1909.
April 6.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

SAMARAKOON *et al. v.* JAYEWARDENE *et al.*

D. C., Chilaw, 3,284.

Partition decree—Irregularity—Impeaching validity of decree in another suit—Fraud—Restitutio in integrum—*Ordinance No. 10 of 1863, s. 9.*

Where, in an action by the plaintiffs to vindicate title to land, the defendants pleaded a decree in a partition suit in their favour, and the plaintiffs impeached the validity of the decree on the ground of fraud and collusion,—

Held, that it was competent to the plaintiffs, not only to prove that the decree was obtained by fraud, but also to take exception to the contents of the decree.

ACTION *rei vindicatio.* Appeal by the plaintiffs from a judgment of the District Judge. The facts and arguments fully appear in the judgment of Wendt J.

Van Langenberg (*Samarawickrame* with him), for the plaintiffs, appellants.

A. St. V. Jayewardene, for the defendants, respondents.

Cur. adv. vult.

April 6, 1909. WENDT J.—

One Jusey Perera, married in the community of estate to the 6th defendant, died intestate in 1895, survived by his wife and four children, viz., 7th, 8th, and 9th defendants, and one Maria, who is now dead, and is represented by her husband, the 3rd defendant, and children, the 4th and 5th defendants. Jusey Perera's estate was a small one. Soon after his death the 6th defendant applied to

[1] *(1845) 3 Menz. 86.*

the District Court for permission to sell the land, which is the subject of this action, and which formed part of the common estate of herself and Jusey Perera, in order to pay debts of the community. The Court granting that permission, the 6th defendant on December 3, 1895, sold the land to Mr. Abeyratne, and with the proceeds paid the debts. On July 16, 1903, Mr. Abeyratne gifted the property to plaintiffs, and a year later plaintiffs brought the present action, alleging that about December, 1903, the 1st and 2nd defendants ousted them and took wrongful possession, " claiming to be entitled thereto by virtue of a decree dated June 5, 1901, entered in case No. 2,233 of this Court." Plaintiffs further averred that the action No. 2,233 had been brought by the present 3rd, 4th, and 5th defendants against the present 6th, 7th, 8th, and 9th defendants; that all the parties thereto were well aware of the plaintiffs' title to the land, and were acting fraudulently and in collusion with each other in obtaining the said decree. The plaintiffs prayed that the decree be declared null and void and be set aside and plaintiffs declared entitled to the land and the defendants ejected therefrom. The 1st and 2nd defendants alone defended the present action. Besides various legal objections, they averred that the decree in case No. 2,233 was one duly obtained under the Partition Ordinance; that the 6th to 9th defendants became by virtue of it absolute owners of the southern seven-eighths of the land, and sold it to 2nd defendant for valuable consideration and without notice of any claim thereto on the part of plaintiffs and their predecessors in title, and 2nd defendant, after possessing the same, sold that portion to 1st defendant. Defendants specially relied on section 9 of the Partition Ordinance as precluding plaintiffs from asserting title to the land.

The District Judge dismissed the action, holding that plaintiffs' proper remedy for getting rid of the decree was by way of application for *restitutio in integrum*. At our request he has recorded his finding on other points argued before him as follows, viz., first, that there was a valid partition decree; and secondly, that plaintiffs' only remedy was that prescribed by section 9 of the Partition Ordinance, viz., an action for damages.

