1937 *Present :* **Soertsz J. and Fernando A.J.**

SENEVIRATNE *v.* KANAKARATNE.

137—D. C. Galle, 32,549.

Partition action—Failure to register lis pendens—*Two actions pending with respect to same land—Preference to the first—Ordinance No. 23 of 1927, s. 12 (1).*

There is no provision in the Registration Ordinance for dismissing a partition action on the ground that it has not been duly registered.

Where two partition actions are pending with respect to the same land the action that was first instituted should as a rule be given preference. *Silva v. Silva* (*37 N. L. R. 33*) referred to.

APPEAL from an order of the District Judge of Galle.

N. E. Weerasooria (with him *Wijemanne*), for plaintiffs, appellants.

L. A. Rajapakse (with him *J. R. Jayewardene*), *for* thirty-seventh defendant, respondent.

Cur. adv. vult.

[1] *(1898) 2 Q. B. D. 300.*

June 16, 1937. SOERTSZ J.—

I cannot help observing, although I do so with regret, that this appeal reveals another instance of unseemly contests in the District Court of Galle, to decide which of two proctors shall tax the bill in partition cases in which, the plaints by running into hundreds of paragraphs and involving hundreds of defendants, open up alluring vistas of row upon row of folios at fifty cents a folio. There would hardly have been all this enthusiasm over the partition of this land if, at the time these plaints came to be filed, the question of the taxation of the item in the bill of costs for making of a copy of the plaint, had been decided in the way in which it was later decided in another case from Galle, *Wickremasinghe v. Seneviratne*[1]. In that case a Divisional Bench held that the Legislature should be taken to have intended the words "making a copy" to be understood as making a copy by other than mechanical means. There, my brother Moseley made this observation "that a proctor should be able by the mere act of handing certain script to a printer and paying the latter Rs. 35 for work done, to recover on that account from his client a sum of Rs. 14,355 can only be described as fantastic". The judiciary has done everything in its power to mitigate this kind of evil, but for its abolition the intervention of the Legislature is urgently called for. A proctor may still tax an item of Rs. 14,355 or more for making copies of plaints by employing a number of scribes to make manuscript copies of the plaint. An outlay of a thousand rupees will yield a return in a case like the one in hand of ten thousand rupees or more. I have dwelt on this aspect of this case in the hope that the District Judge when directing summons to issue will require the copy plaints for service to be printed, and thus prevent any attempt to get round the ruling I have referred to. The labourer, no doubt, is worthy of his hire, but no less is the villager worthy of his land. As things are at the present, he often asks for bread and receives not even a stone.

In regard to the question as to which of the two cases should proceed to trial, we were addressed at great length on the topic of the registration of the *lis*. The appellants contended that their action was the first to come into Court and that it has been duly registered and should, therefore, be given preference, while the thirty-seventh defendant-respondent urged that the appellant's *lis* is not duly registered, but that his is, and that his action should proceed. I am clearly of opinion that there is no provision in the Registration Ordinance for dismissing a partition action on the ground that it has not been duly registered. Section 12 (1) of Ordinance No. 23 of 1927 says "a precept or order for the service of summons in a partition case shall not be issued unless and until the action has been duly registered as a *lis pendens*". I read that as meaning that if a District Judge is of opinion that an action has not been duly registered, he may give the plaintiff an opportunity to remedy the defect and may withold the issuing of a precept till that has been done. In this instance, when the question involved in this appeal came up for consideration by the trial Judge, in my opinion, both actions had been duly registered, for by then, the registrations of both actions had been connected with the

[1] *38 N. L. R. 225.*

folio in which the earliest dealing with this land has been registered, namely, C 2/197 of 1864. But it is objected that that was a registration of the land as situated in the village of Kahawe, whereas the land is situated, in fact, in the village of Uduwaragoda. The thirty-seventh respondent's Counsel contends that the earliest registration of this land in the Uduwaragoda village should be the decisive factor; that that registration occurred in 1887 in folio C 55/17 and that as his action has been registered in a folio connected with C 55/17, it should prevail over the appellant's action. I would make two observations on this contention. First, that this position was taken up at a late stage. The thirty-seventh defendant himself at first treated the folio C 2/197 of 1864 as the right folio and connected himself with it. But he found that the appellants had forestalled him in this move and he, then, seized upon this point of two different villages Kahawe and Uduwaragoda and connected himself with folio C 55/17. It is possible that if the matter is investigated further it may be found that C 55/17 is itself connected with C 2/197. The second observation I would make is that it is more than probable that in 1864 Kahawe village included the hamlet of Uduwaragoda which acquired a separate identity in the Registrar-General's books only at a later date. But, to make assurance doubly sure in the matter of the registration of the *lis*, I would direct the District Judge to require the plaintiffs-appellants to connect their registration with C 55/17, if, in fact C 55/17 is not already connected with C 2/197.

My view is that the case that came first into Court must be given preference. I am not laying that down as an invariable rule. There are instances of later cases being allowed to proceed on the ground that the plaintiff in the earlier case was dilatory, or that his action was not properly constituted. See *Silva v. Silva*.[1] But neither of those statements can be made of the plaintiffs-appellants' case. I, therefore, see no reason why the general rule should not be followed. I refuse to be influenced by the battle of wits which appears to have been waged here to the end that the first case shall be the last, nor will I follow the thirty-seventh defendant's Counsel behind the scenes, as we were invited to do, in order to ascertain who took the first steps, who were in the field first collecting materials to prepare the case.

I do not think it has the slightest bearing on this question, that the thirty-seventh defendant is the largest shareholder of the land. I make this observation because it was argued that for that reason, the thirty-seventh defendant's action should be preferred.

I would, therefore, set aside the order of the District Judge and direct that this case should proceed without further delay. It is deplorable that a prospective bill of costs should have held up this partition for nearly three years already. These tactics must be discouraged. There will be no order as to costs either here or below.

FERNANDO A.J.—I agree.

Set aside.

[1] *37 N. L. R. 433.*