1951 *Present :* **Jayetileke C.J, Basnayake J. and Pulle J.**

MUTTUCUMARASAMY, Appellant, *and* SATHASIVAM *et al.*, Respondents

S. C. 543—D. C. Point Pedro, 2,872

Partition action—Abatement order by Court ex mero motu—*When Court may set aside such order—Alienation or hypothecation of co-owner's share after abatement of action—Validity thereof—Partition Ordinance (Cap. 56), s. 17—Civil Procedure Code (Cap. 86), ss. 402, 403, 405.*

Held, (Basnayake J. dissenting), (i) that an action under the Partition Ordinance is liable to be abated under section 402 of the Civil Procedure Code.

(ii) that such order of abatement can be made by the Court *ex mero motu.*

(iii) that the imperative provision in section 405 of the Civil Procedure Code which contemplates not an *ex parte* but an *inter partes* proceeding before an order of abatement is set aside is to make an *ex parte* order a nullity.

(iv) that a partition action comes to an end when a reasonable time has elapsed since an order of abatement under section 402 of the Civil Procedure Code was made and no action has been taken to have the order of abatement set aside under section 403 read with section 405. A co-owner's alienation or hypothecation, thereafter, of his undivided share of the subject-matter of the partition action is, therefore, not obnoxious to section 17 of the Partition Ordinance.

APPEAL from a judgment of the District Court, Point Pedro. This case was referred to a Bench of three Judges, owing to a difference of opinion between the two Judges before whom it had been previously listed.

C. V. Ranawake, with *A. Nagendra,* for the plaintiff appellant.—The question for the decision of this Court is the preliminary question whether the deed 4D5 executed on February 14, 1934, is inoperative because it was executed during partition action No. 13199 of the Court of Requests of Point Pedro. That action was instituted on September 13, 1909, and interlocutory decree was entered on September 22, 1910. No steps were taken thereafter and on September 6, 1911, the Judge, acting under section 402 of the Civil Procedure Code, made an order of abatement *ex mero motu,* without notice to parties. This order was set aside on November 25, 1912, on the application of the plaintiffs' proctor, without notice to parties.

It is conceded that the order of abatement was good—*Lorenzu Appuhamy v. Paaris* [1] ; *Suppramaniam v. Symons* [2]. It is also submitted that the order vacating the order of abatement was also good and that section 17 of the Partition Ordinance was therefore operative. The vacating order, if bad, has been acquiesced in by the parties. It can only be set aside in the proper way. If the Court had jurisdiction a bad order is good till it is set aside.

[1] *(1908) 3 A. C. R. 171.*

[2] *(1915) 18 N. L. R. 229.*

[JAYETILEKE C.J.: Did the Court have jurisdiction to vacate the abatement order without noticing all parties under section 405 of the Civil Procedure Code?]

The parties were already on the record. The procedure of giving notice is only incidental. The failure to give notice is therefore only an irregularity—*Muttumenika v. Muttumenika* [1].

In certain circumstances a partition action can be regarded as abandoned—*Lawaris v. Kirihamy* [2].

[JAYETILEKE C.J. referred to *Eastern Garage and Colombo Taxi Cab Co. v. Silva* [3].]

It was not considered in that case that the Court can make an order of abatement *ex mero motu*.

In *Allahakoon v. Wickremesinghe* [4] it was held that an order of abatement only causes a case to be removed from the list of pending cases, and in *Kamela v. Andris* [5] it was held that such an order operates as *res judicata*. See also *Appuhamy v. Babun Appu* [6], where an alienation of a divided block after a scheme of partition was submitted but before final decree was held to be void as being obnoxious to section 17 of the Partition Ordinance.

E. B. Wikramanayake, K.C., with *V. Arulambalam*, for the 4th defendant-respondent—The order of abatement is good. The word "may" in section 402 of the Civil Procedure Code gives the Judge a discretion to pass an order of abatement. An application to Court is not necessary as the Code does not say that an application should be made. *Suppramaniam v. Symons* (*supra*) has been approved in *Selamma Achie v. Palavasam* [7].

