1937 *Present :* **Poyser S.P.J. and Fernando A.J.**

JAYARATNE *et al. v.* ZOYSA.

187—D. C. Galle, 14,912.

Partition action—Proof of title—Interlocutory order—Successive intervenients.

In a partition action after interlocutory decree the plaintiff is not bound to prove his title against each successive intervenient.

Appuhamy v. Gooneratne (*1 Wijeyawardene's Reports 60*) followed.

APPEAL from an order of the District Judge of Galle.

L. A. Rajapakse (with him *V. F. Gooneratne*), for plaintiffs, appellants.

158th added defendant respondent, in person.

June 18, 1937. FERNANDO A.J.—

The plaint in this partition action was filed in 1917, and a preliminary plan was made in 1921, showing a land of an extent of 20 acres 3 roods 9 perches. Later, another plan was made in 1927 showing an extent of 27 acres 1 rood 27 perches. Interlocutory decree was entered on August 3, 1928, and at that stage one of the parties to the action was the 85th defendant, the mother of the 158th added defendant.

In 1934, the 85th defendant and a brother of the 158th added defendant-respondent filed an intervention, and in their statement of claim they named the 158th added defendant as also a person entitled to a share in the land. Their statement of claim was dated May 12, 1934, and on October 19, 1934, the Court allowed the brother of the 158th added defendant to withdraw his claim, but refused a similar application made by the 85th defendant. On November 9, 1934, the intervention of the 85th defendant was also withdrawn and dismissed without costs.

The respondent was first present in Court on July 1, 1935, and was added as a party to the action on that date. It would appear from the proceedings of that date that he was unable to state his claim at the time although he was added. He filed the statement of claim on July 15, 1935, and appears to have amended that statement on December 19, 1935.

The learned District Judge inquired into the intervention on several dates, and on May 8, 1936, made order dismissing the plaintiff's action with respect to lots B and C in plan XI which appears to have been filed by the 158th added defendant. It would appear, however, from the earlier portion of his order that he intended to dismiss the action with respect to lots B and C in plan No. 629 which had been filed by the plaintiff, and against this order the appeal is filed by the plaintiffs-appellants. In the course of his order, the learned District Judge observes that "the attitude taken up by the 158th defendant's mother and the long delay on his part in coming to Court must be considered, but they cannot conclude the question". He, however, does not refer to this aspect of the matter any further. Moreover in his order the learned District Judge does not find that the intervenient is himself

entitled to the entirety or to any portion of the lots which he excluded from the partition. In other words' he appears to have treated this action as one in which the regularity of the previous trial was questioned, and to express his own opinion that on the evidence before him the earlier order was incorrect.

In a case where an interlocutory decree has been entered in a partition action, there is no rule of law which lays down the period after which intervention will not be allowed, but I might refer to the remarks of Wood-Renton C.J. in *Bandara v. Baba*[1] "we are not concerned here with the policy of the law, although I may say in passing that I think that the right of intervention under the Partition Ordinance, 1863, so far from being extended should be peremptorily barred in the Courts of first instance on the expiry of a prescribed period after the interlocutory decree, and could be so barred with safety, provided always that due provision was made for securing greater publicity to partition proceedings". The respondent himself in the course of his address to us stated that he was present in Court in November, 1934 when his mother's and brother's claim was withdrawn. He also stated that he was in possession of the land since 1926, and it will be noticed that the plan on which the first trial took place was a plan made in 1927. It would appear therefore that the intervenient was aware that the lots which he sought to exclude had been surveyed for the purpose of this action so long ago as 1927, and he sought to intervene only at the end of 1935, although he was aware that his brother had intervened the previous year.

In the course of the inquiry on the intervention of the 158th added defendant, the main portion of the evidence led for the respondent consisted of certain documents by which he sought to prove that the deeds relied on by the plaintiffs-appellants did not cover the entirety of the land which had been surveyed, and the learned District Judge in his order held that in his opinion the land called Pambokkewatta did not include lots B1, B2, and C. He appears to have come to this conclusion by a consideration of some of the deeds tendered by the respondent. It would almost appear that the learned District Judge thought that the burden of proving that the land sought to be partitioned was covered by the deeds was on the plaintiffs. I would here refer to the remarks of Wood-Renton C.J. in *Appuhamy v. Gooneratne*[2]. "It would be monstrous to hold and there is no enactment and so far as I am aware, there is no decision which compels us to hold that in all partition actions, the plaintiff must prove his title afresh against every successive intervenient". It will be noticed that in this case the respondent's brother and his mother both withdrew their contest and were not prepared on the trial date to contest the position that the lands that had been surveyed were all possessed in one between the parties to the action, and an interlocutory decree was entered presumably because the learned District Judge was then satisfied that the land was so possessed in common. It may not be correct to say that in all partition actions, the burden of proof is always on the intervenient, but in a case like the present one, it seems clear that the intervenient should not be allowed

[1] *19 N. L. R. 1.*

[2] *(1913) Wijeyawardene.s Reports 60.*

to pick holes in the case for the plaintiff without first establishing some claim or interest in himself. Otherwise the result would be that four or five members of one family can each of them in turn attack the case for the plaintiff by successive interventions and prolong partition actions for a large number of years.

In the circumstances of this case, I think the learned District Judge was wrong in dismissing the plaintiff's action with regard to lots B and C, and I would set aside that order and allow the appeal. The intervention of the 158th defendant-respondent is dismissed with costs here and in the Court below.

POYSER S.P.J.—I agree.

Appeal allowed.