1931

Present : **Macdonell C.J. and Garvin S.P.J.**

PERERA *v.* PERERA *et al.*

260—*D. C. Kalutara,* 10,914.

Claim—Inquiry—Withdrawal of claim—Effect of withdrawal—Civil Procedure Code, s. 245.

The withdrawal of a claim to property seized amounts to a disallowance of the claim within the meaning of section 245 of the Civil Procedure Code.

APPEAL from a judgment of the District Judge of Kalutara.

Hayley, K.C. (with him *Goonetilleke*), for second and third defendants, appellants.

Molligoda (with him *N. E. Weerasooria* and *Ameresekere*), for plaintiffs and first defendant, respondents.

January 16, 1931. MACDONELL C.J.—

This is a proceeding under the Partition Ordinance.

The plaintiffs alleged that these premises once belonged to one Manimel Perera and that, at the date of this action, his title had passed to the plaintiffs and the defendant in the following proportions : to the first plaintiff 11/48 ; to the second plaintiff 37/80 ; to the defendant, later referred to as the first defendant, 37/120.

The present second and third defendants, who are wife and husband, intervened and claimed that the second defendant was entitled to $\frac{3}{4}$ of the land. Their main contention was that the premises belonged not exclusively to Manimel Perera, but to Manimel and Porolis in the proportion of $\frac{1}{2}$ to each. They claim that the $\frac{1}{2}$ share which belonged to Porolis has passed to the second defendant, who made title to the remaining $\frac{1}{4}$ by right of purchase from Aron and Caroline Fonseka.

The learned District Judge has found, and we think rightly, that Porolis had no interest in this land ; that it belonged to Manimel Perera and passed to those who claimed under him.

Upon this footing, the title to the entirety of the land was at one stage in Christina and Helena, the children of Manimel Perera. But in an action in the Court of Requests bearing No. 11,013, for reasons which are not stated in the proceedings, Leonora and Helena admitted that 11/48 of the land belonged to Aron and Caroline Fonseka, their step-brother and sister. Plaintiffs, very frankly, brought this admission to the notice of the Court and claimed that the premises were held by the members of the family in the proportion of 37/80 to Leonora, 37/120 to Helena, and the remaining 11/48 to Aron and Caroline jointly. Aron and Caroline sold and conveyed their interest to the third defendant in the year 1911.

In D. C. Kalutara No. 4,616 the interest of Aron and Caroline was seized in execution. The third defendant, Haramanis, preferred a claim which was upheld. The plaintiffs in that action then proceeded under section 247 of the Civil Procedure Code and successfully impeached the conveyance in favour of the third defendant as a fraud upon creditors. The judgment debt, however, appears to have been paid and settled and the property was not sold. In these circumstances the learned Judge was right in holding that the title still remained in Haramanis, the third defendant.

By 2D5 of November 26, 1915, this third defendant sold and conveyed to one Jacovis Perera ¼ of these premises. In 1916 Jacovis conveyed those interests to Charlis. In the year 1918 Charlis re-conveyed the same to Jacovis Perera, who later executed a conveyance in favour of the second defendant, wife of third defendant. In execution of a writ against Haramanis, third defendant, issued in case D. C. Kalutara No. 5,796, the judgment-creditor caused 11/48 of this land to be seized, and at the sale first plaintiff, Maria Soysa, became the purchaser and obtained a Fiscal's transfer, P 18, of the year 1921.

The main question for consideration upon this appeal is whether the learned District Judge is right in assigning 11/48 shares, which once belonged to the third defendant, Haramanis, to the first plaintiff, who claimed these rights by reason of the sale and purchase above referred to, or whether he should have assigned those shares to the second defendant, who claims them upon a title originating with the deed 2D5 of November 26, 1915, by which Haramanis, the third defendant, conveyed ¼ share to Jacovis Perera.