If a party makes an application, then section 405 applies and all parties to the action must be made respondents. Under section 402, although it may be safe to notice the parties, the section does not itself say that notice is necessary. Although the order of abatement is good the order vacating the order of abatement is bad. Because no notice was given the Court had no jurisdiction to pass the order vacating the order of abatement—*H. C. Fernando v. Thambiraja* [8]; *Edward v. de Silva* [9]; *Manomani v. Velupillai* [10].

C. V. Ranawake, in reply.—There is a difference between "notice" and "summons". *Manomani v. Velupillai* (*supra*) is therefore distinguishable. See further *Jayewardene : Law of Partition*, p. 308 *et seq.*

Cur. adv. vult.

October 10, 1951. JAYETILEKE C.J.—

This appeal came up for hearing before my brothers Basnayake and Pulle. At the hearing before, the question arose whether Deed No. 2193 dated February 14, 1934 (4D5) was executed during the pendency of partition action No. 13199 of the Court of Requests of Point Pedro (P18)

[1] *(1915) 18 N. L. R. 510.*
[2] *(1914) 3 Bal. N. C. 38.*
[3] *(1924) 2 Times 166.*
[4] *(1908) 4 A. C. R. 8.*
[5] *(1939) 41 N. L. R. 71.*
[6] *(1923) 25 N. L. R. 370.*
[7] *(1939) 41 N. L. R. 186 at p. 188.*
[8] *(1945) 46 N. L. R. 81.*
[9] *(1945) 46 N. L. R. 342.*
[10] *(1949) 50 N. L. R. 289.*

and is therefore void. As they were unable to reach an agreement on the question I referred it for consideration by a bench of three Judges. P 18 was instituted on September 13, 1909. Interlocutory decree was entered on September 22, 1910, but as no steps were taken thereafter by the plaintiff or by any of the defendants to issue a commission under s. 5 of the Partition Ordinance (Cap. 56) the learned Commissioner passed an order under s. 402 of the Civil Procedure Code (Cap. 86) on September 6, 1911, that the action shall abate *ex mero motu*. On November 1, 1912, the proctor for the plaintiff applied under s. 403 of the Civil Procedure Code for an order to set aside the said order for abatement on the ground that the plaintiff did not take any steps after the interlocutory decree was entered because the defendants agreed to an amicable partition of the land. That application was allowed by the Commissioner. Counsel for the appellant conceded, I think rightly, that the Commissioner had the power to enter an order of abatement *ex mero motu*. In *Suppramaniam v. Symons* [1] Wood Renton C.J. said:—

"I desire, however, to say something upon an argument which was advanced by the plaintiffs' Counsel at the hearing of the appeal. He said in effect that if the parties to a litigation of this description were content to allow it to slumber, neither of them suffered any prejudice, and it was no concern of Courts to interfere. I entirely dissent from that proposition. People may do what they like with their disputes so long as they do not invoke the assistance of the courts of law. But whenever that step has been taken, they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves to see that this is done. The work of our Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled to allow the accumulation upon his cause list of a mass of inanimate or semi-animate actions. We were referred by Counsel to the older decisions—see *Fernando v. Curera* [2], *Fernando v. Peris* [3] *and Cave & Co. v. Erskine* [4]—to the effect that a Court cannot act under the provisions of section 402 of the Civil Procedure Code, except on the application of the defendant and on notice to the plaintiff. These decisions have, however, been strongly dissented from in recent years both in reported and in unreported cases. It is now, I believe, the practice in many of the District Courts for the Judge himself to take the initiative and pass orders of abatement under section 402 after having given due public notice of his intention to do so. No hardship is caused by this practice, as it is always open to an aggrieved person to move the Court under section 403, and any attempt to interfere with its existence or growth on the authority of old cases above referred to is very strongly to be deprecated."

