1948 *Present :* **Dias and Basnayake JJ.**

ALMEDA *et al.* Appellants, *and* DISANAYAKA *et al.* Respondents.

*S. C. 15—D. C. Galle, X 306*

*Partition action—Final decree—Party deprived of rights—Claim for damages—* Bona fides*—Cause of action—Proviso to section 9 of Partition Ordinance.*

A person who brings an action for damages under the proviso to section 9 of the Partition Ordinance cannot succeed unless he can show that the persons against whom he makes the claim have been guilty of a breach of a legal duty which they owed him.

*Suweneris v. Mohamed (1928) 30 N. L. R. 11* (Divisional Court) doubted by Basnayake J.

APPEAL from a judgment of the District Judge, Galle.

*N. E. Weerasooria, K.C.*, with *Vernon Wijetunge*, for plaintiffs, appellants.

*U. A. Jayasundere*, for defendants, respondents.

*Cur. adv. vult.*

March 15, 1948. DIAS J.—

The plaintiffs seek to recover damages from the defendants under the proviso to section 9 of the Partition Ordinance, alleging that the defendants, who are brothers, acting collusively instituted a partitition action, D. C. Galle, L 935, with the intention of obtaining, and, in fact, obtaining a final decree in that action, whereby the plaintiffs lost their title to the land.

It has been found by the District Judge that the plaintiffs were entitled to certain undivided shares in the land in question; and that they were not made parties to the partition action instituted by the two defendants

[1] *In the other case too, the act can be ratified.* [2] *3 Burge (old ed.) 169, 170.*

He holds that the effect of the final decree in that action was to wipe out the plaintiff's title. There is, therefore, not the slightest doubt that it was the act of the defendants in instituting and carrying through the partition case to the final decree stage which caused these plaintiffs to lose their title. Does that fact *per se* give the plaintiffs a cause of action under section 9 of the Partition Ordinance to sue the defendants for damages.

The law on this point was now been settled by the decision of the Divisional Court in *Suweneris v. Mohamed*[1]. A plaintiff cannot establish a cause of action merely by proving that the act of another has caused him some unjustifiable harm. He must be able to go further and establish that such act amounts to an *injuria* in the eye of the law. The fact that a party by availing himself of the provisions of the Partition Ordinance obtained an indefeasible title to the land will not give these plaintiffs a cause of action under the proviso to section 9, unless they can go further and prove either that the defendants have done or omitted to do anything which a legal duty which they owed to the plaintiffs required them not to do or to omit ; or that the defendants have been guilty of some fault or unfairness, lack of care, or inquiry which they were under an obligation to make. In fact, to enable a plaintiff to succeed in a claim for damages under the proviso to section 9, the burden of proof is on him to show that the persons against whom he makes the claim have been guilty of a breach of a legal duty which they owed him. That duty may be sought for outside the Partition Ordinance, or it may be sought for within the four corners of that Ordinance ; but parties to partition actions will not be liable in damages under the proviso to section 9, if they acted *bona fide*, and in ignorance of the rights of a third party. Where the plaintiff makes allegations that the defendants in obtaining the partition decree acted collusively or fraudulently, the burden of proof on the plaintiff would be as heary as in a criminal case—*(1941) A. I. R. Privy Council 93.*

The land in question is a paddy field called Imbulgaha Kumbura. The original owner was Louis de Silva Ranesinghe who died leaving three children—Lucia, Charles and Johana. Lucia died intestate, unmarried and issueless. Johana's shares have devolved on the plaintiffs. Charles died leaving a widow Georgina Perera Gunasekera and a son Michael—see P2. Michael died in 1936. So far as one can see the defendant's root of title makes no contact with the above pedigree at any point.

In the partition action, D. C. Galle, L 935, the defendants alleged that the field in question belonged to one Missi Nona who died leaving a son, John Nelson Ranesinghe, who by deed P 1 of March 14, 1943, conveyed the land to the two defendants in equal undivided shares. The partition action was filed in October, 1943. The final decree gave to each of the defendants a divided half share of the whole field.

It is sought to make the defendants liable in damages on various grounds. It is said that the defendants lived close to the field and should therefore know about the owners of the land. I do not think that

[1] *(1928) 30 N. L. R. 11.*

follows. In the case of a paddy field all that one can usually see is that at various times and seasons the cultivators, who are not necessarily the owners, are tilling the fields. It is said that the defendants have not called their proctor to state what instructions were given him, and what steps the proctor took to ascertain whether there were other co-owners. It is quite clear that the title of this field was registered in two unconnected folios in the Land Registry. There was the folio E 53/59 linked up with folio E 163/290 in which the plaintiffs' deeds were registered. On the other hand, there was folio E 208/85 relating to the same field in which in January, 1942, John Nelson had registered a lease. Therefore, when in 1943 John Nelson executed the deed P 1 in favour of the defendants, it was not negligence or misconduct on the part of the defendants or their proctor to have P 1 registered in folio E 208/85. Michael the son of Charles died in 1936. The evidence shows that after that date the field in question was not possessed by the other co-owners who were employed in various parts of the Island. It may be that John Nelson then entered into possession and gave the deed P 1 in 1943.

