1929.

Present: Fisher C.J. and Drieberg J.

PERERA *v.* ISABEL HAMY.

185—D. C. Negombo, 2,496.

Partition action—Decree for sale—Provision that a co-owner should have an option to purchase—Irregularity—Not binding on a co-owner who has not consented.

Where a decree for sale in a partition action provided that a co-owner who buys at the sale should give another the option to purchase a half share within a certain time,—

Held, that such a condition should not be embodied in the decree and that it is not binding on a co-owner, who has not consented to it.

APPEAL from an order of the District Judge of Negombo.

Croos da Brera, for sixth defendant, appellant.

M. T. de S. Amarasekere, for plaintiff, respondent.

October 24, 1929. DRIEBERG J.—

Mr. Croos da Brera did not press the objection taken in the petition of appeal that the decree was bad as the appellant did not have notice of trial. There was no purpose in pressing this objection for there was a full inquiry into the rights of the parties, and the appellant admits that he was awarded his right share and he agrees that there should be a sale and not a partition.

His objection to the provision in the decree that any co-owner who bought at the sale should be obliged thereafter to sell a half share to the plaintiff, if the plaintiff desired to purchase, within six weeks, is entitled to succeed.

The learned District Judge referred to the case of *Jabar v. Markar*, [1] in which it was held that it was open to a party to a partition action to enter into an agreement to sell the property in the event of his becoming the purchaser. Such an agreement can be effected by deed, but it is not one which should be embodied in the decree.

In the present case the agreement to sell to the plaintiff can be binding only on those who have consented to it ; the appellant did not consent to it.

The decree will be amended by deleting the provision giving the plaintiff the right of purchasing a half share from any co-owner who might buy the land.

[1] *(1920) 22 N. L. R. 129.*

The provision in the decree regarding the rights of the mortgagee and lessee—the tenth defendant and the first intervenient—contains an error. It is stated that " in the event of the mortgagors being purchasers they should not get credit to the extent of the mortgage bonds and the value of the leasehould rights." This is a proper provision to secure the amount due on the mortgages and the compensation to the lessee being paid into Court, but for the word " mortgagors " should be substituted the words " the parties who have succeeded to the rights of the mortgagor and lessor Brampy Appu. "

The appellant is entitled to the costs in the lower Court of the application to set aside the decree. The respondent will pay the appellant his costs of this appeal.

FISHER C.J.—I agree.

Appeal allowed.