Present : Fisher C.J., Drieberg J., and Jayewardene A.J. 1928.

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22—C. R. Galle, 6,203.

Partition—Action for damages—Act or omission—Breach of legal duty—Negligence—Ordinance No. 10 of 1863, s. 9.

[*Per* FISHER C.J. and DRIEBERG J. (JAYEWARDENE A.J., *dissentiente*).]

An action for damages under the proviso to section 9 of the Partition Ordinance must be based upon a wilful act or omission arising from a breach of legal duty on the part of the defendant.

CASE referred by Jayewardene A.J. to a Bench of three Judges. The facts are stated in the reference as follows :—

The plaintiffs bring this action to recover a sum of Rs. 300 from the defendant, alleging that they were the owners of a 5/12 share of a tiled house and of the entirety of a thatched house used as a kitchen standing on a land called Pelawatta, but that the entirety of these two houses were allotted to the defendant by the final decree in partition case, D. C. Galle, No. 20,908.

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One Gunahinge Pingo by deed No. 20,116, dated May 23, 1908, gifted 5/6 share of the tiled house to her son Sadiris and her granddaughter Anohamy.

Anohamy died some time ago leaving as her heirs, her husband Suwaneris, 1st plaintiff, and three children, the 2nd, 3rd, and 4th plaintiffs who are minors.

By deed No. 197 of 1916, Sadiris sold his share to his wife Saino, and by mortgage bond No. 2,943 dated September 13, 1920, Sadiris and Saino mortgaged their shares to one William Singho.

A partition action (D. C. Galle, No. 20,908) was instituted by one Sabiathu Natchia in respect of this land, Pelawatta—the present plaintiffs were altogether omitted from this action. Preliminary decree was entered on March 11, 1925, and these two houses numbered 7 and 8 on the plan were allotted to Sadiris, who was the 18th defendant. Anohamy had built the kitchen, and the plaintiffs are thus entitled to 5/12 of the main houses and the entirety of the other house.

William Singho put his mortgage bond in suit, issued writ, and caused the Fiscal to seize the houses No. 7 and 8 in the preliminary plan filed in D. C. Galle, No. 20,908. One Sirineris purchased the property sold in execution, but, was unable to pay the purchase amount, even after an extension of time to pay the amount due. The property was sold a second time and purchased by the present defendant, who obtained Fiscal's transfer No. 18,604 dated April 9, 1926 (D 1). The defendant then intervened in the partition action, and was added as the 24th defendant. The preliminary decree was amended on May 17, 1926, and the houses in question were allotted to this defendant, and final decree entered accordingly. The defendant has thus by his act deprived the plaintiffs of their shares in the two houses.

The plaintiffs were unaware of the pendency of partition proceedings. The 2nd, 3rd, and 4th plaintiffs are minors of the ages of 15, 12, and 9 years, respectively. The 1st plaintiff says that he and his wife Anohamy lived on the land but that he went to Anuradhapura and remained there for about six years. His wife came in search of him and died at Anuradhapura. There is no reason to disbelieve the 1st plaintiff. He says that he learnt of the sale of the houses only after the partition case.

The learned Judge has dismissed plaintiffs action holding that the defendant was an innocent purchaser, and that it was owing to Sadiris' act that the plaintiffs were deprived of their interests and that plaintiff could recover damages from Sadiris. It has not been proved that the defendant had any knowledge of the rights of the plaintiffs.

Ameresekere, for plaintiffs, appellant.

Tisseverasinghe, for defendant, respondent.

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In this case the plaintiffs sued the defendant for damages alleging (paragraph 5 of the plaint) that "In partition case No. 20,908 of the District Court of Galle, the defendant above named has fraudulently and dishonestly got allotted to himself . . . . two houses thereby depriving the plaintiffs of their rights in the said two houses." It is not disputed that the plaintiffs had rights in the two houses prior to the partition decree, and for the purpose of this appeal it must be assumed that the plaintiffs had no knowledge of the existence of the partition action while it was in progress. The learned Judge found, and his finding is apparently well based, that the defendant was an innocent party so far as knowledge of any rights or claims of the plaintiffs are concerned. The defendant's position is that he bought the interests of one Sadiris, who was a party to the partition suit at a sale in execution and got a Fiscal's transfer. At that time an interlocutory decree had been made in the partition suit allotting the two houses to Sadiris. The defendant got himself made a party to the suit and final decree was made allotting the two houses to him.