The order setting aside the order of abatement was made without notice to the defendants. Section 405 reads:—

"The application under section 398 may be made *ex parte*, but in all other applications for the exercise of the discretion of the court under

[1] *(1915) 18 N. L. R. 230.*
[2] *(1896) 2 N. L. R. 29.*
[3] *(1897) 3 N. L. R. 77.*
[4] *(1902) 6 N. L. R. 338.*

this Chapter all the parties to the action, not being applicants, or such of them as may be affected by the order sought, must be made respondents on the face of the application. ''

The application for an order to set aside the order for abatement is '' an application for the exercise of the discretion of the Court '' within the meaning of s. 405. When an application is made to revive an action under s. 403 the applicant has to satisfy the Court that he had sufficient cause for not taking timely steps to continue the action. The section says that all the parties to the action *must* be made respondents on the face of the application. The word '' must '' has to be construed imperatively. The object of that provision is clearly to give the parties notice of the application so that they may appear and show cause against the order of abatement being set aside. The effect of the plaintiff's failure to give notice to the defendants of his application to have the order of abatement set aside is to render the proceedings void. The order made by the Commissioner must, therefore, be regarded as not having been made. The resulting position is that the order of abatement made on September 6, 1911, remained in force.

It was argued that an order of abatement does not amount to a refusal to grant the application for partition or sale within the meaning of s. 17 of the Partition Ordinance. This question was considered in the case of *Bulner v. Rajapakse* [1]. In that case a partition action proceeded to the stage of an interlocutory decree which was entered in March, 1911. In May, 1911, as none of the parties had taken steps to procure the issue of a commission, the Court made the following order:

'' No Commission issued. Lay over ''.

Thereafter by a deed dated January 31, 1919, the defendant purchased certain shares of the land belonging to a party to the action. On March 6, 1924, on an application to withdraw the action the Court passed the following order:

'' This action was laid by on May 24, 1911. No steps have been taken since that date to prosecute the action. Action abated. ''

By deed dated March, April and June, 1926, the plaintiff purchased the same interests that had been conveyed to the defendant in 1919. In a contest between the plaintiff and the defendant it was held that the plaintiff's deed which was executed after the order of abatement was entered was not obnoxious to s. 17. Garvin A.C.J. said in the course of his judgment:—

'' But an order of abatement does amount to a final determination of the action when upon application to set it aside the Court refuses to do so. The same effect may be claimed from it when a reasonable time has elapsed since the making of the order and no action has been taken to set it aside. In the case before us the plaintiff took no steps in the action for nearly 13 years. The order of abatement entered thereafter on March 4, 1924, was made upon the application of the plaintiff for a dismissal of the action. Since then over two years

[1] *(1926) 28 N. L. R. 260.*

have elapsed. Under the circumstances the effect of a decree finally terminating a partition action may, I think, be claimed for the order, and that effect may be claimed for it as at the date on which it was made. The failure to take steps to set it aside within a reasonable time gives rise to the inference that the order was well-founded and no reason for setting it aside existed. ''

If I may say so with respect, the observations of Garvin A.C.J. which I have quoted seem to me good sense as well as good law and I have no hesitation in applying them to the facts of the present case and holding that the order of abatement entered on September 6, 1911, amounts to a final determination of the action inasmuch as a reasonable time has elapsed since it was made and no action has been taken to set it aside under s. 403 read with s. 405 of the Civil Procedure Code. The deed 4D5 is, therefore, not void under s. 17 of the Partition Ordinance.

The appeal will be listed for further argument before my brothers Basnayake and Pulle or any other bench of two Judges to consider any other questions which may arise in the appeal. The costs of this argument will abide the final result of the appeal.

BASNAYAKE J.—

This appeal was first argued before my brother Pulle and myself. We did not agree as to the decree which should be passed by the Court and it has been re-heard by a Bench of three Judges presided over by My Lord the Chief Justice. I have had the advantage of reading his Judgment, and as I find myself unable to agree with the conclusion reached by him, I set out my reasons for holding that the appeal should be allowed.

