1948 *Present :* **Jayetileke and Windham JJ.**

HINNIHAMY *et al.*, Appellants, *and* CAROLIS, Respondent.

S. C. 151—D. C. Galle, 2,257.

Civil Procedure Code—Amendment of decree—Settlement between parties—Consent order—Mistake made by Counsel in stating terms of settlement—Power of Court to amend—Section 189.

A Court has power, under section 189 of the Civil Procedure Code, to correct an error in an order made of consent between the parties which has been due to a slip on the part of Counsel in stating the terms of settlement to Court.

APPEAL from a judgment of the District Judge, Galle.

C. V. Ranawake, for the defendants, appellants.

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

Cur. adv. vult.

April 5, 1948. JAYETILLAKE J.—

The plaintiff instituted this action against the defendants for a declaration of title to :—

(1) an undivided half share of Hettigoda Mulana Cumbura,
(2) an undivided half share of Hettigoda Mulanawatte,
(3) an undivided 1/12 share of Hettigoda Mulana.

He alleged that the 2nd defendant became entitled to the said shares on the death of her husband and that he purchased the same from her in 1926. He alleged further that the 2nd defendant and her son the 1st defendant were in forcible possession of the said shares.

The defendants filed a joint answer in which they alleged that one Andiris was the original owner of the entirety of Hettigoda Mulana, eight kurunies of Hettigodawattaaddera Kebella and 10 kurunies of Hettigodamulana Kumbura, and that he devised the said lands in equal shares to them by will. They alleged further that the plaintiff, alleging a division of the said lands, wrongfully claimed the entirety of the high lands. The 2nd defendant disclaimed title to any of the lands.

It seems to be fairly clear from the pleadings that the defendants did not dispute the plaintiff's title to the shares claimd by him and that the only question for the decision of the Court was whether the defendants wrongfully prevented the plaintiff from possessing the shares to which he was entitled.

The case came up for trial on August 28, 1946. Mr. Corea appeared for the plaintiff, and Advocate Panditagunawardene, instructed by Mr. Wikramanayake, appeared for the defendants. The case was settled and the following terms of settlement were recorded by the Court :—

" Of consent, plaintiff to be entitled to half share of premises described in schedule to plaint with damages fixed at Rs. 100.00.

Writ for damages not to issue for 3 months from today. Each party to bear his own costs. Enter decree accordingly."

On September 8, 1946, Mr. Corea moved that the consent order be amended by deleting the words "half share" on the ground that a mistake had been made by defendants' Counsel in stating the terms of settlement that had been arranged by the parties. This matter came up for inquiry on October 30, 1946. At the inquiry Counsel for the defendants took the preliminary objection that the Court had no jurisdiction to review the consent order entered on August 28, 1946. The learned District Judge overruled the objection and proceeded to hear evidence. Advocate Panditagunawardene, who appeared for the defendants at the trial, was called by the plaintiff, and he stated that the settlement was that the plaintiff should be declared entitled to the share described in the schedule to the plaint, and that what he meant by "a half share" in stating the terms of settlement to Court was "the half share as set out in the schedule to the plaint and not to a half of half". No evidence was led by the defendants to the contrary.

The learned District Judge accepted Advocate Panditagunawardene's evidence and ordered the terms of settlement to be amended. The present appeal is against that order.

The only question that arises for decision in this appeal is whether the learned District Judge had the power under section 189 (1) of the Civil Procedure Code to amend the order made by him on August 28, 1946. Section 189 (1) reads :—

"(1) The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment."

There is a similar provision in the Civil Procedure of India and also in the Rules of the Supreme Court of England Section 152 of the Civil Procedure Code (1908) of India reads :

"Clerical or arithmetical mistakes in judgments, decrees, or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

Order 28, rule 11 of the Supreme Court Rules of England reads : —

"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal."

There are conflicting decisions in India as to the scope of section 152. In some cases it has been held that errors made by parties can be amended under the section. whilst in others it has been held that the section is confined to the correction of errors made by the Court itself. Chitaley in his well-known commentary on the Code of Civil Procedure says[1] that the latter view cannot be accepted as a sound one.

[1] *Vol. 1, p. 1046.*

The English Courts have taken the view that errors arising by a slip on the part of Counsel, on the part of a solicitor, and on the part of a party to the action, can be corrected by the Court under Rule 28 Order 11.

In *Fritz v. Hobson*[1] a motion for an injunction had been adjourned to the trial of the action. At the trial the plaintiff succeeded, but his counsel forgot to ask the the costs of the adjourned motion. After the judgment had been drawn up and entered, Fry J. acceded to an application by the plaintiff to allow the judgment to be corrected so as to include therein the costs of the adjourned motion, holding that he had power to do so either under the liberty to apply impliedly reserved in the order on the motion, or under the liberty to apply expressly reserved by the judgment, or under the provisions of O. XLI A the terms of which are reproduced in Order XXVIII. r. II.

In *Chessum & Sons v. Gordon*[2] the plaintiffs recovered judgment for an amount to be ascertained by a referee and costs. The referee made his award, and the plaintiffs paid the amount of his fees. Judgment was entered for the plantiffs for the amount found to be due by the referee with costs to be taxed. The costs were taxed, and the taxing master's certificate was given, and the defendant paid to the plaintiffs the amount to the judgment and the taxed costs. Subsequently the plaintiffs discovered that the amount of the fees of the referee had been omitted by their solicitor by an error from the bill of costs carried in for taxation. On an application that the defendant should be ordered to pay the amount of those fees it was held that there had been an error in the judgment arising from an accidental slip or omission which could be corrected under Order XXVIII. r. 11 by including therin the amount allowed on taxation in respect of the fees paid to the referee.

In *Barker v. Purvis*[3] the judgment directed that the defendant should be at liberty to set off against the sum due to the plaintiff a sum of £453 on account of interest which the defendant had paid on behalf of the plaintiff. The amount of £453 was arrived at by an innocent misstatement by the defendant that he had paid this sum, whereas it was discovered, after the judgment was drawn up, that the defendant had by mistake overstated the amount. The court allowed the judgment to be corrected under O. XXVIII. r. 11, holding that there was an error in the judgment which arose from an accidental slip of the defendant.

In *re Inchcape*[4] judgment was entered on a summons to determine the domicil of a testator with the usual order for the taxation and payment of the costs of all parties out of the estate. Considerable costs had been incurred before the summons was issued in obtaining evidence and advice on the question in England and Scotland, but counsel did not ask these costs to be included and they were not provided for. It was held that, it being through an accidental ommission of counsel within O. XXVIII. r. 11, that these

[1] *(1880) 14 Ch. Div. 542.*
[2] *(1901) 1 Q. B. 694.*
[3] *(1886) 56 L. T. 131.*
[4] *(1942) L. R. Chancery Div. 394.*

costs were not provided for, the court had jurisdiction to amend the order by including the costs.

Having regard to these authorities I am satisfied that the order made by the learned District Judge was right. I would, accordingly, dismiss the appeal with costs.

WINDHAM J.—I agree.

Appeal dismissed.