

SILVA v. DINEKEHAMY.

*D. C., Galle, 3,285.*

*Civil Procedure Code, s. 247—Plaint presented within time, but rejected—Irregularity of accepting fresh plaint as amended plaint, though out of time.*

No action solely and exclusively under section 247 of the Civil Procedure Code can be maintained if instituted more than fourteen days after the date of the order upholding the claim to the property seized in execution.

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.

THIS action, which purported in the body of the plaint to be raised under section 247 of the Civil Procedure Code, prayed as follows :—"Wherefore the plaintiff, claiming the "benefits of the 3rd clause of Ordinance 22 of 1871, prays that his "judgment-debtors be declared entitled to the said premises, and "that the said property be declared executable under the said writ."

It appeared that the order of Court releasing the property and allowing the defendant's claim was made on the 28th September, 1894. The plaint was presented on the 10th October following, which was within the period of fourteen days allowed by the section. The District Judge rejected the plaint on the 12th October, "because it was not clearly written, and the value of the "property was in the wrong place." A new plaint dated 10th October was presented on the 19th October, and was accepted on the 22nd October, the Court holding that its "order of rejection "must be taken as an order for amendment, and the new plaint "must be treated as amended and as presented on the 10th."

The Proctor for defendant, ere filing answer, moved that the action be dismissed with costs, on the ground that it was instituted too late. The District Judge disallowed the motion.

The defendant appealed.

Blazé appeared for appellant, and contended that the Court below should have dismissed the action.

*Dornhorst, contra.* An amended plaint is a substitution of the original one (2 C. L. R. 187). The present order is not appealable, on the ground that there is sufficient material on the record to make the action in the alternative an *actio hypothecaria*. If so, it is not touched by the Code.

Blaze, in reply. By section 46 of the Code the time must be limited for amendment. But in this case the Court fixed no time. So, the order must be taken as directing the plaint to be amended then and there.