*Present :* Bertram C.J. and Schneider A.J. **1920.**

CALDERA *v.* SANTIAGOPILLAI.

*82—D. C. Kurunegala, 6,389.*

*Partition Ordinance—Unsuccessful attempt to serve summons on defendant —Order to affix summons to land—Watcher in charge of defendant's interests—Application to set aside decree after final decree.*

After several unsuccessful attempts to serve summons on defendant in a partition action, the Court, on the application of the plaintiff, made an order for substituted service of summons by the affixing of the summons to the land. There was on the land at the time a watcher who was in charge of the defendant's interests. After final decree was entered up the defendant came to know of the decree, and applied to the District Court to set the decree aside. The Court granted the application, holding that there had been no effective service of summons.

*Held*, that the service of summons was not in order, and that the Court had jurisdiction to make the order it made. Under section 3 of the Partition Ordinance, if the defendant cannot be found, summons will have to be served upon the person in physical occupation of the property, and it is only when no such person can be found that the Court can prescribe other modes of service.

"The order was made *ex parte* behind the back of the defendant. And a person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an *ex parte* order of this description."

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THE facts appear from the judgment.

*A. St. V. Jayawardene*, for appellant.

*E. W. Jayawardene* (with him *Croos-Dabrera*), for respondent.

September 16, 1920. BERTRAM C.J.—

This case raises an important question with regard to the service of summons in an action under the Partition Ordinance. The land in question was in the Kurunegala District, and was some 3 acres in extent. The plaintiff was a local Vidane Arachchi; the defendant was a clerk employed in the office of Messrs. Jas. Finlay & Co., living between Bambalapitiya and Wellawatta. His address for service was given, apparently with sufficient correctness, as 42, St. Francis street, Bambalapitiya. Thirty attempts are said to have been made to serve the summons. Finally, on February 26, 1919, the Court made an order for substituted service by the affixing of the summons to the land. This was done; the case was heard; and a survey was made. The surveyor posted a letter—not by registered post—to the defendant's address, 42, St. Francis street, Bambalapitiya. When the survey was made the defendant's watcher was on the land, and he took it that the defendant must have received his letter. Final decree was entered on September 25, 1919, half the land being assigned to plaintiff and half to defendant; the costs were taxed, and, apparently, it was only after this that news of the action reached the defendant. On January 27, 1920, he applied to set the decree aside. The Court granted his application, holding that there has been no effective service, and it is against this order that the plaintiff now appeals.

The question we have to determine in the first instance is whether the affixing of the summons to the land under the order of Court was effective service under section 3. The words of the section are: "Such summons shall be served upon the defendants or such of them as can be found, or, if they cannot be found, upon the person or persons in the actual possession of such property; or, if there be no person in possession, in such manner as the Court shall direct." It appears that there was on or about this land a watcher employed by the defendant who was in charge of his interests. The evidence as to his appointment is not as definite as it might be. The defendant says: "The watcher was on the land for about two years; I cannot say definitely when he was there; he was not under my direct control." The surveyor, however, definitely says he was on the land when the survey was made. The circumstance of a man being employed under the defendant on the land is mentioned in a petition to the Government Agent, and I think it is sufficiently proved that there was a watcher on the spot in charge of the

defendant's interests. The question therefore is, whether this watcher was in the "actual possession" of his property within the meaning of section 3 of the Partition Ordinance.

The section is, unfortunately, drawn with considerable inexactitude. The terms "possession" and "actual possession" are expressions with definite legal significance. "Possession" is defined in Walter Pereira's *Laws of Ceylon*, at page 540, as: "Possession is the actual retention or physical occupation of a thing with the intention of keeping it for oneself and not for another."

The meaning of "actual possession" is explained in a well-known dictum of Maule J. in *Jones v. Chapman* [1]:—

> "It seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

If the words "person in the actual possession" are to be construed according to their legal meaning, they must be taken to refer to an actual owner of the land, but this cannot be the meaning. A partition action is brought by one owner against the other owners. The defendants are therefore the other owners. According to the strict legal meaning, therefore, the interpretation of the passage would be: "Such summons shall be served upon the defendants (that is, the other owners), or such of them as can be found, or, if they (that is, the other owners) cannot be found, upon the person or persons in the actual possession of such property (that is, upon the other owner or owners who are in actual physical occupancy of the property)," that is to say, if no owner can be found, the summons must be served upon the owners who are found upon the property, which is nonsense. The words clearly cannot be interpreted in their legal sense; they must, therefore, be interpreted in a popular sense. "Actual possession" must be construed as though it read "physical occupancy." Quite apart from this particular expression "actual possession," these sentences are all very loosely drawn. The words "or if they cannot be found" must mean "and if any such defendant cannot be found." The words "upon the person or persons in the actual possession, of such property" even if we construed "actual possession" as meaning "physical occupancy,"

[1] *2 Ex. 803, at page 821.*

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cannot mean what they say. *Ex hypothesi* the land belongs to several owners. The words, therefore, cannot refer to a person who is in charge of the interests of some other owner; still less can they refer to a person in the occupancy of the land adversely to the absent owner, or representing interests adverse to him. The whole passage therefore, "if they cannot be found, upon the person or persons in actual possession of such property," must be construed as though it read "if any such defendant cannot be found, upon the person or persons in the physical occupancy of such property in the interests of such defendants." Similarly, in the next clause the words "no person" must be construed as though they read "no such person."

In my opinion, in view of the serious consequences of a partition decree, the Court ought to exercise very great care with reference to the alternatives prescribed by this section. Where personal service is found impossible, the plaintiff, if he wishes to serve summons upon some agent of the defendant who is said to be in actual occupancy of the property in the interests of the defendant, should apply to the Court for leave to serve the summons upon this agent. If there is no such agent in occupation of the property, the only remedy in that event is to apply to the Court for some other form of substituted service; and, in my opinion, the Court ought not to order any other form of substituted service, unless it is first satisfied both that the defendant cannot be found and that there is no person in charge of his interests in the actual occupancy of the property.

Mr. A. St. V. Jayawardene, who appears for the appellant, has raised a further point. He says that the order for substituted service being one made by the Court must be taken to be good unless it is set aside, and that neither the Judge who made the order nor his successor is competent to set aside the order of the Court, which order, he contends, can only be set aside by this Court either in appeal or in revision. I do not agree with this contention. The application of the defendant to set aside the decree involves in itself an application to set aside the application for substituted service. The order was made *ex parte* behind the back of the defendant, and in accordance with the authorities cited in a very recent case (see S. C. No. 58, D. C. (Inty). Badulla, No. 3,358[1]). A person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an *ex parte* order of this description.

I would therefore dismiss the appeal, with costs.

The failure to effect service in this case seems to require explanation. The address appears to have been a correct one. The answer of the Government Agent to a petition of the defendant

[1] *S. C. Mins., Sept. 1, 1920.*

directed to this address reached him. He is a person of education, daily attending an office in the Fort, and his whereabouts could have been ascertained by inquiry from the numerous persons of similar position in his neighbourhood. The Registrar will refer the matter to the Fiscal for inquiry.

SCHNEIDER A.J.—I agree.

*Appeal dismissed.*