SOMAWATHIE
V.
MADAWELA AND OTHERS

SUPREME COURT
SHARVANANDA, J., WANASUNDERA, J.,
WIMALARATNE, J., RATWATTE, J. AND
SOZA, J.
S.C. NO. 24/82, S.C. NO. LA/23/82
C.A. APPLICATION NO. 399/77
D.C. KURUNEGALA NO. 3903/P
FEBRUARY 28 AND MARCH 01, 1983.

Partition — Finality of interlocutory and final decrees — Revision — When can deed purporting to convey a divided block be treated as conveying undivided interest ?

Declaration — Section 12(1) and 48 of Partition Act — Interpretation — Expressio unius exclusio alterius — Intervention after interlocutory decree.

Held —
When the boundaries of a purportedly divided block in a deed are insufficient for an exact and precise demarcation the deed conveys only undivided interests.

When there is no proper compliance with Section 12(1) of the Partition Law in the matter of the declaration stipulated to be filed under that section and no notice has been served on the claimants before the Surveyor as required by section 22(1)(a) of the Act then the Appeal Court can intervene by way of revision, to prevent a miscarriage of justice.

Although section 48 invests interlocutory and final decrees entered under the Partition Act with finality the revisionary powers of the Appeal Court are left unaffected. The position is the same under the Partition Law.

The powers of revision and restitutio in integrum of the Appeal Court have survived all the legislation that has been enacted up to date.

When the language used in a statute has been interpreted by the Courts and the legislature repeats the same or similar language it may be presumed (though not a canon of construction in the absence of indications to the contrary) that the legislature uses such language in the meaning the courts have given. The maxim expressio unius exclusio alterius is not a maxim of universal application and must be applied with caution. The exclusio is often the result of inadvertence or accident and must not be applied where having regard to the subject matter it would lead to inconsistency or accident. The words expressed could be illustrative only or used out of abundant caution.

The District Judge has no power to allow intervention after entry of interlocutory decree.

Cases referred to :

1. *Ponna v. Muthuwa* (1949) 52 NLR 59
2. *Dias v. Dias* (1959) 61 NLR 116
3. *Ukku v. Sidoris* (1957) 59 NLR 90
4. *Mariam Beebee v. Seyed Mohamed* (1965) 68 NLR 36
5. *Amarasuriya Estates Ltd v Ratnayake* (1956) 59 NLR 476
6. *Sirimalie v. Pinchi Ukku* (1958) 60 NLR 448
7. *Siriwardene v. Janasumana* (1958) 59 NLR 400
8. Seelawathie v. Weeraman (1966) 68 & NLR 313
9. *Leisahamy v. Davith Singho* (1970) 79 CLW 109
10. Isohamy v. Haramanis (1963) 66 NLR 57
11. Siriya v. Amalee (1957) 60 NLR 269
12. *Gunasinghe v. Aron Appuhamy* (1970) 79 CLW 110
13. *Ex parte Campbell In re Catheart* (1870) LR 5 Ch. App. 703, 706
14. *Perera v. Jayewardena* (1947) 49 NLR 1
15. *Barlow v. Teal* (1885) 15 QBD 403, 404, 405
16. *Greave v. Tofield* (1880) 14 ChD 563, 571
17. *Webb v. Outrim* [1907] AC 81, 89
18. *Colquhoun v. Brooks* (1888) 21 QBD 52, 65
19. *Maurice & Co. Ltd. v. Minister of Labour* [1968] IWLR 1337, 1345.
20. *Mohamedaly Adamjee v. Hadad Sadeen* (1956) 58 NLR 217
21. *Nono Hami v. De Silva* (1891) 9SCC 198
22. *Jayawardena v. Weerasekera* (1917) 4 CWR 406

APPEAL from judgment of the Court of Appeal

J. W. Subasinghe, Senior Attorney-at law with *S.Mahenthiran & Miss E. M. S. Edirisinghe* for plaintiff-appellant.

H. L. de Silva, Senior Attorney-at-law with *Fritz Kodagoda* for 7(a) to 7(c) substituted defendant-respondents.

Cur. adv. vult

June 29, 1983
SOZA J.