The District Judge in a careful judgment has given reasons for holding that the plaintiffs have not proved their case. I agree with him that, however unfortunate may be the situation of the plaintiffs, this is a case of *damnum absque injuria*. The evidence when fairly considered shows no neglect of any duty which the defendants owed these plaintiffs, or any lack or care or inquiry which they were under an obligation to take or make. There is no evidence of any fraud or collusion or lack of *bona fides*. The burden lay on the plaintiffs to prove these facts. In my opinion, they have failed to do so. I therefore dismiss the appeal with costs.

BASNAYAKE J.—

I agree to the order proposed by my brother Dias as I am bound by the decision of this Court in the case of *Suwaneris v. Mohamed* [1]. I wish, however, to take this opportunity of saying, with the greatest respect, that I find myself unable to agree with the view taken therein. My own view is that any party prejudiced by a decree under the Partition Ordinance is entitled to receive damages upon mere proof that he has suffered damages by the act of the party against whom he brings the action.

Section 9 of the Partition Ordinance makes a decree obtained thereunder in the prescribed manner final and conclusive against all persons whomsoever whatever right or title they have in the property although all persons concerned are not named in any of the said proceedings, or the title of the owners or of any of them is not truly set forth therein. The special provision therein in the nature of a proviso which reads

> " Provided that nothing herein contained shall effect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued."

[1] *(1928) 30 N. L. R. 11.*

has been regarded by this Court not as one that creates a new remedy but as one that merely keeps intact such remedies as exist (*Fernando v. Fernando*[1]) under the Roman Dutch Law. Under that system division of land held in undivided shares was well recognized (*Voet Bk. X Tit. 3. Sampson's translation p 385*). The *actio communi dividundo* which was the action by which such division was effected has received much attention from such writers as Van Leeuween (*Censura Forensis Bk IV Ch. XXVII Barber's translation p. 220*) and Grotius (*Bk III Ch. XXVIII sec. 6—Maasdorp's translation p. 296*).

An *actio communi dividundo* can be reopened like a decree in an ordinary action (*Voet Bk. X Tit. II sec. 34 Sampson's translation p. 377*) and is not attended by the wide and far reaching consequences attaching to a decree under the Partition Ordinance. How can it be then said that the proviso keeps alive an existing remedy when the evil which the proviso seeks to remedy never existed under the Roman Dutch Law?

It is clear from the Partition Ordinance that it is not an attempt to codify the existing Roman Dutch Law. It purports to create a new jurisdiction, new procedure, new forms and new remedies. In fact, one finds in it a complete scheme wherein provision is made for—

(*a*) a method of institution of proceedings,

(*b*) a procedure for service of summons,

(*c*) a right of appeal, and

(*d*) stamp duty and taxation of costs.

I am not aware of any decision of this Court which holds that the *actio communi dividundo* is no longer available for the division of land held in common. But for practical reasons no one will seek that action when the more effective procedure of the Partition Ordinance is available. Even if any one claims the right to bring such an action he may be met with the objection that was raised in the respect of maintenance proceedings in the case of *Anna Perera v. Emalianu Nonis* that the special rights and remedies created by the Ordinance must be held to have superseded the common law. It is now well settled that in the case of an Act which creates a new jurisdiction, a new procedure, new forms of new remedies the procedure, forms, or remedies there prescribed and no others must be followed until altered by subsequent legislation—*Pasmore and others v. Oswaldtwistle Urban District Council*[3], *Reg. v. Judge of Essex County Court*[4], *Thin Yen v. Secretary of State and another*[5].

The fact that the remedy of damages is to be found in a proviso to the section does not in my view by itself indicate that it is a mere saving of an existing remedy. Although the effect of an excepting or qualifying proviso, according to the ordinary rule of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it, provisos which contain matter which is in substance a fresh enactment adding to and

[1] *(1918) 20 N. L. R. 410 at 411.*
[2] *(1908) 12 N. L. R. 263.*
[3] *(1898) A. C. 387.*
[4] *(1887) 18 Q. B. D. 704.*
[5] *(1940) 3 Federal Law Journal 50.*

not merely qualifying what goes before are not unknown in legislation both here and elsewhere (*Rhondda U. D. C. v. Taff Vale Railway Company*[1]).

If then the remedy given by the proviso to section 9 is a statutory remedy given by the Partition Ordinance the limitations placed on the plain words of the section by the cases of *Fernando v. Fernando*[2], *Appuhamy v. Samaranayake*[3], and *Suweneris v. Mohamed* (*supra*) cannot be justified.

*Appeal dismissed.*