The only question for our decision is whether the plaintiffs have a right to claim damages from the defendant by virtue of the proviso to section 9 of the Partition Ordinance, which reads: "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 accrued."

The words "affect the right" indicate that it was not intended that any new right of action should be brought into being by the proviso. The right is a right "to recover damages from the parties by whose act whether of commission or omission such damages accrued." A right to recover damages must be based on a breach of a legal duty, and in my opinion the words of the proviso can only point to some breach by the party sought to be charged of a duty which he owed to the person seeking to recover damages. They cannot, in my opinion, refer to something which is solely attributable to the operation of the Ordinance. I can see nothing which the defendant has done or omitted which his duty to the plaintiffs required him not to do or to omit. By no fault or unfairness on his part, by no lack of care or inquiry which he was under any obligation to make, but simply and solely by availing himself of the Partition Ordinance he has been given an indefeasible title to what he purchased under due process of law. The position in which the plaintiffs find themselves is therefore solely attributable to the operation of the Ordinance in favour of one who has in good faith and without any notice, express or implied, of the rights of the plaintiffs availed himself of its provisions.

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I entirely endorse the view expressed by Bertram C.J. in *Fernando v. Fernando*[1] that "It is clear that no action lies under section 9, except upon proof of the breach of a legal duty. The proviso to section 9 does not create fresh remedies, but merely keeps intact such remedies as exist. If a person claims damages under that proviso, he must show that the person against whom he claims them had been guilty of a breach of a legal duty towards him. That legal duty may be sought for outside the Ordinance, or it may be sought for within the four corners of the Ordinance," and with the view expressed by de Sampayo J. in *Appuhamy v. Samaranayake*[2] in which he says: "I do not think that the parties to a partition action will be liable in damages if they acted *bona fide* and in ignorance of the rights of any third party." It does not seem to me that the decision in *Cassim v. de Vos et al.*[3] necessarily conflicts with those views. In that case the defendant knew of the claim of the plaintiff and failed to make him a party to the partition action. Ennis J. at page 480 says: "In the circumstances, I am of opinion that the plaintiff's right to bring this action arose on the act of the first defendant in instituting the partition action without making the present plaintiff a party to that action. It is unnecessary to consider whether the act of the 1st defendant was fraudulent or wilful. It is sufficient that he caused the damage and that it was done knowing that the present plaintiff had preferred a claim to the land." Apart, therefore, from any fraudulent or wilful act there was a ground for imputing a breach of duty to the defendants. In this case there is none. The policy of the law is always to protect as far as possible one who has done nothing but act in an ordinary and honest way, in this case a *bona fide* purchaser for value; and I am of opinion that the judgment of the District Judge dismissing the action was right. The appeal will be dismissed and the first plaintiff will personally pay the costs both in this Court and in the District Court.

DRIEBERG J.—

The facts of this case are set out in the judgment of my brother Jayewardene. The principal issues on which the trial proceeded were these:—

(1) Were the plaintiffs entitled to 5/12ths of the 11 cubits house and the 5 cubits thatched house?

(2) Did the defendant get the same allotted to him in D. C. case No. 20,908?

(3) What damages are plaintiffs entitled to by reason of their being deprived of the share of the house?

[1] *(1918) 20 N. L. R., at page 411.* [2] *(1917) 19 N. L. R., at page 405.*
[3] *(1924) 25 N. L. R. 477.*

(4) Was defendant aware of the rights of the plaintiff ?

(5) Did defendant fraudulently and dishonestly get the said houses allotted to him ?

(6) Should plaintiff's action, if any, be against Sadiris ?

The trial Judge found that the respondent was an innocent purchaser who did not know of the appellant's rights and that he did not act fraudulently. The 2nd and 3rd issues were apparently framed to support the contention that the bare circumstance that the respondent procured in his favour title to the entirety of the houses made him liable in damages to the appellants, the measure of damage being the value of their interest in these houses. This contention was advanced at the argument of the appeal before my brother Jayewardene who submitted the question for consideration before a Bench of three Judges.

Except for certain observations by Ennis J. in *Cassim v. de Vos* [1] there is no authority for this proposition and it is not consistent with other judgments in which the effect of the proviso to section 9 of the Partition Ordinance has been considered.

