1958 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

P. M. COORAY *et al.*, Appellants, *and* M. A. P. WIJESURIYA, Respondent

S. C. 26—D. C. Kalutara, 29505/L

Partition action—Duty of Court to examine title of each party—Proof of pedigree—Statements in deeds—Evidential value thereof—Partition Act, No. 16 of 1951, ss. 25, 26 (f), 48—Evidence Ordinance, ss. 32 (5), 32 (6), 50 (2).

Section 25 of the Partition Act imposes on the Court the obligation to examine carefully the title of each party to the action.

Before a Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in sections 32 (5), 32 (6) and 50 (2).

APPEAL from a judgment of the District Court, Kalutara.

H. W. Jayewardene, Q.C., with *Cecil de S. Wijeratne*, for 2nd to 5th Defendants-Appellants.

A. L. Jayasuriya, with *S. D. Jayasundera*, for Plaintiff-Respondent.

Cur. adv. vult.

October 30, 1958. SINNETAMBY, J.—

This is a partition case to which the provisions of the Partition Act No. 16 of 1951 apply. The plaintiff sought in this case to partition that portion of the land called Kahalagodayawatte depicted in plan P 1 as lot A. The 2nd to 5th defendants, who alone contested the plaintiff's claim and will hereinafter be referred to as defendants, pleaded that lot B, which plaintiff claimed as his separate property, was also part of this land. In the course of the trial the plaintiff abandoned his claim to the exclusive ownership of lot B and agreed that it too formed part of the land sought to be partitioned.

The plaintiff, in his pleading and throughout the trial, based his claim on the footing that Warnage Bastian Fonseka and Warnage Paulu Fonseka were originally entitled to this land in the proportion of $\frac{3}{4}$ and $\frac{1}{4}$ respectively. Subsequently, long after the case for the plaintiff and defendants had been closed and even after the address of learned Counsel for the defendants, plaintiff's Counsel in the course of his address took up the position that these two persons were entitled to the land in equal shares. The defendants' case throughout was that W. Bastian Fonseka was the sole owner of the entire land and that the plaintiff was not entitled to any share whatsoever. The learned trial Judge allowed a partition and allotted shares in accordance with the plaintiff's amended pedigree and the appeal is against these findings by the 2nd to the 5th defendants.

According to the plaintiff, Bastian Fonseka died leaving as his heirs six children whom he named as :

1. Franciscu.
2. Pedru.
3. Davith.
4. A daughter who was married to M. Jusey Silva.
5. Philippu.
6. Manuel.

The defendants on the other hand stated that Bastian Fonseka had seven children, viz.,

1. A daughter married to P. Juwanis Fernando.
2. A daughter married to D. Franciscu Peris.
3. Selestina.
4. Nonababa.
5. Manuel.
6. Philippu.
7. Pedru.

Both agreed that Pedru, Philippu and Manuel were children of Bastian Fonseka. The plaintiff claims no interests through Philippu and Manuel but claims 1/8th share through Pedru upon deeds P 5 and P 6. P 5 is a transfer in 1916 by one Warnage Juan Fonseka to Warnage Niko Fonseka of a 1/8th share of a land called Kahalagodayawatte giving the eastern and western boundaries as Old High Road and Old Road, and the northern and southern boundaries as portions of the same land without designating who the owners of these portions are. Deed P 6 recites title through P 5 and conveys the same share to Lewis Perera in 1917. In order to succeed in his claim upon these two deeds the plaintiff must establish two facts : first, that Juwanis was a son of Pedru, and secondly, that the land described in the deed is the same as the land sought to be partitioned. For reasons which I shall presently detail the plaintiff has in my opinion failed to establish both requirements.

Section 25 of the Partition Act imposes on the Court the obligation to examine the title of each party to the action and section 26 (*f*) gives legal sanction to a practice that existed in actions tried under the old Partition Ordinance of leaving a share unallotted. It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the production of a few deeds relying on the shares which the deeds purport to convey. It is a common occurrence for a deed to purport to convey either much more or much less than what a person is entitled to. Before a Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. How then is the proof to be established in a Court of Law ? It only too frequently happens, especially in uncontested cases, that the Court is far from strict in ensuring that the provisions of the Evidence Ordinance are observed ; and when this happens where there is a contest in regard to the pedigree, as in the present case, the inference is that the Court has failed totally to discharge the functions imposed upon it by section 25 of the Act. It cannot be impressed too strongly that the obligation to examine carefully the

title of the parties becomes all the more imperative in view of the far-reaching effects of section 48 of the new Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigours of the conclusive effect of section 9 of the repealed Partition Ordinance No. 10 of 1863.

The relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in section 32 (5), section 32 (6) and section 50 (2)—I am omitting for the moment proof by the production of birth, death and marriage certificates. It almost always happens that birth and death certificates of persons who have died very long ago are not available : in such cases the only way of establishing relationship is by hearsay evidence. Section 32 (5) of the Evidence Ordinance renders a statement made by a deceased person admissible

> " when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised. "