This appeal raises an important question regarding the finality of interlocutory and final decrees entered in partition cases and the powers of revision exercisable by the Court of Appeal.

By way of essential narrative we can begin with one Ensina Perera who by right of purchase on deed No. 2124 of 22.12.1942 (P1) became owner of the entire land sought to be partitioned which comprises several allotments of land amalgamated and consolidated as one land called Veralugahapitiya, Puwakgahakotuwekumbura & Pillowa, Puwakgahakotuwehena now garden. Beralugodehena alias Demtagollehena, Puwakgahakotuwe Kahatagahamulahena and depicted as Lots 1 to 10 of a total extent of 18 acres 3 roods 05 perches in plan No. 2646 of 14.12.1942 made by G. A. de Silva Licensed Surveyor marked P2 in the case. Ensina Perera by deed No. 2828 of 22.7.1943 (7D1) conveyed "all that divided and defined allotment of land in extent three acres from and out of all those lots marked 10 and 9 in plan No. 2646 dated 14th December 1942 made by G. V. de Silva, Licensed Surveyor of the land called Puwakgahakotuwe Kahatagahamulahena" which, I might add, was the name Lots 10 and 9 bore before the amalgamation and consolidation — see the legend describing the several lots by their names on the face of plan No. 2646 (P2). The boundaries given for the three acre extent were as follows :

North : remaining portion of lot No. 9;
East: land of Mr. Madawela R. M. and Handugala Village boundary;

South: garden of Bandirala Vidane and Kapuruhamy Aratchi;
West: Land of Kapuruhamy Aratchi and others.

Lot 10 is an extent of 2 acres 3 roods 22 perches and lot 9 is an extent of 2 roods 12 perches. Therefore an extent of 18 perches had to be carved out from lot 9 so as to make up the three acres conveyed on the deed No. 2828. As no plan or fence has been referred to the northern boundary can be positioned in several different ways and the resultant 18-perch block can be in the shape of a trapezium or quadrilateral with no parallel sides. In these circumstances the extent conveyed by deed No. 2828 must be regarded as undivided and undefined despite the asseverations of the grantor to the contrary. If authority is needed for this view it will be found in the case of *Ponna v. Muthuwa.*[1]. In this case two deeds had been executed, one for the southern 2/3 share of a land where the northern boundary was given as "the rock and the lolu tree forming the boundary of the remaining 1/3 share of the land" and the other for the northern 1/3 share of the land where the southern boundary was given as "the rock on the limit of the remaining 2/3 share of this land and lolu tree". Gratiaen J. who decided this case enunciated the test that should be adopted as follows at page 61 :

> "..... Where the words of description contained in the grant are sufficiently clear with reference to extent, locality and other relevant matters to permit of an exact demarcation of all the boundaries of what has been conveyed, then the grant is of a **defined** allotment. If however, the language is insufficient to permit of such a demarcation, the grant must be interpreted as conveying only an undivided share in the larger land".

Gratiaen J. held that the deeds failed the test of precision as the common boundary separating the northern and southern portions could not be precisely located. Se also *Dias v. Dias*[2].