In *Appuhamy v. Samaranayake* [2] a land was partitioned among persons who alleged a title derived from Ausadahamy. The plaintiffs claimed damages, claiming title from a person from whom Ausadahamy had taken a usufructuary mortgage of the land in 1868. The mortgage bond was not registered. The plaintiffs action failed on other grounds also, but the question now before us was raised and de Sampayo J. said :—

> " I am not aware of any case in which an action has been held to lie against a party to a partition action simply because he was such party and got a portion of the land. This is what the plaintiffs seek to maintain in this action, since, although in the plaint they alleged fraudulent misrepresentation, they abandoned that position, and no issue was stated at the trial, and no evidence given on that point,"

and further,

> " I do not think parties to a partition action will be liable in damages if they acted *bona fide* and in ignorance of the rights of any third party."

Referring to this feature of the case Ennis J. said :—

> " The parties to the partition action were unaware of the bond and the omission to mention it was therefore not deliberate."

[1] *(1924) 25 N. L. R. 477.*

[2] *(1917) 19 N. L. R. 403.*

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In addition to cases of fraud and deliberate omission, the authorities on which are noted on page 222 of Jayewardene *The Law of Partition in Ceylon, 2nd ed.*, the proviso would undoubtedly include negligence on the part of the defendant.

In *Fernando v. Fernando*[1] Sir Anton Bertram C.J., who agreed with the opinion of de Sampayo J. in *Appuhamy v. Samaranayake* (*supra*), in the passage quoted by my Lord the Chief Justice in his judgment says that the act or omission must amount to a breach of a legal duty towards the plaintiff. Negligence is a breach of the legal duty to take care. I know of no case where damages were claimed on the ground of the defendant's negligence, but in *Baba Appu v. Siyadoris*[2] Loos A.J. based his judgment alternatively on the ground that if the defendant was a stranger he should have made inquiries about the rights of the plaintiffs who owned a house on the land and were residing in it.

The authorities go on further than this. The endeavour to extend relief in the manner claimed by the appellants is based on an opinion expressed by Ennis J. in *Cassim v. de Vos* (*supra*) that an action under section 9 need not be based on any wilful or fraudulent act, but may be based on any act which gives rise to damages; he suggested that the action permitted was one *rei vindicatio* in which by reason of an action for declaration of title to and recovery of possession of the land being barred by the conclusive nature of the partition decree, the alternative claim for the value of the land was allowed.

It appears to me to be extremely difficult, if not impossible, to regard the action allowed by section 9 as having any affinity to an action *rei vindicatio*. It is true that this form of action is dealt with in Maasdorp's *Institutes of Cape Law, Book III., Part II.*, as a relief for actionable wrongs, but, it should be noted, for actionable wrongs against the rights of ownership. The whole basis of an action *rei vindicatio* is the title, or rather the superior title, of the plaintiff and a denial of that title or an interference with the plaintiff's rights under it by the defendant. An action under section 9 cannot be of this nature for the plaintiff in it cannot rely on title.

Further, can a title under a partition decree have the quality of being good and conclusive against all persons if the holder of the title, simply for the reason that he is the holder of it, is liable in damages to some person not a party to the proceedings who, but for the decree, would be the owner of it ?—and damages would mean not merely restitution of the value of the land but also compensation for injury caused by his being deprived of it. If the legislature had the intention that a partition decree title should be subject to such a claim I do not think it would have expressed it in the words of the proviso which founds the action

[1] (*1918*) *20 N. L. R. 410.* [2] (*1919*) *7 C. W. R. 72.*

on an act or omission of the defendant and not on the mere circumstance that he holds the title which but for the decree would be in the plaintiff.

Cases may arise where the act or omission which prejudices the plaintiff is not that of the person to whom his land has been decreed, but of another; for example, the Commissioner might wrongly include the plaintiff's land in the partition and it might be allotted to a party to the action who was not aware of the error until after the final decree.

Who then would be liable? In the view I have taken I should say the Commissioner. There is nothing in the section to limit liability to parties to the partition action. The legal duty, the breach of which gives rise to the action, may exist even outside the Ordinance; see Anton Bertram C.J. in *Fernando v. Fernando* (*supra*) on page 411.

If the submission of the appellants is correct the party to whom the land was allotted will be liable though the act or omission which prejudiced the plaintiff was that of the Commissioner.