It is under this provision of law that oral evidence of pedigree is generally sought to be led. What practitioners and the Court sometimes lose sight of is the fact that before such evidence can be led there must be proof that the hearsay evidence sought to be given is in respect of a statement made by a person *having special means of knowledge* : furthermore, it must have been made *ante litem motam*. Where the statement is made by a member of the family such knowledge may be inferred or even presumed, but where it is a statement made by an outsider proof of special means of knowledge must first be established. In the present case the plaintiff himself knows nothing of the pedigree ; but he, nevertheless, gave evidence of the pedigree and stated that Bastian Fonseka had six children. Under cross-examination he admitted that, apart from deeds, his evidence was based on information given to him by his vendor Charles Edward Perera. Charles Edward Perera is not a member of the family of Warnage Bastian Fonseka and there is no evidence that he had any other special means of knowledge. Furthermore, he is alive and could have been called into the witness-box : indeed at one stage learned Counsel for the plaintiff at the trial in the lower Court undertook to call him but eventually did not do so. Much of the evidence given by the plaintiff on this question is therefore double hearsay : not only is it not admissible, it is not acceptable as proof of the family relationship. Plaintiff, later in his evidence when pressed, professed to know Pedru and Franciscu ; still later he added that he knew Davith also but he did not state that he had personal knowledge of their relationship with Bastian Fonseka : on the contrary he stated that he got most of his information from searches in the Land Registry and from a pedigree handed to him by C. E. Perera ; there

is nothing on record to establish special means of knowledge. The plaintiff's evidence therefore is not of the kind contemplated by section 32 (5) of the Evidence Ordinance.

I have so far dealt with hearsay evidence of oral statements made by persons having special means of knowledge. Much more reliance can, however, be placed on written statements made by such persons: indeed such statements are accepted without question especially when they happen to be contained in deeds. It is a practice with some notaries to recite the vendor's title in the deed they attest. For instance, a deed may recite that the vendor's title to a share is derived by inheritance from a deceased father and the father's name is given. Such a recital being a statement made by a deceased vendor having special means of knowledge and made *ante litem motam* would be admissible to establish relationship: in fact it would be very strong evidence of the family relationship. Such evidence to establish the relationship between Bastian Fonseka and those who, the plaintiff says, are his sons is totally lacking in this case. P 3 is a transfer by Franciscu who, the plaintiff asserts and the defendants deny, is a child of Bastian Fonseka. The deed while reciting title by paternal inheritance does not give the name of the father but it states that it is granted in consideration of the marriage of a daughter Maria Fonseka. P 7 is a transfer by a daughter of Davith. This deed while it recited that the vendor is a daughter of Davith from whom she derived title by inheritance to a 1/8th share says nothing to establish the alleged relationship between Bastian Fonseka and Davith: in fact no mention is made of Bastian Fonseka. P 5 is a transfer by Juwan who is said to be a son of Pedru, but P 5 while it recites paternal inheritance does not state that Juwan's father is Pedru nor how that father is related to Bastian Fonseka. P 8 is a transfer of a 1/12th share by one Miko Silva and the deed recites that the vendor held and possessed it by right of maternal inheritance. It does not help to establish the relationship between Miko's mother and Bastian Fonseka.

The other provisions of the law relating to relevancy of evidence to establish relationship are, as stated earlier, to be found in section 32 (6) and section 50 (2). The former renders admissible evidence of statements in *writing* as to relationship between deceased persons contained in deeds or wills relating to the affairs of the family to which the deceased persons belonged and the latter makes relevant opinion expressed by conduct as to the existence of the relationship by a person who is a member of the family or has special means of knowledge. No attempt was made in this case to establish the relationship between Bastian Fonseka and the persons who the plaintiff alleged were his sons under the provisions of either of these sections of the Evidence Ordinance.

What the plaintiff did in this case was to try to evolve from his deeds and the shares mentioned therein the existence of a relationship between the earliest known vendors in his chain of title and Bastian Fonseka,

who had to be brought in, in view of P 13, which is the earliest deed produced and was executed in 1840. To give to each of the children a 1/8th share he assigned to Bastian Fonseka a 3/4th share and to Bastian's brother Paulu a 1/4 share. The fact that Bastian Fonseka and Paulu and one Juwanis were brothers is established by a recital in P 13, wherein it is stated that the three brothers, of whom one is deceased, purchased by a deed of 1811 a block of land bearing the same name which had at the time of P 13 been divided into three portions. Subsequently, when learned Counsel addressed the learned Judge this was altered to 1/2 share each in view of certain deeds produced by the defendants.

The second defendant gave evidence of the pedigree and stated that he got his information from Niko. The other defence witness is Marthinu Peris a direct descendant of Paulu Fonseka. According to this witness Davith and Franciscu were sons of Paulu and not of Bastian. The witness was a grandson of Franciscu being a son of Louisa who was a daughter of Franciscu. The learned Judge rejected his evidence because the witness said he had forgotten the name of the husband of Maria who was another daughter of Franciscu. He, however, said that Maria's husband was from Paiyagala and P 3 which is a dowry deed in her favour describes her husband Joronis de Silva as being a man of Paiyagala. Had the learned Judge acted on the evidence of Marthinu Peris there would have been no objections to any conclusions he may have reached based upon that evidence. Niko admittedly was a member of the family and the information which the witness obtained from her was obtained before the present dispute arose, but as the learned Judge has rejected his evidence it is not necessary to consider its effect.

From what has been stated above it is quite manifest that the plaintiff has failed to establish his pedigree by legally admissible evidence. On that ground alone his claim to a share in the property sought to be partitioned must fail, quite irrespective of the strength of the defendants' case. In view of the fact that the defendants, who are in possession, do not desire a partition the decree entered should be set aside and the plaintiff's action dismissed but as much argument was addressed to us on other aspects of the case I propose to deal with them briefly.

[His Lordship then dealt with the other aspects of the case, and concluded :—]

In the result the plaintiff's action for partition fails and I would accordingly set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs both here and in the Court below.

BASNAYAKE, C.J.—I agree.

Appeal allowed.