Hence if one looks at R. B. Madawela's deed No. 2828 and no more, one would see that the extent of 3 acres conveyed by it is in truth undivided. Accordingly the plaintiff quite rightly brought her action to partition the entirety of the corpus depicted in plan No. 2646 but her failure to make R. S. Madawela a party and show him an undivided 3 acres was a serious lapse. When the Commission was first issued to the surveyor plan No. 2646 was not furnished to him. The surveyor surveyed the land according to the boundaries pointed out to him by the plaintiff's husband in the presence of the 1st defendant who represented himself and the 2nd, 3rd, and 4th defendants, and prepared his plan No. 3312 dated 4.11.69. In his return to the Commission the surveyor drew attention to the fact that he had not been furnished with a copy of plan No. 2646 referred to in the schedule to the plaint. The corpus depicted in plan No. 3312 was in extent 15 acres and 24 perches and one of its southern boundaries was significantly described as the barbed wire and live fence separating the coconut garden of R. B. Madawela. Thereafter on 10.3.1970 the plaintiff's attorney-at-law tendered plan No. 2646 and moved for the reissue of the Commission so that the corpus could be resurveyed in accordance with this plan. In execution of the second Commission the surveyor prepared plan No. 3392 of 17.8.1970 adding to the corpus already surveyed lots 3 and 4. Lot 3 was in the possession of the 1st defendant while lot 4 was in the possession of R. B. Madawela according to the surveyor's report. Yet no notice was taken of the claim of R. B. Madawela and he was lost sight of. The trial was held on 5.5.1972 and interlocutory decree was entered on the same day. When the surveyor went to the land to partition it in accordance with the interlocutory decree, R. B. Madawela found lot 4 which was possessed by him and which had been excluded at the first survey, being treated as part of the corpus to be partitioned. On the very day on which the final plan of partition was filed of record, namely, 6.11.1972, R. B. Madawela's proxy was filed by his attorney-at-law and an application for permission to intervene in the action was made on his behalf. Although the judge did not order him to be added, Madawela's name was entered on the caption of the case as the 7th defendant under date 6.11.1972. While Madawela's application was still pending he died and on 11.11.1976 and his heirs were added as 6(a), 6(b)

and 6(c) defendants. The numbering was corrected during the proceedings of March 23, 1977 and these heirs were, by order of Court, made the 7(a), 7(b) and 7(c) defendants in the case. In these circumstances they must be now treated as duly added defendants in the case. On the same day, that is, 23.3.1977 the Court made order dismissing the application for intervention and entered final decree. The 7(a), 7(b) and 7(c) defendants filed an application by way of revision in the Court of Appeal seeking to have the interlocutory and final decrees entered in the case set aside and lot 4 in plan No. 3392 excluded from the corpus sought to be partitioned. The Court of Appeal by its judgment of 8.3.82 set aside the interlocutory decree and all the orders made thereafter and the final decree. Madawela's heirs were directed to be added as parties and given an opportunity to file their statement of claim. The other parties were to be entitled to file further pleadings and trial was to be held *de novo* on the pleadings and on the basis of plan No. 2646 of 14.12.1942. The plaintiff has appealed to this Court from this judgment of the Court of Appeal.

The plaintiff-appellant's contention is that the decrees under challenge are, under the legal provisions applicable, final and conclusive for all purposes notwithstanding any omission or defect of procedure and even if all persons concerned are not parties to the action. The 7(a), 7(b) and 7(c) defendant-respondents attack the proceedings which led up to the entering of the interlocutory and final decrees on two main grounds:

1. There was no proper compliance with section 12(1) of the Partition Act No. 16 of 1951 which was operative at the time this case was filed. Under this provision it was imperative that a proctor should file a declaration under his hand certifying that all such entries in the Register maintained under the Registration of Documents Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by him after the registration of the action as a *lis pendens,* and giving the names and, where such is registered, the addresses of every person found upon such inspection to be a necessary party to the action under section 5 of the Act. If in fact the Proctor who gave the declaration had personally inspected the registration

entries he could not have missed Deed No. 2828 of 22.7.1943 in favour of R. B. Madawela executed by Encina Perera. The declaration dated 18.8.1969 filed in this case did not disclose Madawela's name.

2. In the Surveyor's report attached to plan No. 3392 depicting the corpus sought to be partitioned the name of R. B. Madawela is disclosed as being the person in possession of lot 4 but no notice was issued on him as required by section 22(1) (a) of the Partition Act.

In view of the conclusive and final effect attaching to partition decrees, can the Court of Appeal interfere by way of revision?

The concept of finality and conclusiveness of partition decrees embodied in our statutes owes its inspiration to English law and not to Roman-Dutch law - see Voet 10.2.24. An old English statute of 1697 (8 & 9 Will .3 c.31) provided that when final judgment was entered it "shall be good, and conclude all persons whatsoever . . . . . whatever right or title they have and may at any time claim . . . . . although all persons concerned are not named in any of the proceedings nor the title . . . . truly set forth." A similar provision was included in section 12 of our local Ordinance No. 21 of 1844 but its applicability was restricted to decrees for partition only and not to decrees for sale. When the Partition Ordinance No. 10 of 1863 came to be passed provision was made in its section 9 to give conclusive effect to decrees whether for partition or sale. Section 9 reads as follows:

"The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty:

Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover

damages from the parties by whose act, whether of commission or omission, such damages had accrued."

