuvalavu for a year and a day,

[1] *(1892) 2 C. L. R. 97.*

just before he was ousted on August 19, 1908, by the defendant. He asks that he be put back into possession.

" In No. 1,669, D. C., Batticaloa, this defendant, who was the execution-creditor in that case, seized this garden under writ, and the present plaintiff claimed it. The sale was stayed, and the claim fixed for inquiry. The defendant then took no further interest in the matter, and as he was guilty of unnecessary delay, and the claim appeared to have been made to cause vexation and delay, his claim was disallowed without any inquiry under section 242, Civil Procedure Code. The plaintiff then preferred no action under section 247 within fourteen days of that order.

" I hold that the order operates as *res judicata* in an action for title to the same land between the parties, and is a complete answer to a possessory action such as this. In *Menachy v. Gnanapracasam*,[1] the claim proceedings terminated exactly as they did in this case. Then, at the argument in appeal it was conceded by Mr. van Langenberg for the appellant that such an order would operate as *res judicata* in a question of possession as distinguished from one of title.

" Here the question is simply one of possession ; and, as I said before, this order in the claim proceedings is a complete bar to the present action.

" On the 3rd issue, therefore, I hold in favour of the defendant, and dismiss plaintiff's action with costs."

In appeal,—

H. A. Jayewardene, for the plaintiff, appellant.

Tisseveresinghe, for the defendant, respondent.

Cur adv. vult.

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This was a possessory action in which plaintiff-appellant complained he had been dispossessed on August 19, 1908, of a garden called Kulathuvalavu, of which he had been in possession more than a year and a day previous to such dispossession. The defendant, *inter alia*, pleaded in bar that the plaintiff was estopped from bringing this action by an order disallowing a claim made by the plaintiff on June 11, 1898, to this land when seized in execution in June, 1898, by the defendant. Amongst other issues, this issue was disposed of first : " Whether plaintiff can maintain this action on the face of the order in D. C., Batticaloa, 1,669, disallowing plaintiff's claim to this land." The learned Commissioner of Requests held in favour of the defendant, and dismissed the plaintiff's action as *res judicata* on the authority of *Menachy v. Gnanapracasam*.[1] The plaintiff appealed, and for him it was contended that when the claim was dismissed on June 11, 1898, the proceedings had not reached the stage of an *inter partes* contest ; that the claimant's proctor had merely filed a proxy for him, but had not issued the usual notices ;

[1] *(1892) 2 C. L. R. 97.*

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that the claimant had apparently delayed from June 1 to June 11 to issue his notices, and the Judge therefore disallowed the claim for dilatoriness under section 242. This appears to be the case from a perusal of D 2, apparently a certified copy of the journal entry in the case. Counsel for the respondent relied on the decision of the Supreme Court in *Menachy v. Gnanapracasam* [1] (*ubi supra*).

I have obtained a record in this case after considerable delay from the District Court of Badulla, and I find that the report of the facts in *Menachy v. Gnanapracasam* [1] is not quite correct as regards the claim being dismissed without inquiry. On the day fixed for the hearing of the claim, both the claimant and the judgment-creditor of the debtor whose land he had seized in execution were present, and there is nothing on the face of the record to show that the claimant was not ready to proceed, except that he called the plaintiff only as his witness. Both parties were present in person and were represented by proctors, and it is quite clear that a decision between the parties was given. In this case no notices had been issued to the execution-creditor, and the claim was dismissed when it had only reached an *ex parte* stage.

One of the necessary elements in a valid estoppel by *res judicata in personam* is that the previous proceedings should have been between the same parties, and here there were no parties to the order made, but the claimant. Estoppels must be mutual. (*Caine* and *others v. Palace Steam Shipping Co.*,[2] *Petrie v. Nuttall.*[3]

I think, therefore, the claimant's position on the dismissal under section 242 without notice to the other side is the same as if he had made no claim. It is not obligatory on an owner of land to make a claim if his property is seized in execution, and if the owner feels secure in his title he is entitled to sit still and disregard it, and the person seizing and selling it does so at his own risk, while the purchaser is always liable to be ejected therefrom on an action *rei vindicatio* within the period of prescription. Of course, if an owner knowingly allows his property to be sold in execution without dispute, he risks the chance of having his claim rejected when he brings his tardy action in vindication, on the ground that acquiescence in the right of the execution-creditor to seize showed an acknowledgment of the title of his debtor in the property seized. A person whose claim is dismissed without notice to the other side under section 242 can, I think, always bring his action *rei vindicatio*. He might also, I think, if he chooses, although section 247 only gives the right to persons against whom orders have been made under sections 244, 245, and 246, bring the action contemplated in that section.

In my opinion the ruling of the learned Commissioner is incorrect and must be set aside, and the appeal allowed with costs. The case will go back for trial in the ordinary course.

Appeal allowed; case remitted.

[1] (*1892*) *2 C. L. R. 97.*
[2] (*1907*) *1 K. B. 670 at p. 683.*
[3] (*1856*) *25 L. J. Ex. 200.*