1948 *Present :* **Basnayake J.**

JAYAWICKREME *et al.*, Appellants, *and* DON LEWIS, Respondent.

S. C. 126—C. R. Matara, 22,941.

Partition action—Court of Requests—Averment in answer that land is of value of more than Rs. 300—No issue raised at trial—Duty of Court—Partition Ordinance, section 4.

Where in a partition action brought in the Court of Requests some of the defendants in their answer stated that the land was worth over Rs. 2,000, the fact that the parties did not raise this issue at the trial does not absolve the Court from deciding the question in view of the provisions of section 4 of the Partition Ordinance.

Held further : Survey plans other than those which are deemed by statute to be accurate until the contrary is proved must be proved according to the rules of evidence.

APPEAL from a judgment of the Commissioner of Requests, Matara.

N. E. Weerasooria, K.C., with *H. W. Jayewardene*, for the appellants.

H. W. Tambiah, for the plaintiff, respondent.

Cur. adv. vult.

May 5, 1948. BASNAYAKE J.—

By deed No. 5174 of September 25, 1941, referred to in these proceedings as P 1, the plaintiff, one Palihawadana Kodikara Don Lewis, purchased from four persons named Vitiyala Vidanage Suwaris Appuhamy and Vitiyala Vidanage Don Carolis, Dampellagamage Babehamy, and Pothumulle Kankanange Don Allis for a sum of two hundred rupees a land called Gamageowita depicted as lot O in plan No. 830 made by L. G. Perera, Surveyor, filed in D. C. Matara, Case No. 753, bounded on the north by Ithanawaka, east by Mahaowita, south by the Nilwala-ganga, west by Radagewatta *alias* Bogahaowitewatta in extent 1 acre 2 roods and 20 perches. It appears from the deed that the consideration was not paid in the presence of the notary. The vendors Suwaris and Carolis admit having received twenty-five rupees and fifty-six rupees respectively. There is no evidence as to the payments, if any, made to the other two vendors.

Within three months of his purchase the plaintiff on December 10, 1941, instituted this action under the Partition Ordinance. In his libel under section 2 of that Ordinance the plaintiff named eight persons as co-owners. Of these eight the first and second named did not appear and take part in these proceedings. The others contested the plaintiff's action on grounds fully stated in the respective statements filed by them.

Although the third and fourth defendants in their statement contend that the subject-matter of this action is worth over Rs. 2,000, the learned Commissioner appears to have paid no heed to this averment.

It is settled law that a decree purporting to be made by a court of limited jurisdiction with regard to a matter outside its jurisdiction is a nullity. It has been decided in the case of *Neelakutty v. Alwar* [1] that it is open to any one whether a stranger or a party to the suit to impeach the validity of a decree passed by a court which is not competent to try the suit. In the present case the third and fourth defendants have in their answer, as I have said before, made the averment that the land is worth more than Rs. 2,000 and expressly taken the plea that the court has no jurisdiction to try the action. The learned Commissioner was therefore under a duty to determine this matter in pursuance of the requirements of section 4 of the Partition Ordinance. The portion of that section which is material reads :

> " If the defendants or any of them shall appear and dispute the title of the plaintiffs, or shall claim larger shares or interests than the plaintiffs have stated to belong to them, *or shall dispute any other material allegation in the libel,* the court shall in the same cause proceed to examine the titles of all the parties interested therein, and the extent of their several shares or interests, *and to try and determine any other material question in dispute between the parties* . . . . "

The learned Commissioner has failed to carry out the imperative direction of section 4. The fact that the parties did not raise this issue specifically at the trial does not absolve the court. It has been held by this Court

[1] *(1918) 20 N. L. R. 372.*

in the case of *Peris et al. v. Perera et al.*[1] that the court should not regard partition actions as merely to be decided on issues raised by and between the parties. The failure of the third and fourth defendants to press their objection at the trial cannot confer jurisdiction if in fact the averment in the answer is true. Consent of parties cannot give a Court of Requests jurisdiction to try a matter which it has no jurisdiction to try[2].

The judgment of the learned Commissioner is therefore set aside and the case sent back so that he may decide the question whether the Court of Requests has jurisdiction to try this action. If he finds that the value of the land on December 10, 1941, did not exceed three hundred rupees he will proceed to hear and determine the case *de novo*. But if he finds that the value of the land on December 10, 1941, exceeded three hundred rupees, the plaintiff's action should be dismissed with costs with liberty, if he so desires, to institute fresh proceedings in a court of competent jurisdiction. There will be no costs of this appeal.

I refrain from saying anything on the facts of the case in view of the order I have made. But I wish to state that I disapprove of the course that has been adopted in this case of putting in evidence various figures of survey from which the court is asked to draw inferences of fact without either proving them or calling a qualified surveyor to explain by oral evidence the various features depicted thereon. Except in the case of survey plans which are deemed by statute[3] to be accurate until the contrary is proved and to be *prima facie* proof of the facts exhibited therein, all other survey plans must be proved according to the rules of evidence. By way of caution to the parties I wish to repeat the words of Laurie J. in *Akbar v. Slema Lebbe*[4] :—

> " If on a survey I find certain conventional figures, such as a circle filled with blue, or a number of dark lines or parallel lines red or blue, and if I find on the margin that the surveyor states that he means thereby to represent a well or a marsh or a rock or a road or a river, I take the survey to prove that the well or marsh, the rock, the river or road, was there when the survey was made ; but if I find such notes as " East, Don John's property " or " reservation " or " encroachment", the survey does not prove the truth of these allegations. These are not records of the observation of the surveyor. They are statements of hearsay or the results of calculations made by him, and until we know the grounds for his opinion we cannot take that opinion as of probative value."

Sent back for retrial.

[1] *(1896) 1 N. L. R. 362.*

[2] *Jusey Appoo v. Ukku-rala and another, (1859) 3 Lorenz 280; and Neelakutty v. Alvar et al., (1918) 20 N. L. R. 372.*

[3] *Section 83 Evidence Ordinance ; Section 6 Land Surveys Ordinance ; Section 64 Thoroughfares Ordinance.*

[4] *(1893) 2 C. L. R. 175 at 176.*