1939 *Present :* **Keuneman and Wijeyewardene JJ.**

DE SILVA *v.* WILLIAM *et al.*

308—D.C. Galle, 35,440.

Decree—Plea of res judicata*—Power of Court to construe the decree with reference to judgment—Arithmetical error in decree.*

Where a Court has to decide a question of *res judicata* in respect of the shares allotted to the parties in a previous partition action the decree alone need be considered.

But where the decree contains an arithmetical error, it may be construed with reference to the judgment.

[1] *(1933) 35 N. L. R. 57.*

[2] *(1936) 38 N. L. R. 96.*

[3] *(1936) 38 N. L. R. 271.*

APPEAL from an order of the District Judge of Galle.

L. A. Rajapakse (with him *S. W. Jayasuriya* and *Senaratne*), for plaintiff, appellant.

N. E. Weerasooria, K.C. (with him *Kurukulasuriya* and *A. E. R. Corea*), for first, third, seventh, and eighth defendants, respondents.

Cur. adv. vult.

April 3, 1939. WIJEYEWARDENE J.—

The plaintiff-appellant filed this action for the partition of a land called Himburanawatta claiming to be entitled to certain undivided shares in the said land under deed No. 4,304 of October 4, 1934 (marked P 2) executed by one Gabriel de Silva.

There was an earlier partition case D. C. Galle, No. 26,256, in respect of the same land in which Gabriel de Silva, the plaintiff-appellant's vendor, was the fifteenth defendant. The other parties in the two cases are identical. Judgment was entered in that case on June 30, 1930. In that action Gabriel de Silva claimed the shares which he conveyed later by P 2. The District Judge held that Gabriel de Silva was entitled to a smaller share than he claimed. The share allotted to Gabriel de Silva in the judgment was represented in the decree by an arithmetical expression which, if correctly interpreted, gave him a larger share. Gabriel de Silva appealed against the preliminary decree and the appeal was dismissed by this Court. Some time after the dismissal of the appeal the plaintiff in D. C. Galle, No. 26,256, discovered the "error" in the preliminary decree and applied to the District Court to amend the decree. On an objection taken by Gabriel de Silva the District Judge disallowed the application on the ground that he had no jurisdiction to amend the decree as it had become a decree of the Supreme Court and made order on October 7, 1932, that the plaintiff should if so advised move the Supreme Court to amend the decree. The plaintiff failed to take any steps after that order and the District Judge on February 24, 1934, entered an order of abatement under section 402 of the Civil Procedure Code, 1889. In December, 1937, the plaintiff's proctor applied to the District Judge under section 403 of the Code for an order to set aside the order of abatement. Notice of the application was issued on the parties but owing to the non-service of the notice on some of the parties the District Judge has not disposed of the application as yet.

The present action for a partition was filed in June, 1937. After the parties led evidence at the trial the District Judge heard argument on the legal question which was formulated as follows:—"What is the effect of the preliminary decree in partition case No. 26,256?" He held that the judgment in D. C. Galle, No 26,256, and not the "erronous" decree operated as *res judicata* and that the shares of the parties in the present action should be determined by reference to the judgment and not the decree in that case. The plaintiff-appellant has preferred the present appeal against that judgment.

I find it difficult to assent to the proposition of law as stated by the learned District Judge. Section 207 of the Civil Procedure Code states

in unambiguous terms that it is the decree passed by a Court that is final between the parties. It is, no doubt, true that frequently the judgment and even the pleadings in an action are examined in order to ascertain the questions of fact and law that have become *res judicata* by the passing of the decree. This is done for the obvious reason that the decree which states only the relief granted does not show the various questions of fact and law which were put in issue or could have been put in issue between the parties. But when a court has to decide a question of *res judicata* in respect of the shares allotted to the parties in a previous partition action, the decree alone need be considered as it contains normally all the necessary information with regard to the shares.

The preliminary decree entered in D. C. Galle, No. 26,256, however, does not admit of an intelligent interpretation. If the parties to the present action are declared entitled to the respective shares set out in that preliminary decree, it will not be possible to effect a partition of the land as the aggregate of the several fractions representing the several shares exceed unity. The decree, as it stands, is unintelligible. I think, therefore, that in the circumstances of the present case it is eminently desirable and even necessary that the judgment in D. C. Galle, No. 26,256, should be examined in order to construe the decree entered in that case. When the decree is read in the light of that judgment it becomes clear that the draftsman responsible for the decree thought that the fraction 987/5760 was correctly represented by the arithmetical expression ½ plus ⅜ of 141/720 and did not know that the correct way of writing the arithmetical equivalent of 987/5760 was (½ plus ⅜) of 141/720 and not ½ plus ⅜ of 141/720. The learned District Judge has in the present action allotted to the plaintiff, in addition to some other interests, 987/5760 shares which the draftsman of the earlier decree sought to represent by ½ plus ⅜ of 141/720. I think, therefore, that the District Judge has given the correct share to the plaintiff. In reaching this decision I have regarded the decree as the final judicial determination of the suit, but in view of the fact that certain arithmetical expressions used in the decree become unintelligible when read with the rest of the decree, I have construed the decree with reference to the judgment.

It was also argued before us by the Counsel for the respondent that P 2 did not convey any title to the plaintiff as it was executed during the pendency of D. C. Galle, No. 26,256. This deed, however, has been executed after an order of abatement was entered in that case. That order of abatement has not been set aside. This Court has held in *Cooray v. Perera*[1] and *Bulner v. Rajapakse*[2] that a deed executed during the period intervening between an order of abatement and the setting aside of such an order is not obnoxious to the provisions of section 17 of Ordinance No. 10 of 1863. I hold therefore that the deed P 2 is not void.

I dismiss the appeal but make no order as to the costs of the appeal.

KEUNEMAN J.—I agree.

Appeal dismissed.

[1] *(1914) 17 N. L. R. 460.*

[2] *(1926) 28 N. L. R. 260.*