Present: Ennis and De Sampayo J.J.

APPUHAMY *v.* DAVITH APPU.

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368—D. C. Kalutara, 10,561.

Costs—Partition action—Not a first charge on the land.

Costs in a partition action are not a first charge on the land to be partitioned or on the divided portions after partition, but they are payable by the individuals taking part in the partition action, so that when a writ issues for costs, the property belonging to the individual liable to pay may be seized and sold in execution in the ordinary way without there being any charge on the land.

THE facts are set out in the judgment.

H. V. Perera, for defendant, appellant.

R. L. Pereira (with him Weerasooriya), for plaintiff, respondent.

April 4, 1924. ENNIS J.—

In this case the plaintiff asked for a declaration of title to two lots of land marked H and U in the plan filed in the action which is the same as the plan filed in the partion action in which the ownership of the lots was considered. It appears that in the partition action lot H was allotted to one Odiris and lot U was unallotted. Both lots H and U were seized and sold for costs and purchased by the plaintiff. The learned judge held that as the property was sold for costs in the partition action, the purchaser would get a good and valid title, because costs are a first charge on the land sought to be partitioned. The defendant appeals, and Mr. H. V. Perera for the appellant does not press the appeal with regard to lot H, because that lot was undoubtedly dealt with in the partition action which would bind the defendant, but as regards lot U unallotted in the partition action the appeal is pressed.

In my opinion the learned Judge was wrong in stating that costs in a partition action are a first charge on the land to be partitioned. They do not appear to be a charge on the land to be partitioned or on the divided portions after partition, but to be sums payable by the individuals taking part in the partition action, so that when a writ issues for costs, the property belonging to the individual liable to pay may be seized and sold in execution in the ordinary way without there being any charge on the land. It appears that the defendant, appellant, was not a party to the partition action. It also appears from the finding of the learned Judge, which is not

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disputed on appeal, that he has been for 55 years in possession of lot U, and the question we have before us at present is whether that possession for 55 years is in any way affected by the partition action. The learned Judge has held the defendant is estopped from denying the plaintiff's title to lot U, because he stood by and allowed the property to be sold. There is, however, nothing to show, and the District Judge does not hold that the plaintiff was misled by any act of the defendant, or that he purchased under any such misapprehension. Moreover, no issue with regard to estoppel was raised in the case. It would seem then that the defendant's possession has been undisturbed and uninterrupted for 55 years. notwithstanding the partition action, but defendant is entitled to succeed on another ground. The plaintiff at the Fiscal's sale bought nothing, because the property seized did not belong to the person against whom the writ issued. The plaintiff, therefore, had no title by his purchase and he has not had possession, and the person in possession is entitled to retain that possession until somebody with title makes a claim.

In the circumstances the appeal will be allowed with regard to lot U, and I would send the case back to the District Judge to ascertain the compensation to be paid in respect of the building on lot H and to ascertain the damage in respect of lot H.

The appellant is entitled to the costs of the appeal.

DE SAMPAYO J.—I agree.

Appeal allowed.