The words "as hereinbefore provided" however enabled the appellate courts to interfere whenever such steps as were imperative under the ordinance or essential to the investigation of title or obligatory under the rules of natural justice had not been taken.

In the course of time it became apparent that the object of the legislature to invest decrees under the Partition Ordinance with finality was not being achieved. Hence when the Partition Act No. 16 of 1951 came to be enacted special attention was given to the need to ensure finality for decrees of partition and sale entered under the Act. This Act by section 48 provided that the interlocutory and final decrees entered in terms of its provisions shall "be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree." The expression "encumbrance" as used here was defined to mean "any mortgage, lease, usufruct, servitude, fidei commissum, life interest, trust or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period exceeding one month, and the rights of a proprietor of a nindagama." The provisions of section 44 of the Evidence Ordinance were made inapplicable to decrees under the Act. Hence no attack was possible on the ground of fraud or collusion or lack of competency of the court. But the statute itself provided that the decrees were not final and conclusive against a person who was not a party to the action and did not claim his right, title or interest directly or remotely under the decree if he proves that the decree had not been

entered by a court of competent jurisdiction or that the action had not been duly registered as a *lis pendens.* So some room was left for collateral attack.

But although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitution in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice. In the case of *Ukku v. Sidoris*[3] T.S. Fernando J. (as he then was) declared as follows at page 93.

> "While that section (i.e. section 48 of the Partition Act) enacts that an interlocutory decree entered shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of opinion that it does not affect the extraordinary jurisdiction of this Court exercised by way of revision or *restitutio-in-integrum* where circumstances in which such extraordinary jurisdiction has been exercised in the past are shown to exist."

The jurisdiction of the Supreme Court to exercise its powers of revision and *restitutio in integrum* despite the new legislation was repeatedly affirmed in a number of cases, e.g. *Mariam Beebee v. Seyed Mohamed*[4], *Amarasuriya Estates Ltd. v. Ratnayake*[5], and *Sirimalie v. Pinchi Ukku*[6].

The pattern of interference by the Supreme Court followed the traditional lines: failure to effect due service of summons which is a vitiating factor more fundamental than an omission or defect of procedure - *Siriwardene v. Janasumana*[7]; service of a notice instead of summons - *Leelawathie v. Weeraman*[8]; incapacity of a party and

failure to have a guardian-ad-litem appointed - *Ukku v. Sidoris* (supra); settlement prejudicial to minors and failure of the judge to comply with the provisions of section 500 of the Civil Procedure Code - *Leisahamy v. Davith Singho*[9]; difference between land sought to be partitioned as described in the plaint and land depicted in preliminary plan - *Amarasuriya Estates Ltd. v. Ratnayake* (supra); party dead at the time of the entry of the decree and no substitution effected - *Isohamy v. Haramanis*[10], *Mariam Beebee v. Seyed Mohamed* (supra); inability to attend trial for causes beyond control resulting in the judge not observing the *audi alteram partem* rule of natural justice - *Siriya v. Amalee*[11]; no proper examination of title - *Gunasinghe v Aron Appuhamy* [12]. It is not necessary to multiply instances further. It became clear that section 48 had still failed to achieve the desired finality and conclusiveness for decrees under the Partition Act. The death of a party, for instance, who was during his lifetime neither interested in nor in enjoyment of any interests in the corpus sought to be partitioned nor indeed entitled to any rights was often exploited by designing persons who were only bent on prolonging the case for their own ends. Failure to serve summons, incapacity of parties owing to minority or unsoundness of mind and omission to effect substitution on the death of a party were most frequently the grounds on which the stability of decrees under the Partition Act was being undermined.