It was stated by Sir Anton Bertram C.J. in *Fernando v. Fernando* (*supra*) that the proviso to section 9 created no fresh remedy but merely kept intact such remedies as existed. A similar opinion was expressed in the earlier cases of *Sado v. Mendis* [1] and *Fonseka v. Perera.* [2]

Under section 12 of Ordinance No. 21 of 1844, repealed by Ordinance No. 11 of 1852, which was the first enactment on this subject, the same effect is given to a partition decree as by section 9 of Ordinance No. 10 of 1863, but there is no such provision as in the proviso to section 9.

We were not referred to any cases showing on what grounds relief was granted against decrees under section 12 of Ordinance No. 21 of 1844.

In *Sado v. Mendis* (*supra*) Phear C.J. dealing with this point said:—

> "Even if the enactment of clause 9 of Ordinance No. 10 of 1863 had applied to the case, it would have been necessary for the plaintiffs, in order to obtain the benefit of the proviso of that clause in the shape of a decree for damages against any defendant, to prove as against him some act of commission or omission in relation to the sale of the property such as would have entitled the plaintiffs to recover from him consequent damages independently of the Ordinances; for it is important to observe that the proviso does not create any new ground of action, or right to recover any damages; it simply saves all such rights as would have existed without the enactment."

[1] *(1879) 2 S. C. C. 127.* [2] *(1915) 1 C. W. R. 197.*

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This lends strong support to the view that the act or omission must be something other than the mere acquisition by the defendant of the plaintiff's rights.

It appears to me, however, to be unnecessary to look outside section 9 for a proper understanding of the proviso or to seek to trace in it by analogy the features of other actions by which relief can be obtained against decrees which have not the special qualities of partition decrees.

A partition decree creates a title which is good and conclusive for all purposes ; it eliminates the title of a previous and true owner who is not a party to the proceedings but allows him an action for damages against the person by whose tortious act this was caused.

It was urged that the respondent was guilty of an omission which entitled the appellants to relief. No issue was stated as to negligence on the part of the respondent and it would be difficult to hold against him on this point without giving him an opportunity of meeting it. There is, however, sufficient material to hold in in his favour. What was sold by the Fiscal were " the houses marked 7 and 8 in preliminary plan in D. C. Galle, No. 20,908, as per partition decree in the said case."

Though the preliminary decree adjudicating upon the title to the land and decreeing a partition is not the decree to which conclusive effect is given by section 9, it is in the absence of subsequent intervention by others the final adjudication by the Court upon the title to the land.

It is not possible, in considering whether the respondent was guilty of negligence in not further investigating the title he bought, to regard the decree as a mere decree *inter partes* in, for example, an action for title to land. It is not an adjudication upon matters submitted by the parties but an investigation by the Court into the title to the land.

In *Mather v. Tamotharam Pillai* [1] Layard C.J. said :—

> " The judge cannot order a decree unless he is perfectly satisfied that the parties before the Court are entitled to the property, alleged by the plaintiff to be held by him in common with the defendants. The Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title, his suit for partition must be dismissed. It has been repeatedly held by this Court that the District Judge is not to regard the partition suit as merely to be decided on issues raised by, and between, the parties to the suit, and that the plaintiff must strictly prove his title, and, only when he has done so to the satisfaction of the Court, has he established his right

[1] *(1903) 6 N. L. R. 246.*

to maintain such action. The paramount duty is cast by the Ordinance upon the judge himself in partition proceedings to ascertain who are the actual owners of the land sought to be partitioned."

There was no intervention after the preliminary decree, no notice of the claim of the appellants, and I do not think it can be said that under the circumstances the respondent was guilty of negligence in having himself substituted in place of Sadiris and proceeding to final decree.

Nor would an examination of available records have revealed anything to put him on inquiry or given him notice of the appellant's claim. He would have found from the proceedings that Sirineris, a brother of Sadiris, and Anohamy, through whom the appellants claim, had acknowledged the title of Sadiris to these houses in the partition action and had bid for and purchased them at the first Fiscal's sale. It was on his making default in payment that they were again sold and purchased by the respondent.

The appellants were not at the time living in the houses or on the land and there was nothing to direct his attention to their claim.

There is some evidence in this case which has escaped attention in the judgment of the lower Court. The 1st appellant said that Simon sent him P 4 saying that the property was for sale ; P 4 is a copy of the Fiscal's sale notice produced by the 1st appellant, and if his evidence is correct it means that he had notice of the partition action which is mentioned in the sale notice and that he therefore cannot maintain this action.