The only question that arises for decision in this appeal is whether deed No. 2193 of 14th February, 1934, (hereinafter referred to as 4D5) has been executed contrary to the prohibition contained in section 17 of the Partition Ordinance. The learned Commissioner of Requests has held that it is not obnoxious to that section. The present appeal is from that decision.

Section 17 reads: '' Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be ; and any such alienation or hypothecation shall be void. ''

It appears from the evidence that an application for partition of the property dealt with in the deed had been made on 13th September, 1909. Interlocutory decree was entered on 22nd September, 1910. On 5th September, 1911, an order of abatement was made by the Court *ex mero motu* without notice to the parties and on 25th November, 1912, that order was set aside on the application of the plaintiff. On 27th November, 1912, steps were taken for the issue of a commission to partition the land. After 22nd January, 1913, the action lay dormant till 10th February, 1937.

The decisions of this Court are to the effect that in a partition action an order of abatement under section 402 of the Civil Procedure Code has the effect of a decree refusing the application for partition. In *Peris et al. v. Perera* [1] Bonser C.J. incidentally said:

> "An interlocutory decree for partition, unless proceeded with, is useless for all purposes. It would not even support a plea of *res judicata*. Where such an interlocutory decree has been made, but not proceeded with, provisions of section 402 of the Civil Procedure Code should be applied by the Court and its roll cleared of the action."

Later in the case of *Lawaris v. Kirihamy* [2], de Sampayo J. while assuming that the Court had power to clear its roll of a partition action by entering an order of abatement, extended section 17 of the Partition Ordinance to actions which may be deemed to have been abandoned. He appears to have done so without reference to the precise words of that section. This is what he says :

> "Now, after more than ten years the institution of the action is put forward as invalidating all alienations thereafter. In my opinion a partition action in order to have that effect must be alive under circumstances similar to those applicable to a case of *lis pendens*. If this were an ordinary question of *lis pendens* I should say that the action not being actively and constantly prosecuted was no longer pending . . . . The 4th defendant was content to have her rights decided in this case on their merits, and her whole attitude confirms me in the opinion that the previous partition action was abandoned and cannot be considered to have the effect of invalidating the alienations made on that footing."

In the case of *Babiyale v. Nando et al.* [3], Ennis J. refrained from applying the rule enunciated by de Sampayo J. that an action not actively and constantly prosecuted is no longer pending. His opinion is thus expressed in the judgment:

> "If, then, the Court can refuse to grant the application at any time before final decree, the terms of section 17 of the Ordinance prohibit any alienation till then, and declare any such alienation void. In the circumstances I do not see any room for the application of the rule of law that an action not actively and constantly prosecuted is no longer pending."

Garvin A.C.J. who found considerable difficulty in holding that an order of abatement amounted to a decree refusing the application for a partition went on to express the view, in *Bulner v. Rajapakse et al.* [4], that an order of abatement amounts to a final determination of the action when upon application to set it aside the Court refuses to do so, and that the same effect may be claimed for an order of abatement when a reasonable time has elapsed since the making of the order and no action has been taken to set it aside.

With the greatest respect to the learned and eminent judges who took part in the decisions I have referred to above, I find myself unable to

[1] *(1896) 1 N. L. R. 362.*
[2] *(1914) 3 Balasingham's Notes of cases 38.*
[3] *(1915) 18 N. L. R. 370.*
[4] *(1926) 28 N. L. R. 260.*

