1921.

Present : Bertram C.J. and De Sampayo J.

MARACAIR *v.* MARICAIR.

314—D. C. Batticaloa, 4,916.

Claim dismissed for default—Action not instituted under s. 247, Civil Procedure Code—Conclusive effect of order dismissing claim.

Where the date of the inquiry of a claim under section 241, Civil Procedure Code, has been duly notified and the proceeding is otherwise regular, and where, therefore, it is the duty of the claimant to appear and adduce evidence in support of his claim, but he fails to do so, the Court is within its powers in disallowing the claim, and an order so made is equivalent to an order after investigation under section 245 of the Code, and is conclusive against the claimant unless he brings an action under section 247.

THE facts appear from the judgment.

H. J. C. Pereira, K.C. (with him *Arulanandan*), for plaintiff, appellant.

E. W. Jayawardene, for defendant, respondent.

August 4, 1921. DE SAMPAYO J.—

This section raises a question of procedure of considerable importance. In form it is an action to vindicate a field called Mullacarevayal. The plaintiff claims it on a deed of transfer granted to him by one Meeralebbe V. V. Ibrahim Saibo. The defendants, on the other hand, allege that the field belonged to one M. K. Mustaphalevve

[1] *(1911) 14 N. L. R. 193.*

Marakayar, and that upon his death, his widow, Patumuttumma, as administratrix of his estate, sold the same to them on December 17, 1919. This dispute as to title has not been determined on its merits, but the plaintiff's action has been dismissed on a legal objection taken by the defendants. It appears that in D. C. Batticaloa, 4,391, the field was seized in execution as the property of Ismalevve Marakair Ahamadolebbe, the defendant in that action, and the said Meeralebbe V. V. Ibrahim Saibo preferred a claim in execution. This claim was eventually dismissed under the circumstances presently to be mentioned. Ibrahim Saibo did not bring any action under section 247 of the Civil Procedure Code, and the property was in due course sold by the Fiscal and was purchased by the second plaintiff in that action, and was subsequently transferred by the purchaser to Mustaphalevve Marakayar, under whom the defendant claims title. It is the effect of the order dismissing Ibrahim Saibo's claim in execution that has to be considered. When a claim in execution is dismissed or disallowed after inquiry, and no action is brought under section 247 of the Civil Procedure Code, the purchaser in execution will obtain good title as against the unsuccessful claimant, whatever the actual right of the claimant to the property might be. In this case, however, there was no inquiry into the claim. On the day fixed for inquiry the claimant Ibrahim Saibo was absent, though he himself had issued notice of inquiry to the other parties, and his proctor, Mr. Tambyrajah, who was present, stated that he had no instructions, and no evidence whatever was produced. Thereupon the Court dismissed the claim. In the circumstances, the claimant cannot well be said to have appeared by his proctor, and I think that the order must be taken to have been made for default of appearance.

Section 241 of the Civil Procedure Code provides for the Court investigating a claim in execution, and section 243 requires the claimant on such investigation to adduce evidence in support of his claim. Sections 244 and 245 provide that, according to the finding of the Court upon such investigation, the Court shall release the property from seizure or shall disallow the claim. Finally, section 247 provides that the judgment-creditor or the claimant, as the case may be, may institute an action, and declares that, subject to the result of such action, if any, the order on the claim shall be conclusive. The question in this case is whether an order dismissing a claim, not upon investigation, but for default of appearance on the part of the claimant, or for his failure to adduce any evidence, is an order under section 245, with the consequence that, if no action is brought under section 247, the order is conclusive against the claimant.

The decisions on this point are somewhat conflicting. The earliest local case is *Silva v. Wijesinha*,[1] which, though three Judges

[1] *(1892) 2 C. L. R. 143.*

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took part in it, is not quite a good authority. The report states that the claimant was absent on the day for investigation, and no evidence was adduced on his behalf, but that the Court "adjudicated upon" and disallowed the claim. It is possible that the Court in some way disposed of the claim on its merits. In any event, the question considered was only whether a claimant, who abandoned his claim, ought to be allowed to institute an action under section 247. The Court thought that such a practice was contrary to principle, and was certainly most inconvenient and oppressive, but that as the Code did not expressly provide against it, the claimant was not prevented from bringing such an action. In *Muttu Menika v. Appuhamy*[1] the claimant was in default and an *ex parte* order was made dismissing the claim, but was subsequently set aside on the claimant's application. Wood Renton J. held that the claimant had no right to have the order set aside, and that his remedy was the action provided for in section 247, and concluded his judgment as follows: "There can be no doubt but that an *ex parte* order is an order within the meaning of this group of sections, and I think, therefore, that in terms of section 247 it is conclusive, unless the party aggrieved by it brings the action for which that section provides."