It is not necessary however to base a judgment on this ground for the appellants have failed to show that the respondent is liable on the ground referred for decision by my brother Jayewardene and have also failed to prove that he was guilty of a breach of a legal duty.

I agree with the order made by my Lord the Chief Justice.

JAYEWARDENE A.J.—

The plaintiffs bring this action to recover the sum of Rs. 300 alleging that they were the owners of a 5/12 share of a tiled house and of the entirety of a thatched house standing on a land called Pelawatta, but that these houses were allotted to the defendant by the final decree in a partition case, D. C. Galle, No. 20,908. The plaintiffs were unaware of the pendency of the partition action. The 2nd, 3rd, and 4th plaintiffs are minors of the ages of 15, 12, and 9 years respectively. The houses were claimed by one Sadiris and allotted to him in the interlocutory decree, but they were seized and sold by the Fiscal on a writ against Sadiris and bought by the present defendant who obtained Fiscal's transfer dated

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April 9, 1926. The defendant intervened in the partition action and was added as the 24th defendant. The interlocutory was amended on May 17, 1926, and the houses in question were allotted to the defendant and final decree was entered accordingly. The plaintiffs are thus deprived of their shares in the two houses. It has not been proved that the defendant had any knowledge of the rights of the plaintiffs. The learned Judge has dismissed the action on the ground that the defendant was an innocent purchaser, and that it was owing to Sadiris' act that the plaintiffs were deprived of their interests, and that the plaintiff could recover damages from Sadiris. The plaintiffs have appealed. The question arises whether the defendant, who was ignorant of the rights of the plaintiffs and had purchased the interests of a party who had been allotted those interests in the interlocutory decree, can be held to be liable to the plaintiffs in damages, under the proviso to section 9 of the Partition Ordinance.

Damages constitute the compensation which a plaintiff can recover by process of law in respect of injury ; such injury arising through breach of contract or commission of a tort.

It is essential to an action in tort, says the Privy Council, that the act complained of should under the circumstances be legally wrongful as regards the party complaining ; that is it must prejudicially effect him in some legal right. *Rogers v. Rajendra Dutt.*[1] A legal right is a right residing in a person to the exclusion of the world at large and includes rights; (1) of reputation, (2) of bodily safety and freedom, and (3) rights of property or estate. These three rights embrace all the personal rights that are known to the law (per Cave J. in *Allen v. Flood*[2]).

Sir A. F. S. Maasdorp C.J., in his *Institutes of Cape Law* under the head of actionable wrongs treats of wrongs to ownership. (*Bk. 3, Pt. 2, Ch. 3.*) Rights to ownership consist in the exclusive right of an owner to dispose of and deal with his own property, which includes the right to the inviolability or security of such property from interference by others. Wrongs to ownership, on the other hand, consist in the violation of any of these rights, whether the property in any case be movable or immovable. He says that similar rules will apply to immovable as to movable property. Thus an owner who has been illegally deprived of or kept out of the possession of his land will be entitled to a similar action to that which lie at suit of an owner of movables illegally converted. A landowner, therefore, will be entitled to damages for encroachment made on to his ground by a building of his neighbour, even though, owing to his delay in pressing his claim, the Court may refuse to order the removal of such building. *Maasdorp's Institutes, Vol. IV., 26 and 37.*

[1] *(1860) 13 Moore P. C. 209.*

[2] *(1898) A. C. 29.*

In *Rogers v. Rajendra Dutt* (*supra*), the Privy Council held that if the act which the defendant did was itself wrongful, as against the plaintiffs and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by the order of the superior power, nor in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action : an imprisonment of the person, a battery, a trespass on land, are instances and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet if any damage, even in legal contemplation, be the consequence, an action will lie—and the Privy Council stated " No doubt an act which *primâ facie*, would appear to be innocent and rightful, may become tortuous, if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house : *primâ facie*, it is lawful to erect what one pleases on one's own land ; but if the neighbour has acquired the right to the light, the erection of any building which obstructs it is an invasion of the right, and so not only does the damage, but is unlawful and injurious."

In *Spencer v. The Registrar of Titles*,[1] where the plaintiff brought an action for damages for deprivation of title by reason of the grant of a certificate of title to a third party, the Privy Council held that the plaintiff was entitled to succeed on the ground that the plaintiff had the fee simple and that the person to whom the certificate was issued had no beneficial interest or estate in the fee simple, and on a later appeal,[2] the Privy Council assessed the measure of damages as to the value of the land when the plaintiff's title fell into possession.

