1941 *Present :* **de Kretser and Wijeyewardene JJ.**

LENORAHAMY *v.* ABRAHAM.

6—D. C., Colombo, 935.

Partition action—Divided portion of land to be partitioned possessed by party pending action for prescriptive period—Sale of divided portion—Abatement of action.

A party to a partition action cannot acquire a prescriptive title to a divided portion of the land during the pendency of the action to enable him to give a valid title to such divided portion to a purchaser.

The interest of such party continues to be undivided against the other parties during the pendency of the partition action.

APPEAL from a judgment of the District Judge of Colombo.

E. F. N. Gratiaen (with him *J. M. Jayamaha*), for defendants-appellants.

L. A. Rajapakse, for plaintiffs-respondents.

Cur. adv. vult.

July 18, 1941. WIJEYEWARDENE J.

In execution of a writ for costs due to them in D. C., Colombo, No. 30,748, the defendants seized the right, title, and interest of one Elisahamy in a land called Kahatagahalande of the extent of nearly 7½ acres. The plaintiff, a daughter of Elisahamy, claimed undivided three-fourths of lot A described as a divided portion of 1 acre 3 roods and 3.55 perches out of the land of 7½ acres mentioned earlier. Her claim was based on a deed P 1 dated November 16, 1935, and executed by Elisahamy. On her claim being dismissed, the plaintiff instituted the present action under section 247 of the Civil Procedure Code. The District Judge entered judgment declaring the interest claimed by the plaintiff not liable to be sold in execution of the defendant's writ.

[1] *29 N. L. R. 208 at p. 210.*

The main point for decision is the effect and scope of deed P1. By that deed Elisahamy conveyed to the plaintiff "undivided three-fourth part of a divided portion of the land marked lot A called Kahatagahalanda" basing her title on an earlier deed of 1896. About 1909 certain parties including Elisahamy filed D. C., Colombo, No. 26,417, against their co-owners for the partition of the entire land of Kahatagahalanda of which lot A is admittedly a portion. Under the preliminary decree entered in that case Elisahamy was declared entitled to an undivided one-fourth part and the commissioner made his return to court in 1915 submitting a scheme of partition assigning lot "A" to Elisahamy. Notices were taken on various occasions between 1915 and 1921 requesting the parties to show cause, if any, against the scheme of partition but the scheme did not come up for consideration by the court owing to the failure to serve the notices on some of the parties. In June, 1938, the third plaintiff in that action moved the court to enter an order of abatement under section 402 of the Civil Procedure Code but the journal entries D1 do not show that such an order has, in fact, been made. It will thus be seen that the deed P1 has been executed pending the action for partition.

On these facts the learned counsel for the plaintiff-respondent contended that the deed P1 was not affected by section 17 of Ordinance No. 10 of 1863 as that section dealt with alienations of undivided shares of the land. His argument may be briefly summarized as follows :—Elisahamy entered into possession of lot A shortly after 1913 and acquired a prescriptive title to it. She conveyed by deed P1 certain interests in that lot. Section 17 of the Partition Ordinance renders invalid only an alienation of an undivided interest in the entire land and cannot affect an alienation in respect of a divided portion of that land title to which has been acquired by prescriptive possession by a party to the action during the pendency of the action.

The rights of the parties to an action must be determined as at the date of the action. Hence the final decree to be entered in the partition case cannot take into account any prescriptive rights acquired by the parties pending the action. The question may also be considered in this way. Suppose, in an action for partition, a defendant had been admitted in the sole and exclusive possession of a defined portion of the land for seven years at the time of the institution of the action. Suppose further that defendant continues to be in possession of that lot after the institution of that action and when the case comes up for trial it is proved that the defendant has had possession for over ten years up to the date of trial and that the possession was of the nature contemplated by section 3 of Ordinance No. 22 of 1871. That defendant cannot possibly claim at the date of trial that his lot should be excluded from the partition.

I think that, once an action for partition is filed, it is not possible for a party to the action to acquire a prescriptive title to a defined portion of the land as against the other co-owners. I hold that Elisahamy's interests in the land continued to be undivided interests as against the other co-owners during the pendency of the action and that she could not have acquired a prescriptive title to lot A in 1935 when she executed P1. It was further argued by the Counsl for the respondent that the deed should be read as a deed conveying "the lot that would be decreed to

Elisahamy under the final decree" and therefore the rights of the plaintiff should be safeguarded to that extent. I do not think that it is possible to give such an interpretation to the deed and moreover even such an interpretation will not help the plaintiff in the present action (*vide* *Fernando v. Atukorale*[1].

I do not think it is necessary to examine closely the finding of the learned Judge that the deed was not executed by Elisahamy in fraud of creditors.

I would allow the appeal and direct that decree be entered declaring the property seized liable to be sold in execution of the writ issued by the defendants. The defendants are entitled to the costs of the appeal and the costs in the District Court.

DE KRESTER J.—I agree.

Appeal allowed.