The Law Commission made recommendations aimed at eliminating the existing avenues of attack on partition decrees. The Commission felt that depriving the original court of the power to grant relief in cases where decrees were bad for want of jurisdiction or where the proceedings were null and void would result in no hardship as the extraordinary powers of revision and *restitutio in integrum* vested in the Supreme Court were left intact. The amendments to section 48 suggested by the Law Commission were incorporated into section 651 of the Administration of Justice (Amendment) Law, No. 25 of 1975 which replaced, *inter alia*, the

Partition Act. One of the main changes was the wide-ranging definition given to the expression "omission or defect of procedure". The expression was henceforth to include an omission or failure -

(a) to serve summons on any party,

(b) to substitute the heirs or legal representative of a party who dies pending the action or to appoint a person to represent the estate of the deceased party,

(c) to appoint a guardian *ad litem* over a party who is a minor or a person of unsound mind.

But if in consequence of the omission or failure to serve summons on a party or to effect substitution in the case of a dead party or to appoint a guardian *ad litem* over a party who is a minor or of unsound mind, such party's right, title or interest in the subject-matter of the action is extinguished or otherwise prejudiced, and he had no notice whatsoever of the partition action prior to the date of the interlocutory decree, an application could be made in the manner and in accordance with the procedure prescribed in the section no later than 30 days after the date of the return of the surveyor to the Commission to partition the land or of the return of the person responsible for the sale, as the case may be, for special leave to establish such right, title or interest notwithstanding the entry of the interlocutory decree. The relief granted will be limited to the right, title or interest of the successful party and to that extent the interlocutory decree can be amended or modified, and where a claim has been established to the whole land, even set aside and the action dismissed. I might add that when the Partition Law No. 21 of 1977 replaced the provisions in the Administration of Justice Law relating to partition actions, similar provisions were included in the new Law. The new Partition Law No. 21 of 1977 however extended the availability of this relief to a fourth class of persons - parties to the action who had duly filed their statements of claim and registered their addresses but failed to appear at the trial owing to accident, misfortune or other unavoidable cause.

It should be observed that in these provisions for relief found in the Administration of Justice (Amendment) law No. 25 of 1975 and later in the Partition Law No. 21 of 1977, "persons concerned" who had not been made parties despite the fact that they had a right, title or interest in the subject-matter, are not included. Yet such "persons concerned" who have been the victims of a miscarriage of justice can always invoke the powers of revision and restitutio in integrum vested in the Court of Appeal. In the case of *Mariam Beebee v. Seyed Mohamed* (supra) Sansoni C.J. delivering the majority decision of the Divisional Bench that heard this case said as follows at page 38:

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."

Even the Law Commission whose recommendations of 11th September, 1971 to the Minister of Justice were incorporated in the Administration of Justice (Amendment) Law No. 25 of 1975 felt that any hardship that may be caused by making partition decrees inviolate could always be relieved in fit cases by the exercise of the extraordinary powers of revision and restitutio in integrum vested in the Supreme Court. There is no doubt that the dictum of Sansoni C.J. which I have just cited was still applicable after the passage of the Administration of Justice (Amendment) Law in 1975. The powers of revision and restitutio in integrum of the Supreme Court were left intact. I might add that they remained unaffected even after the enactment of the Partition Law No. 21 of 1977.

Further it must be observed that after the Divisional Bench of the Supreme Court had held in the case of *Mariam Beebee v. Seyed Mohamed* (supra) that section 48(1) of the Partition Act No. 16 of 1951 (Cap 69) did not preclude the Supreme Court from exercising its powers of revision in appropriate cases in respect of interlocutory and final decrees entered under the Act, the then National State Assembly enacted section 651(1) of the Administration of Justice (Amendment) Law No. 25 of 1975 following closely the language of the old section 48(1) and elaborating only on the meaning of "omission or defect of procedure". Section 651(1) was later superseded by section 48(1) of the Partition Law No. 21 of 1977 again retaining almost the identical language. It is well recognised that where cases have been decided in Courts on particular forms of language in a statute and in later statutes on the same subject and passed with the same purpose and the same object, Parliament uses the same forms of language which have earlier received judicial construction, it must be presumed, in the absence of any indication to the contrary, that Parliament intended the forms of language used by it in the later statutes to be construed in the same manner as before. This is, of course, not a canon of construction of absolute obligation but a presumption that the Legislature intended the language used by it in the later statute should be given the meaning already attributed to it by the courts. As Sir W. M. James L. J. said in the case of *Ex parte Campbell, In re Catheart*[13]:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statue, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them".