On the other hand, in *Fonseka v. Ukkurala*[2] the Court, consisting of Lascelles C.J. and Wood Renton J., pointed out that the Code provided that the order should be made upon investigation, but where the claimant was prevented from attending on the proper day owing to a mistake made by the Court as to the fixing of the date for inquiry, and an order dismissing the claim was made in his absence, it was held that the order was not conclusive under section 247. The distinction between a case where there is a real default of appearance and failure to adduce evidence, and a case where the claimant is not bound to appear on the day fixed for inquiry, was emphasized by Wood Renton J. In this distinction, I think, lies the solution of the difficulty. This same distinction was recognized by Pereira J. in *Chelliah v. Sinnacutty*,[3] for there it was held that if no investigation took place owing to a cause for which the claimant was not responsible, the order dismissing the claim would not be one under section 245, but that if the inquiry was fixed with notice to all parties, and the claimant absented himself or otherwise failed to adduce evidence in support of the claim, the order would be one under section 245, because in that case the proceeding would, in effect, be an investigation of the claim, and the learned Judge in that connection used the expression "constructive investigation." This no doubt is putting somewhat of a strain upon the language of the Code, but considering the ordinary and necessary consequence of the default of a party, I

[1] *(1911) 14 N. L. R. 329.* [2] *(1912) 15 N. L. R. 219.*
[3] *(1914) 18 N. L. R. 65.*

think that, if the Code does not specifically provide for the case, an extended interpretation of its actual provisions is not unreasonable.

The Indian Courts appear to me to have taken a similar view. In *Roy v. Dossia*[1] the Court observed that a claim rejected because the claimant failed to produce any evidence at all was in the same footing as if he produced evidence unworthy of credit, and that the order was in effect an order on the merits of the case. This is a better way of describing the situation than calling it a "constructive investigation." *Hajrah v. Tajooddeen*[2] was also a decision to the effect that an order disallowing a claim by reason of the claimant not having given any evidence was an order under section 246 of the Indian Act of 1859 corresponding to our section 245, and the Court proceeded to observe that where it was the claimant's duty to appear and give evidence and he did not do so, the only thing the Court could do was to make an order under that section disallowing his claim. *Debia v. Chowdry*[3] and *Debia v. Khatoom*[4] are to the same effect. *Rahim Bux v. Abdul Kader*[5] was decided on the same principle. On the other hand, in *Sarala v. Kamsala*[6] the Court held that an order dismissing a claim for default of appearance was not an order made after investigation and was not conclusive. The report of the case, however, does not show whether the claimant had notice of the day for inquiry, and whether therefore it was his duty to appear.

In this state of judicial authority, and upon a consideration of the principles involved in this question of procedure, I think that the ruling should be that where the date of the inquiry has been duly notified and the proceeding is otherwise regular, and where therefore it is the duty of the claimant to appear and adduce evidence in support of his claim but he fails to do so, the Court is within its powers in disallowing the claim, and that an order so made is equivalent to an order after investigation under section 245 of our Code, and is conclusive against the claimant, unless he brings an action under section 247. In view of the circumstances, in which the order dismissing the plaintiff's vendor Ibrahim Saibo's claim in action D. C. Batticaloa, 4,391, was made, I think the order concluded Ibrahim Saibo and necessarily also the plaintiff. I would dismiss the appeal, with costs.

BERTRAM C.J.—I agree.

Appeal dismissed.

[1] *(1873) 20 W. R. 345.*
[2] *(1874) 21 W. R. 409.*
[3] *(1874) 22 W. R. 37.*
[4] *(1875) 24 W. R. 411.*
[5] *(1904) I. L. R. 32 Cal. 537.*
[6] *(1908) I. L. R. 31 Mad. 5.*