The learned District Judge has held in favour of the first plaintiff upon the ground that the interests conveyed by the deed 2D5 were the interests which Haramanis claims to have acquired from the heir of Porolis, who, the learned District Judge has held, had in fact no interest in the land. But an examination of the deed 2D5 and all the other relevant deeds does not justify the conclusion that the interests conveyed upon 2D5 can clearly and unambiguously be identified as those which passed to the third defendant, Haramanis, from Porolis. On November 26, 1915, when Haramanis executed the conveyance 2D5 he was in a position to set up title to 11/48 from two alternative sources—one source being Porolis, the other being Aron and Caroline Fonseka. But the learned District Judge has found rightly that Porolis had no valid title, consequently it follows that, at the date of the execution of 2D5 Haramanis's only title will have been the title to 11/48 based upon the transfer in his favour by Aron and Coroline Fonseka. Haramanis's transferee, Jacovis Perera, was therefore entitled to claim that the transfer in his favour was an effectual conveyance to him of the title of Haramanis to 11/48 of the land, and one that must prevail over the first plaintiff's title by Fiscal's transfer, P 118, of the year 1921.

The facts on which the decision as to this contest of title must turn are these. In case D. C. Kalutara 5,796 these 11/48 were, as has been said, seized in execution and shortly after the seizure Charlis, the successor in title thereto of Jacovis, who was himself the successor in title thereto of Haramanis, third defendant, lodged a claim under section 241 of the Civil Procedure Code alleging the following right :—" By right of purchase under Bill of Sale No. 1,836 dated March 8, 1916. " Now according to the journal entries, a day was fixed as required by the Code for the hearing of this claim by Charlis, there were adjournments, and on August 1, 1918, one of the dates to which the hearing of the claim had been adjourned, there is a journal entry " Claim withdrawn, inform Fiscal ". We apprehend that this was a disallowance of the claim within the meaning of section 245. Claimant had pleaded his claim, stating its nature and specifying the document containing it, and this was as much a pleading as if it had been set out with every formality By withdrawing that claim, he said in so many words that he could not succeed on the matter pleaded. " In order to effect an estoppel it is necessary that it appear on the record that the question was put in issue " (*Goucher v.Clayton*[1]) ; " I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of giving the judgment and which the party had an opportunity of bringing before the Court " (*Newington v. Levy*[2]). Here,

[1] 34 *L. J. Ch.* 239.
[2] *L. R.* 6 *C. P. at* 193, *per Blackburn J.*

claimant put a question in issue on an existing matter, and had the opportunity of bringing it before the Court, and withdrew it. This distinguishes his case from *Perera v. Fernando*,[1] where the claim was for an undivided share, and the Judge thought it was one which could not be sustained in law, and from *Chelliah v. Sinnacutty*[2], claim dismissed because not sufficiently stamped, and from *Peiris v. Peiris*[3] claim dismissed because the property in question had been seized under a mortgage decree and the Commissioner thought he had no jurisdiction to try it, in each of which it was held that there had been no "investigation" of the claim as required by sections 241 *sqq.* and, that consequently, the dismissal or rejection of the claim was not a "disallowance" thereof, and so did not create an estoppel by *res judicata*. But the present case is a stronger one than *Meenachy v. Gnanaprakasam*,[4] where the claim was dismissed because claimant failed to appear on the day fixed for the inquiry, and where the dismissal was held to be a "disallowance" of the claim within section 245.

The withdrawal by Charlis of his claim involved, then, its disallowance under section 245, and the learned District Judge by assenting to its withdrawal gave a judgment to that effect within section 184. No formal decree seems to have been drawn up but this, it has been held over and over again, see in particular *Ibrahim v. Rahima Beabee*,[5] is a purely ministerial act which can be done at any time. The claim having been disallowed under section 245, the claimant, Charlis, had fourteen days within which to bring an action under section 247, the period allowed being calculated from the date of the judgment disallowing his claim (*Emalishamy v. Ego Appu*[6]). No such action was brought. Then the disallowance of the claim lodged by Charlis was conclusive against him and those claiming under him, and, if so, the first plaintiff title by Fiscal's transfer must prevail.

For the foregoing reasons, we are of opinion that this appeal must be dismissed with costs.

GARVIN J.—I agree.

Appeal dismissed.

[1] 1 *C. W. R.* 17.
[2] 18 *N. L. R.* 65.
[3] 9 *N. L. R.* 189.
[4] 2 *N. L. R.* 97.
[5] 3 *C. W. R.* 350.
[6] 7 *N. L. R.* 38.