1919.

Present: Ennis A.C.J. and De Sampayo J.

FERNANDO *v.* FERNANDO.

408—D. C. Kalutara, 7,594.

Action quia timet—Action by co-owner against another co-owner and mortgagee of such co-owner for declaration that he is entitled to compensation for the house.

The second defendant, who owned two-thirds share of a land, mortgaged his share to the first defendant. The first defendant obtained a decree for sale. The plaintiff, who owned the remaining one-third share, brought this action to have it declared that he has a right to compensation for the house.

Held, that the action was premature.

THE facts appear from the judgment.

Bawa, K.C. (with him *Drieberg*), for appellants.

A. St. V. Jayawardene (with him *F. de Zoysa*), for respondents.

June 9, 1919. ENNIS A.C.J.—

In this case the second plaintiff and the second defendant are co-owners of a certain land in the proportion of one-third and two-thirds, respectively. On the land a house has been built. The second defendant mortgaged his interest to the first defendant, and the first defendant has obtained a decree for sale. The plaintiff has brought this action to have it declared that he has a right to compensation for the house standing on the land on the basis that he built it. The learned Judge has held that the action is not maintainable, and dismissed it, with costs. With regard to costs, he directed that the costs should be on a higher scale than that on which the action has been brought. In my opinion this action was premature, and the substantial rights of the parties are not affected by the decree appealed from. It was suggested that it should be allowed as a *quia timet* action. It would seem, from the cases quoted, that such actions are maintainable in Ceylon; and Phear C.J., in the case of *Fernando v. Silva*, [1] with regard to these actions, said: "It may sometimes be right that a person should be afforded an opportunity of making a *de bene esse* used of evidence which he has at hand to establish title against a person who only threatens and does not yet disturb it." That judgment was cited with approval in the case of *The Ceylon Land and Produce Co., Ltd., v. Malcolmson* [2]. In the case of *Raki v. Casie Lebbe* [3], Wood Renton J. said: "I entirely agree with the forcible remarks of the District Judge as to the need for caution on the part of courts of law in seeing that the conditions which can alone render an action *quia timet* competent to suitors exist before such actions are entertained.

[1] *S. C. C. 27.* [2] *(1908) 12 N. L. R. 16.* [3] *(1911) 14 N. L. R. 441.*

Nor do I think that it is possible, or desirable to attempt, to lay down any general rules as to the classes of cases in which such actions are maintainable. Each case must be decided on its own merits and special facts. ''

It would seem that such an action may be permitted, and has been permitted, where no other remedy was available. But, in the present case, it would seem that the plaintiff has an immediate remedy in an action for partition. In the circumstances of this case, I am of opinion that there is no occasion to allow a *quia timet* action.

With regard to the order for costs, the learned Judge has directed costs to be paid as for an action in the Rs. 5,000 class, the Rs. 5,000 being the costs of the building of a house in 1901. The decree which gave rise to this case was for an amount of Rs. 696.89 only. I can see no ground for assuming that the value of the improvements is Rs. 5,000. I would accordingly delete the order as to stamps in the judgment, and vary the order for costs in the decree to an order for costs on the scale in which the action was brought. With these variations I would dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Varied.