subscribe to their views as to the meaning and effect of section 17 of the Ordinance and I say so with all humility. Those decisions do not show that sufficient regard has been paid to the specific words of section 17. Section 17 is framed in precise and clear language. It says that, *unless and until the court before which the action was instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale*, as the case may be, any alienation or hypothecation contrary to the prohibition therein shall be void. Can the duration of the prohibition be couched in more exact terms ? An order of abatement or its equivalent finds no place in the sure and certain terms of the section. It may be highly desirable that the scope of the section should be enlarged by stating that an order of abatement shall be deemed to be a decree refusing to grant the partition or that inaction on the part of the plaintiff for a reasonable period shall be deemed to have the same consequence. But the function of the Court is to interpret the section as it stands and declare what is its meaning. Clear words such as are found in section 17 require no interpretation—*Absoluta sententia non indiget expositore* (2 Inst. 533)—and must be given their effect regardless of the consequences. If the words of a statute are clear and unequivocal the Court must give effect to them and is not entitled to refrain from doing so from any notions which may be entertained by the Court as to what is just or expedient [1].

Apart from the fact that the language of section 17 of the Ordinance does not permit the inclusion therein of orders other than a decree as contemplated therein sections 402 and 403 of the Civil Procedure Code seem inapplicable to proceedings under the Ordinance. In a suit for partition of land once the libel is filed it is open to any party thereto to proceed with the action, especially after interlocutory decree has been entered. If no steps are taken after interlocutory decree, how can it then be said that it was the plaintiff and not the defendant or defendants who omitted to take a step which is necessary? For, section 5 of the Partition Ordinance provides that any party to suit for partition may apply for the issue of a commission for partition. The word " necessary " in section 402 has been construed by this Court to mean " rendered necessary by some positive requirement of law " [2]. There are other difficulties in the way of applying section 402 to proceedings under the Partition Ordinance. Section 403 empowers only the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff to ask that the order of abatement be set aside. It is not the plaintiff alone that is interested in an action for partition of land. The defendants are equally interested. There may also be intervenients who are as interested as the plaintiff ? Must all these persons suffer for the negligence of the plaintiff? Once an action abates under Chapter XXV, no fresh action shall be brought on the same cause of action. Must then the co-owners for all time hold in common the property in respect of which the action which abated was instituted ?

[1] *(1933) A. C. 680—New Plymouth Borough Council v. Taranaki Electric Power Board.*
[2] *Lorensu Appuhami et al. v. Paaris et al. (1908) 11 N. L. R. 202, Kuda Banda v. Hendrick et al. 6 Weerakoon 42-43.*

Apart from all these considerations the order of abatement has been made without notice to any of the parties, not even the plaintiff. It has been held by this Court that an order of abatement in a partition action should not be made *ex mero motu* without due notice to the plaintiff [1], and that an order of abatement made without notice to the plaintiff must be regarded as not having been entered [2]. With those decisions I am in respectful agreement. Even if it is conceded that an order of abatement may be properly made in a partition action, the order of abatement in question is bad and cannot operate as a decree refusing the application for partition.

The deed 4D5 is therefore obnoxious to section 17 of the Ordinance and void.

There is another reason for holding that the deed 4D5 is void. Assuming for the moment that the order of abatement is one that was properly made, it cannot be said to be in force as it has been set aside though without notice to the parties. Section 405 of the Civil Procedure Code provides that the application under section 398 may be made *ex parte*, but in all other applications for the exercise of the discretion of the Court under this Chapter all the parties to the action, not being the applicants, or such of them as may be affected by the order sought, must be made respondents on the face of the application. It is not disputed that the order of abatement was set aside on the application of the plaintiff's successor in title and without notice to the other parties. Now what is the effect of non-compliance with section 405 ? The answer to that question depends on whether the provision is imperative or directory. The section does not require that all the parties to the action should necessarily be made respondents. The applicant is given an option either to name all the parties to the action or such of them as may be affected by the order sought. The determination of the persons who fall into the latter category is left to the judgment of the applicant. It is just possible that however honestly he may approach the question of selecting those who are affected by the order sought, the applicant might make a mistake and omit to make a person affected by the order a respondent. Is such an error of judgment to be fatal to the order made on the application ? That would be the result if the requirements of the section were regarded as imperative and not directory. The submission of counsel for the respondent is that the failure to give notice in terms of the section renders the order of Court a nullity. I am unable to accede to that submission. In considering provisions of the nature of section 405, I think it is necessary to differentiate between proceedings or orders which are nullities and proceedings or orders in respect of which there has been nothing more than an irregularity. An irregularity can be waived but in the case of proceedings or orders which are a nullity they are *ab initio* void and nothing can be done to restore them. This topic is thus referred to in the case of *Fry v. Moore* [3] :—

