

21st March, 1895. WITHERS, J.—

We think it proper to affirm this order, refusing to dismiss the action on a motion made by the Proctor for the defendant on the date appointed for his client to appear and answer to the summons issued on the accepted plaint.

It has been argued before us that this plaint is not one exclusively within the provisions of the section 247 of the Civil Procedure Code, but contains an alternative claim, one being independent of those provisions. But this point was not taken before the Court below, and we come to the conclusion that the defendants should answer this plaint in such a way as they may be advised. What we do now decide is, that if this is an action solely and exclusively under section 247, it cannot be maintained, inasmuch as the action has been instituted more than fourteen days after the date of the order upholding the defendant's claim on the property seized in execution.

A plaint was submitted to the Judge within the requisite time, but the Judge rejected the plaint for the reasons which he has recorded on the record at page 24. Not till the 22nd October, 1894, and therefore long after the prescribed time, was the present plaint submitted and accepted.

If a plaint is rejected and is not put on the file of the Court, it cannot be said to constitute the institution of an action.

It is because of the way the Judge intended to deal with the rejected plaint and of the concluding paragraph of section 46 of the Civil Procedure Code, which says that the rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, that we allow this judgment to stand with the limitation mentioned before.

We cannot allow a fresh plaint in respect of an action under section 247, but only in respect of an action that lies outside that section.

Costs to abide the event.

LAWRIE, A.C.J.—

I agree. This is an action under section 247, which cannot be entertained, as the plaint was presented too late. In agreeing to send the case back for further proceedings, I express no opinion whether the plaint contains any other cause of action. That is a matter not yet dealt with by the District Court, and will be dealt with on the defendant's answer.