Soertsz S.P.J. cited this passage as authority for a like proposition which he stated as follows in the Divisional Bench case of *Perera v. Jayewardene*[14] :

> "..... it is a well established principle that when a word has received a judicial interpretation and the same word is re-enacted, it must be deemed to have been re-enacted in the meaning given to it".

The principle is an aid to construction and has been applied in a number of cases, e.g. *Barlow v. Teal*[15], *Greaves v. Tefield*[16], and *Webb v. Outrim*[17]. See also *Maxwell on The Interpretation of Statutes* 12th edition (1969) pp. 71,72: *Craies on Statute Law* 7th edition (1971) p. 141 : *Bindra on The Interpretation of Statutes* 6th edition (1975) pp. 257,258.

Accordingly the use by the Legislature in successive enactments of a form of words substantially similar to the form of words in section 48(1) of the repealed Partition Act No. 16 of 1951, supports the assumption that the Legislature intended to leave unaffected the powers of revision and *restitutio in integrum* vested now in the Court of Appeal in conformity with the construction adopted by Sansoni C.J. in *Mariam Beebee v. Seyed Mohamed* (supra).

While on the subject of interpretation, I would like to refer to one further matter. A point was made of the fact that in the new Partition Law No. 21 of 1977 a special reservation of the powers of the Supreme Court by way of revision and *restitutio in integrum* has been included in subsection 3 of section 48 after insulating partition decrees from attack on grounds of fraud and collusion. It was submitted that the maxim *expressio unius est exclusio alterius* applies. The maxim is that the express

mention of one thing implies the exclusion of another. But it is not of universal application and great caution must be exercised in applying it. As Lopes, L. J., said in the case of *Colquhoun v. Brooks*[18]

> "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

Where the words expressed are intended to be illustrative only, the rule is inappropriate *(Maurice & Co. Ltd. v. Minister of Labour*[19]*).* Nor should the maxim be applied where what is expressed has been put in by way of abundant caution (Bindra (supra) p. 137).

The saving of powers of revision and restitutio in integrum was probably put into subsection 3 of section 48 of the Partition Law No. 21 of 1977 out of abundance of caution because of the decision of the Privy Council in the case of *Mohamedaly Adamjee v. Hadad Sadeen*[20]. In this case the Privy Council following the decisions of Burnside C. J. in *Nono Hami v. De Silva*[21] and Sir Alexander Wood Renton in *Jayawardene v. Weerasekera*[22], held that a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title, even by fraudulent collusion between the parties, had been concealed from the Court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages. Lord Cohen who delivered the judgment of the Board went on to say that although the law abhors fraud and equity has an undoubted jurisdiction to relieve against every species of fraud, still to say that fraud vitiates everything obtained by it is too broad a proposition. When adequate relief can be had at law and when in fact there is a full, perfect and complete remedy otherwise, it is not the course to interfere.

Whatever the reason for the saving of the powers of revision and *restitutio in integrum* in section 48(3) of the Partition Law No. 21 of 1977, to say that these powers will not be available outside the area of fraud and collusion would be to leave victims of miscarriages of justice where there is no fraud and collusion without remedy. The *expressio unius* rule should not be applied where to do so would produce a wholly irrational situation and gross injustice. Further there is nothing to support an inference of legislative intent on the basis of the maxim *expressio unius exclusio alterius.* The omission to reserve specially the powers of revision and *restitutio in integrum* of the Supreme Court in section 48(1) of the Partition Law No. 21 of 1977 does not support the conclusion that these powers that were already there have been impliedly taken away. Nothing less than an express removal of these powers would be required to achieve such a result.

The pronouncement of Sansoni C.J. in regard to the revisionary powers of the Court in *Mariam Beebee v. Seyed Mohamed* (supra) therefore remains applicable even after the enactment of the Administration of Justice (Amendment) Law No. 25 of 1975 and the Partition Law No. 21 of 1977. The powers of revision and *restitutio in integrum* have survived all the legislation that has been enacted up to date. These are extraordinary powers and will be exercised only in a fit case to avert a miscarriage of justice. The immunity given to partition decrees from being assailed on the grounds of omissions and defects of procedure as now broadly defined, and of the failure to make "persons concerned" parties to the action should not be interpreted as a licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred.