Plaintiffs' counsel contended before us that there was in fact no partition decree allotting the southern seven-eighths of the land to defendants' vendors. In spite of respondents' objection, I think it was open to plaintiffs to take this point. They were not parties to the decree and had no notice of it, and therefore their averring that defendants claimed under a decree and praying that it be set aside as obtained by fraud does not preclude them from taking exception to the contents of the decree when the record was produced and relied upon. The record of the action No. 2,233 is before us. It was not purely a partition action, because the plaintiffs averred that since their mother's death three years before the defendants had been in the wrongful possession of the lands to the exclusion of the

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plaintiffs, and claimed a declaration of title and damages by way of mesne profits until possession was delivered, and then came the prayer that the said lands be partitioned in terms of Ordinance No. 10 of 1863. The 2nd and 3rd plaintiffs there (the present 4th and 5th defendants) were minors represented by the 1st plaintiff, their father (present 3rd defendant). The 1st and 2nd defendants (present 6th and 7th) alone appeared, but filed no answer. There was a perfunctory inquiry as to the wrongful possession by the defendants, and hardly a word as to the title—only the 1st plaintiff and the 1st defendant were examined. The former said nothing about the title. The latter said : " My husband Jusey Perera owned these three lands." She then stated the pedigree and the death of her husband, and added, " then I became entitled to half, and each of my four children to an eighth." She did not say that she or her children were at present entitled to anything, and in view of her conveyance of December, 1895, she could not truthfully have said that she at all events had any interest in the land. The judgment " found it proved that the shares as stated in the plaint are correct " —nothing as to the title—and directed a decree to be entered allotting those shares. A commission was issued to a surveyor to partition the land accordingly, and he eventually on April 18, 1901, made his return, stating that he " proceeded to the land called Kahatagahawatta (apparently that described in the present plaint) after giving due notice to the parties and partitioned the same. The defendants requested me to leave their portions of land in common as they have sold their rights to one man, but they did not come to the land." He annexed to his report plans of the three lands, showing in each a portion marked A, which he proposed to allot to the plaintiffs. The Commissioner did not state, and there was no evidence before the Court that he had, thirty days at least before making his partition, affixed on the land the notice required by section 5 of the Ordinance, or that he had given notice of his intention to partition by beat of tom-tom and " in such other manner as shall appear best calculated for giving the greatest publicity thereto." Notice of the day fixed for the consideration of the Commissioner's return was served on the defendants, who did not appear, and the Court ordered : " Enter final decree in terms of the Commissioner's return." The decree that was drawn up recites the reading of the Commissioner's report, and decrees and declares " that the following lands are partitioned between the plaintiff (the words ' and defendants' are scored out) in terms of Ordinance No. 10 of 1863 ..... ; and that by virtue of such partition the lots marked A in each of the said figures of survey having been allotted to the plaintiffs, it is decreed that the plaintiffs be and they are hereby declared the absolute owners, the 1st plaintiff of one-half and the 2nd and 3rd plaintiffs of one-half of and in ..... ; (3) that divided portion of the land called Kahatagahawatta marked A in the said figure No. 198, and containing

in extent 3 roods and 30 square perches." Now, this is the decree which, as is now well settled, is to be regarded as the decree for partition given as "hereinbefore provided," and to which section 9 gives the conclusive effect by which the present defendants seek to estop the plaintiffs. This decree allots no interest whatever in the land in question, and the record discloses in the Commissioner's report a good reason why the Court should advisedly have abstained from declaring the defendants entitled to any interest at all, for they had informed the Court through the Commissioner that they had sold their rights in the land to a third party. The effect of declaring them entitled to the shares mentioned in the preliminary decree would have been, by reason of that very conclusive effect upon which the respondents here rely, to deprive the defendants' vendee of his title and to drive him to an action for damages under section 9. For these reasons I think that there is no decree which estops the plaintiffs from proving their title to the land in claim. I feel the less regret at being obliged to construe the decree as I have, because the "inquiry" held by the District Judge was so slipshod that it failed to discover the fact that the 6th defendant had already alienated the land—an alienation which she concealed from the Court. That concealment was clearly a fraud on her part.

I think the appeal should be allowed, the dismissal of the action set aside, and the case sent back for the disposal of such further issues between the parties as the Court may settle. The defendants will pay the costs of the argument in the Court below and of this appeal; other costs to be costs in the cause.

HUTCHINSON C.J.—I agree.

Appeal allowed; case remitted.