" But there arises the question whether the order for substituted service was a nullity, rendering all that was done afterwards void, or

[1] *Allahakoon v. Wickramasinghe (1908) 4 A. C. R. 8.*
[2] *Eastern Garage & Colombo Taxi Cab Co. v. de Silva (1924) 2 Times 166.*
[3] *(1889) 23 Q. B. D. 395 at 398 ; 58 L. J. Q. B. 382.*

whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived."

In the case of *Craig v. Kanseen* [1], Lord Greene M. R. stated the proposition of law thus:

> " An order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order ; that an appeal from that order is not necessary."

In the instant case all the defendants except the 3rd defendant appear to have been aware of the order setting aside the order of abatement but raised no protest and it was the 2nd defendant who long afterwards on 10th February, 1937, made an application for a commission under section 5 of the Partition Ordinance on the footing that the order of abatement had been set aside. In my opinion the failure to notice the parties who should be noticed under section 405 of the Civil Procedure Code is an irregularity rendering the order made without notice liable to be set aside at the instance of the aggrieved party. Such failure can be waived by the party affected by the order. Even a judgment or order which the person affected is entitled *ex debito justitiae* to have set aside cannot be treated as if it did not exist on the record. Until it is either declared to be a nullity or set aside by a court of competent jurisdiction, it is binding on the parties.

For the foregoing reasons I am of opinion that the appeal should be allowed with costs.

PULLE J.—

I concur in the opinion expressed by my Lord, the Chief Justice, that the deed marked 4D5 dated February 14, 1934, is not void under section 17 of the Partition Ordinance.

The authorities are clear that an action under the Partition Ordinance is liable to be abated under section 402 of the Civil Procedure Code. There is not even an expression of doubt on this point in any of the authorities that were cited to us at the argument. That an order of abatement can be entered in a partition case is implicit in the judgment of Ennis, J., in *Babiyale v. Nando* [2] who stated, " It was urged that the Court should make a *nunc pro tunc* order of abatement of the earlier action. In my opinion it would not be right to make such an order, even if it could be done, for the purpose of rendering valid an alienation of land which the Partition Ordinance declares void."

[1] *(1943) 1 All E. R. 108 at 113.* [2] *(1915) 18 N. L. R. 370.*

There has been a divergence of judicial opinion as to whether an order of abatement can be made *ex mero motu*. On this point I prefer to follow the judgments of Wood Renton, C.J., and Ennis, J., in *Suppramanian et al. v. Symons et al.* [1]. Wood Renton, C.J., expressly dissented from the cases of *Fernando v. Peris* [2] and *Cave & Co. v. Erskine* [3] which formed the basis of the decision in *Allahakoon v. Wickremasinghe* [4]. I would respectfully adopt the interpretation placed on section 402 by Ennis, J., in *Suppramanian et al. v. Symons et al.* [29] that there is nothing in the section which prohibits the Court from acting *ex mero motu*.

In regard to the order of the 25th November, 1912, setting aside, on the *ex parte* application of the plaintiff, the order of abatement entered on the 5th September, 1911, I have little to add to what my Lord, the Chief Justice, has stated in his judgment. The imperative provision in section 405 which contemplates not an *ex parte* but an *inter partes* proceeding before an order of abatement is set aside is to make an *ex parte* order a nullity.

I agree that the appeal should be set down for further hearing, if necessary, on the other questions raised by the appellant.

Appeal to be set down for further hearing.