

1889.
August 28.

DE CROSS *et al.* v. FERNANDO.

D. C., Negombo, 1,863.

Partition Ordinance—Duty of Commissioner appointed to carry out partition—Owely of partition—Practice.

In carrying out the partition decreed by Court, it is competent to the Commissioner, without special directions from Court, to award owely in adjusting the values of the divided portions. If the owely is fair, the Court should allow it. But the parties should be heard *pro* and *con*, and the Commissioner may be examined in support of his proposal.

THIS was an action for a partition. The Court declared plaintiff entitled to two-thirds and defendant to one-third, and issued a commission to Mr. Anderson to carry out the partition of the 14 acres and 32 perches which formed the whole area. The Commissioner allotted the portion A to plaintiff, in extent 9 acres 1 rood 34 perches, as his two-thirds share, valuing it and the trees thereon at Rs. 3,083. He allotted to defendant the lot B, in extent 4 acres 2 roods and 37 perches, as his one-third share, valuing it at Rs. 1,191.

The defendant objected to this partition being confirmed, on the ground that the Commissioner had exceeded his authority in awarding Rs. 208·44 to plaintiff more than he ought to have got.

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The District Judge ruled as follows :—

The Commissioner was asked to partition the land, and not to make awards as to one side paying money to the other as compensation. I confirm the partition except as regards the question of compensation.

The plaintiff appealed.

Dornhorst, for appellant.

No appearance for respondent.

Cur. adv. vult.

28th August, 1899. WITHERS, J.

This is a partition case, and the plaintiff appeals from the decree of partition on the ground that it omits to provide for owelty : that is, compensation to the plaintiff to make the partition equal on the score of value. The District Judge, without deciding whether the plaintiff is entitled to compensation, adopted the Commissioner's proposed physical partition and declined to do more, because the Commissioner had not been specially directed to provide for owelty in his scheme of partition. But it seems to me that it was the Commissioner's duty to do so without special directions.

The Ordinance requires that his return should show the estimated value of the land and the mode in which the Commissioner proposes that the partition should be made. This is all that Mr. Anderson, the Commissioner, has done here. He sends in a plan and says : I propose to divide the land into the two parts indicated in my plan ; but to adjust the values of the divided land so as to make the partition as fair as possible, I compute what, in my opinion, the defendant should give to the plaintiff. This has to be done every day in the partition of immovable property. If the allowance is fair, the District Judge ought to allow it. But the parties should be heard *pro* and *con*, and the Commissioner can be examined in support of his proposal, if necessary. After hearing the parties and the Commissioner and any other evidence the parties may desire to call, the Court will be in a position to decide whether the plaintiff is entitled to any or what compensation by way of owelty. If he finds something is due, the District Judge will reform his decree accordingly. If he is of opinion that the plaintiff is not entitled to any compensation, the decree will stand.

BROWNE, A.J.—I agree.