1935 *Present :* **Garvin S.P.J. and Maartensz A.J.**

DE SILVA *v.* JUWA.

40—D. C. Tangalla, 3,234.

Abatement of an action rei vindicatio—*Subsequent action for partition—Effective bar—Civil Procedure Code, s. 403.*

The abatement of an action for declaration of title to land is a bar against the institution of an action for partition in respect of the land where the same question of title is involved.

APPEAL from a judgment of the District Judge of Tangalla.

C. V. Ranawake, for the plaintiff, appellant.

Aelian Pereira, for the intervenient respondent.

February 4, 1935. GARVIN S.P.J.—

This is a proceeding under the provisions of the Partition Ordinance. The subject of the proceeding is a land called Wedigederahena. The plaintiff claimed to be entitled to 2/3 of the land and assigned the remaining 1/3 in equal shares to the two defendants. This proceeding was instituted on November 6, 1930. In May, 1933, the respondent to this appeal intervened and claimed that he was entitled to the entirety of the premises. It was pleaded on his behalf that it was not competent for the plaintiff to maintain this action in view of the circumstance that in an earlier action brought by the plaintiff against him in which the plaintiff sought a declaration of title to these premises an order of abatement had been entered which is still effective inasmuch as it had not been set aside. The earlier action referred to is No. 2,680 of the same Court. The plaintiff

[1] *3 N. L. R. 161.* [2] *31 N. L. R. 438.*

there claimed to be entitled to the entirety of the land. The defendant denied his title and claimed that he was the owner. That action was instituted in November, 1927, and terminated in an order of abatement on August 21, 1931. It would seem therefore that when that action had been pending for nearly three years the plaintiff conceived the idea of instituting this proceeding for the partition of the land and filed the necessary plaint, concealing from the Court the circumstance that the respondent to this appeal claimed to be owner of the entirety of the land and concealing also from the Court the fact that the action No. 2,680 had terminated in an order of abatement which had not been set aside. That was the situation when the respondent intervened. After the intervention the objection taken by the respondent was argued and considered by the learned District Judge who upheld the contention that it was not competent for the plaintiff to maintain the action as against the intervenient.

The provision of the law which must be invoked in support of such a contention is section 403 of the Civil Procedure Code which enacts that " when an action abates or is dismissed under this chapter no fresh action shall be brought on the same cause of action ". It is not the same as the objection on the ground of *res adjudicata* but the provision is an effective bar against the institution of a second action in respect of the same cause of action. The questions we have to consider are: first, whether this is a " fresh action " in the sense of an action instituted subsequent to the date on which the order of abatement was entered and, second, whether this is an action based " on the same cause of action ".

If the date of the action be taken to be the date upon which the plaint was filed, then clearly the action was instituted before the order of abatement was entered. But so far as the intervenient was concerned no action had been brought against him in that he had not been made a party to the proceedings and not even disclosed in the pleadings as a person having an interest in the land. In these circumstances it is urged that the action can only be said to have been brought as against him as at the date of his intervention. Now there is an authority of this Court for the proposition that an action for partition is not brought as against persons who are named subsequent thereto until such persons have been made parties to the action. This is the effect of the decision in *Lucihamy v. Hamidu*[1]. In this view of the law the present action was not brought as against the intervenient until the date of his intervention which was long subsequent to the order of abatement which is pleaded in bar of the present action. This would therefore appear to be a fresh action in the sense that so far as the intervenient and the plaintiff are concerned this action was brought by the plaintiff as against the intervenient subsequent to the date of the order of abatement. But is the action " brought on the same cause of action ? " The cause of action in the earlier proceedings in case No. 2,680 was the denial by the defendant of the plaintiff's claim to be the owner of these premises, the question at issue then being whether the plaintiff or the defendant was the true owner of the entirety of this land. As a result of the respondent's intervention in this action, identically the same question arises for decision and the plaintiff when he

[1] *26 N. L. R. 41.*

instituted this action must have realized that unless he was completely successful in his subterfuge that was the question which would arise for determination immediately notice of the pendency of this proceeding reached the intervenient. Inasmuch as he is now a defendant that is the one question which arises for determination. It is quite true that in theory an action for partition is a proceeding between co-owners, the purpose of which is to resolve their respective interests in common into holdings in severalty. But in a large percentage, perhaps too large a percentage, of cases what the Court has to determine is the respective rights of parties who are frequently if not generally in conflict as to such rights. In such cases a proceeding instituted under the Partition Ordinance is in substance, and I think in fact, an action for a declaration of title. Though in form actions for partition they are often in reality actions for a declaration of title to land. In *Ponamma v. Arumugam* [1], the Privy Council held that a certain action for partition brought under the provisions of the Partition Ordinance though in form an action for partition was in reality an action for the recovery of the land and as such was obnoxious to the provisions of section 547 of the Civil Procedure Code which prevented such an action being maintained until administration to the estate had been obtained.

I think therefore that the plaintiff's action as against the intervenient is barred by the provisions of section 403 and that the learned District Judge was right in the conclusion at which he has arrived. This action will therefore stand dismissed. The plaintiff-appellant will pay the costs of the intervenient both here and below.

MAARTENSZ A.J.—I agree.

Appeal dismissed.