In the instant case R. B. Madawela the original intervenient was a "person concerned". He was a necessary party. The deed in his favour would have come to the plaintiff's notice when the Land Registry was searched before her purchase from some of Ensina Perera's heirs. She would have come to know of it had she caused a search to be made, as any prudent plaintiff should have done, before she filed the present case. But be that as it may. The declaration under section 12(1) of the Partition Act No. 16 of 1951 which was the law in operation at the time this case was filed, was a legal imperative. Section 12(1) stipulates that after

the partition action is registered as a *lis pendens* the plaintiff must file or cause to be filed in the case a declaration under the hand of a proctor certifying that he personally inspected all the registration entries relating to the land which is the subject-matter of the action and stating the names of all the persons found by him to be necessary parties to the action under section 5 of the Act. Where the address of any such party is registered, this too should be mentioned. The purpose of this declaration is to satisfy the conscience of the Court that all persons who are seen upon an inspection of the entries in the Land Registry to be persons entitled to a right, share or interest in the land sought to be partitioned are before it. In fact it is only after the declaration is filed that the Court issues summons. It is the declaration that gives the green light for the case to proceed. Inexplicably the declaration which the Proctor filed in the instant case failed to carry the name of R. B. Madawela although the deed in his favour by Ensina Perera is duly registered — see the extract of registration entries marked X3. This glaring blemish taints the entire proceedings. It amounts to what has been called 'fundamental vice'. It transcends the bounds of procedural error. The plaintiff's husband who represented her at the survey evidently informed the surveyor at the first survey that what was later brought into the corpus as Lot 4 was R. B. Madawela's land. Undisputedly R. B. Madawela had made a young plantation on Lot 4. The 1st defendant who is Ensina Perera's son and in fact had witnessed the deed on which Madawela bought, did not contradict the representations made to the surveyor on the first occasion by plaintiff's husband concerning Madawela's land. Even when the surveyor reported Madawela's claim and his ownership of the young plantation to Court, no effort was made at least at that stage to comply with the requirement that notice should be served on claimants before the surveyor. At the trial surveyor's report would have been read but its contents appear to have received scant attention. It must be borne in mind that the surveyor's report is invariably found to be very relevant to the careful investigation of title — another imperative requirement. If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice.

But in the circumstances of this case the extent to which the Court should intervene in the exercise of its revisionary powers should be given some thought. To set aside all the proceedings would be too sweeping and cause unnecessary hardship, inconvenience and delay. The substantial relief which R. B. Madawela wanted when he first intervened was the exclusion of lot 4 in plan No.3392 of 17.8.1970 made by S. T. Gunasekera Licensed Surveyor marked X9 although he could very well have staked a claim for an undivided 3 acres from the whole land to include Lot 4. As it is there is a well established fence on the north of Lot 4 and, as I said before, even the plaintiff's husband referred to this Lot as R. B. Madawela's land at the first preliminary survey. Hence it is reasonable to infer that after his purchase in 1943, R. B. Madawela fenced off a portion with the consent of Ensina Perera who was the owner at that time of the entire remainder, and began possessing it as his own. This is Lot 4 in plan X9. Accordingly it would meet the ends of justice if without setting aside the interlocutory decree it is only amended by excluding from the corpus decreed to be partitioned, Lot No. 4 in plan No. 3392 (X9). I also order. The final decree and the proceedings leading up to it from the stage of the interlocutory decree are set aside. I might add that the District Judge had no power to allow the intervention after the entry of interlocutory decree. This can be done only by a superior Court acting in revision. After the interlocutory decree is amended as directed the action can proceed in accordance with the law. Subject to this variation the appeal is dismissed with costs payable to the 7(a), 7(b) and 7(c) defendants.

SHARVANANDA, J. — I agree

WANASUNDERA, J. — I agree

WIMALARATNE, J. — I agree

RATWATTE, J. — I agree

Interlocutory Decree varied.
Final Decree set aside.