On May 17, 1926, the District Judge amended the interlocutory decree in the partition case by giving the intervenient, 24th defendant, that is the present defendant, the houses which were originally allotted to Sadiris, the 18th defendant. In his evidence the defendant stated " I noticed Sadiris. After due notice I was allotted the houses after my purchase. Sadiris applied for the houses. I produce D 8—copy of preliminary decree showing the amendment after my intervention."

To my mind this evidence shows positive acts of intervention, notice and claim. All the parties to a partition action have the double capacity of plaintiff and defendant. *Bandi Naide v. Appu Naide*.[3] " *Duplex autem haec actio dicitur, eo quod in ea singulae personae duplex jus habent, puta, agentis et ejus cum quo agitur et par causa omnium videtur.*" *Voet X. 11., 3.*

[1] *(1906) A. C. 503.* [2] *(1910) 103 L. T. 647.*

[3] *(1923) 5 C. L. R. 192, 196.*

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In order that they may be recoverable, damages must be such as arise not only naturally but also immediately from the act complained of. Damages are too remote where they are not the proximate or immediate result of the act complained of, but of some intervening cause. In determining whether damages are too remote it is necessary to consider whether the original cause so far continued to operate that it was the proximate cause of the essential damage. The operation of the original cause ceases, and the chain of causation is broken, by the intervention of independent volition. Volition is not to be regarded as independent where it is due to terror or to an overmastering impulse engendered by the wrongful act of the defendant. (*10 Halsbury 318–320.*)

Sadiris had only an interlocutory decree in his favour, and that order, unless proceeded with, was useless for all purposes. *Peris v. Perera.*[1] It was binding on the parties to it, but did not bind others like the present plaintiff, *Catherinahamy v. Babahamy.*[2] The operation of Sadiris' original wrongful act had ceased and the chain of causation broken by the interposition of the defendant's independent act and volition. The real, direct and immediate cause of the damage, to use the language of Lord O'Brien C.J. in *Butterby v. Drogeda Corporation,*[3] was the defendant's act.

The act of the defendant was *bona fide* and the question remains whether the defendant can still be held to be liable in damages under section 9. In *Appuhamy v. Samaranayake,*[4] de Sampayo J. thought that the parties to a partition action will not be liable in damages if they acted *bona fide* and in ignorance of the rights of a third party, and in *Fernando v. Fernando,*[5] Bertram C.J. was of opinion that a person claiming damages must show that the defendant had been guilty of a breach of legal duty towards him, and in *Dullewa v. Dullewa,*[6] the expression " act of omission " was defined as implying some element of wilfulness and intention to produce a prejudicial result.

The question was fully considered in *Cassim v. De Vos.*[7] Ennis J. was of opinion that *Appuhamy v. Samaranayake* (*supra*) and *Fernando v. Fernando* (*supra*), were not binding authorities, as in the former case the plaintiffs knew all about the partition case when it was proceeding and stood by and did nothing, and in the latter case the defendants had not acted *bona fide,* and were guilty of a deliberate omission. Ennis J. thought that an action under section 9 need not be based on any wilful or fraudulent act but may be based on any act giving rise to damage. De Sampayo J.

[1] *(1896) 1 N. L. R. 362.*
[2] *(1908) 11 N. L. R. 20.*
(1907) 2 I. R. 134, 21 Hals. 447.
[3] *(1917) 19 N. L. 403.*
[4] *(1913) 20 N. L. R. 410.*
[5] *(1922) 24 N. L. R. 166.*
[6] *(1924) 25 N. L. R. 477.*

agreed with this judgment. It should be mentioned that in this case it was found that the defendant knew of plaintiff's claim and omitted him from the partition action.

In his book on the *Law of Partition*, Mr. Justice A. St. V. Jayewardene inclines to the view that the action provided by the Ordinance was intended to enable persons prejudiced to obtain compensation for the value of the interest in the land of which they have been deprived, and which by the decree has been given to parties not really entitled to it, whether there has been fraud, negligence or breach of duty or not, and whether the act of commission or omission was wilful or accidental. That interpretation seemed to the author to be sound and just. The solution to the difficulty may perhaps be found in the language of Bertram C.J. in *Fernando v. Fernando* (*supra*). He says: "I think it is clear that no action lies under section 9 except upon proof of the breach of a legal duty. The proviso to section 9 does not create fresh remedies but merely keeps alive such remedies as exist. If a person claims damages under that proviso, he must show that the person against whom he claims them had been guilty of a breach of legal duty towards him. That legal duty may be sought for outside the Ordinance, or it may be sought for within the four corners of the Ordinance."

