1920.

Present : Bertram C.J. and Schneider A.J.

THIRIONIS APPU *et al. v.* WICKREMESINGHE.

15—D. C. Galle, 13,612.

Fresh survey ordered to be made at plaintiffs' expense—Judgment for plaintiffs, with costs—Are plaintiffs entitled to get costs of survey from defendant ?

On the application of the plaintiffs the Court ordered that a fresh survey be made at plaintiffs' expense; this order as to costs of survey did not add the words "in the first instance." The plaintiffs obtained judgment, with costs of action.

Held, that the plaintiffs were entitled to include the costs of the fresh survey in his bill of costs as the survey was necessary.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *De Zoysa*), for appellants.

Cooray, for respondent.

July 29, 1920. SCHNEIDER A.J.—

This is an appeal by the plaintiffs against an order of the District Judge acting in review of the taxation of plaintiffs' bill of costs. He has upheld the disallowance by the taxing officer of an item of Rs. 567·18, being the costs in connection with a survey made by Mr. Vandort upon a commission issued by the Court at instance of the plaintiffs. The application for the commission is recorded in the journal of the action as follows :—

> September 18, 1916. "Mr. Advocate Gunaratne moving fresh application of the plan applied by Mr. Abeygoonewardene to be made by Surveyor Vandort at plaintiffs' expense."

As the plaintiffs were awarded their costs of the action, they are entitled to recover this item from the defendant under the provisions of section 208 of the Civil Procedure Code if it can be regarded as expenses "necessarily incurred." The learned District Judge appears to have been moved by two reasons in making his order. He interprets the order allowing the commission as meaning that Mr. Vandort's survey was to be done at plaintiffs' expense, and that there was no such qualification as "in the first instance." He says that he cannot "get behind that order." As a further reason, the District Judge adds that Mr. Vandort's survey was not really necessary, because "the first Commissioner (Mr. Dias) could have been directed to survey the whole land if required." I am unable to agree with either of the reasons given by the District Judge. Both parties produced surveys made by different surveyors; and the commission issued to Mr. Vandort directed him to survey the land as described in the plaint, and also to survey a block of 100 acres according to the defendant's plan and to apply the different plans to one another. Mr. Vandort carried out his commission. He gave evidence at the trial. The judgment contains references to his plan. The decree is based upon his plan. It is stated in the petition of appeal that the first surveyor, to whom a commission issued, did not, in fact, make a survey of the whole of this 100-acre block of land. This appears to be correct. It seems to me, therefore, that it is not correct to say that Mr. Vandort's survey was not "really necessary." The amount allowed for Mr. Vandort's travelling is not a large sum, and the fact that what was done by Mr. Vandort might have been done by Mr. Dias is no reason for disallowing the costs of Mr. Vandort's survey.

I am unable to agree with the interpretation put by the District Judge upon the order for the commission to be issued to Mr. Vandort. At the time the application was made the Court had already ordered either party to deposit a sum of money towards the cost of the commission to Mr. Dias. The plaintiffs could not, therefore, at that stage ask the Court for an order on the defendant to contribute in advance towards another commission. It is the ordinary practice,

1920.

SCHNEIDER A.J.

Thirionis Appu v. Wickremesinghe

where one party is unwilling in the first instance to contribute towards the cost of a survey, for the other party, who desires such a survey, to get the work done at his expense and take his chance of recovering it after the determination of the action. I therefore regard the application for the commission to Mr. Vandort as having been made and allowed upon the footing that it was to be at plaintiffs' expense in the first instance, and not that the plaintiffs should not recover that expense in any event.

I would, therefore, allow the appeal, with costs. The District Judge had dismissed the plaintiffs' application for review, with costs. Besides the item which is the subject-matter of this appeal, the plaintiffs contested the taxation of a number of others, and their contest failed. I would, therefore, vary the District Judge's order, and direct that the taxation be held to be correct, subject to the increase of Rs. 10 referred to by the District Judge and the inclusion of the item of Rs. 567·18, which has been disallowed. Each party is to bear his own costs of the review of taxation.

BERTRAM C.J.—I agree.

Varied.