The legal duty outside the Ordinance towards an owner, as I have attempted to show, is not to trespass on, or deprive him of his rights. In that view the defendant is guilty of a breach of legal duty and is answerable to the plaintiff. I venture to think, with all respect, that the principle enunciated by Bertram C.J. is the correct one and solves every difficulty.

It has been held that the proviso creates no new ground of action or rights to recover damages but saves all such rights as would have existed without the enactment. *Sado v. Mendis*,[1] *Fonseka v. Perera*,[2] and *Fernando v. Fernando* (*supra*). It is thus open to the plaintiff to prove as against the defendant some act of commission or omission as would have entitled them to damages independently of the Ordinance. Quite apart from the Ordinance, a party claiming title to a thing including land has the right to bring an action to vindicate his title, but if the thing itself cannot be recovered, he has a claim for the value of the thing as shown in the passage quoted from Maasdorp.

It is contended that the final decree itself is a bar to the present action. If this contention holds good, the partition decree must have its full effect, until it is set aside whether for fraud or other cause. A partition decree does not become ineffectual and cannot be ignored, when the plaintiff proves that he was omitted by fraud, wilfulness, or malice, from the action. Such circumstances may

[1] *(1879) 2 S. C. C. 127.* [2] *(1915) 1 C. W. R. 197.*

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raise a personal equity in favour of the plaintiff but will not preclude the defendant from setting up the judgment. The judgment of a Court cannot be altered or changed and is binding over afterwards as long as it remains in force and unreserved. It may be impeached for fraud and may be set aside if fraud is proved. *Hubeboy v. Vuluboy.*[1] If the decree itself can be pleaded in bar the proviso to section 9 becomes of no effect. To my mind the proviso was enacted with the special purpose of neutralizing the effect of section 9 and to compensate owners of land for the loss they might sustain by the rigid operation of the section, as suggested by the learned author of the *Law of Partition*. It gives the sufferer a right to be compensated in damages for a wrong which cannot be undone. It is worthy of note that in none of the many cases under this section has it been stated that the partition decree itself acts as a bar or defence to an action under the proviso.

It is a principle in the construction of statutes that you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature (*Mansfield v. Mansfield*[2]), and it is a rule not to construe a statute as interfering with or injuring persons' rights, without compensation, unless one is obliged so to construe it (*Attorney-General v. Horner*[3]).

The defendant has bought the plaintiff's property at an execution sale against Sadiris to whom it did not belong. The fact that it was a Fiscal's sale does not to my mind affect the question. Fiscal's transfers are often successfully impeached. If he does not restore the property to its real owner, but pleads section 9 of the Ordinance he is still liable, under the proviso, in damages to the full value of the property. The defendant must not be permitted to be enriched at the expense of the plaintiff. Three of the plaintiffs are minors. The Surveyor valued the two houses at Rs. 650—the defendant has only paid Rs. 260 at the Fiscal's sale, and the plaintiffs claim Rs. 300. The defendant will still probably stand to gain, even though he has bought from a person who had no title.

In their plaint the plaintiffs pleaded that the defendant fraudulently and dishonestly got allotted to himself the entirety of the houses and this was the 5th issue, but the 2nd issue made no mention of fraud or dishonesty, but raised the bare question whether the defendant got the houses allotted to himself in the partition case. The 4th issue was merely whether the defendant was aware of the rights of the plaintiffs.

[1] *(1882) 6 Bom. 703.* [2] *(1889) 43 Ch. D. 12, 17.*
[3] *(1884) 14 Q. B. D. 257.*

I have stated my reasons at length, because I am on some points not in agreement with eminent judges, whose opinions are entitled to the greatest weight and respect.

I would hold that the plaintiffs have been deprived of their rights to the two houses by reason of the act of the defendant in getting them allotted to himself in the final decree in the partition case, and I answer the 2nd issue in the affirmative. I would set aside the judgment in appeal and enter judgment for plaintiff as prayed for with costs.

Appeal dismissed.