1934 *Present :* **Garvin S.P.J. and Dalton J.**

DON DAVID *v.* DON SIMON.

44—(Inty.) D. C. Matara, 7,739.

Partition action—Summons served on defendant—No notice of trial on defendant—Ex parte proceedings—Ordinance No. 10 of 1863, s. 4.

Where, in a partition action, the defendant on service of summons was absent on the day appointed for his appearance, he is not entitled to receive notice of the day of trial.

In such circumstances the Court is required to proceed to hear the evidence and investigate the title of the respective parties in so far as may be practicable by an *ex parte* proceeding.

APPEAL from an order of the District Judge of Matara.

Mr. T. de S. Ameresekere for the defendant appellant.

E. F. N. Gratiaen (with him *S. Alles*), for the plaintiff, respondent.

August 1, 1934. GARVIN S.P.J.—

This is a proceeding under the Partition Ordinance. In the plaint the persons disclosed as having interests in this land are the plaintiff and the defendant alone. The plaintiff claimed that he was entitled to 1/3 and assigned the remaining 2/3 to the defendant. In due course summons was issued upon the defendant and on October 18, 1932, there was a report that the defendant had been served with summons, but he was absent. It is not disputed or denied that the summons was duly served upon him or that he was absent upon the date appointed for his appearance. Thereafter the defendant took no notice of the proceedings which followed and a trial took place, after which the learned District Judge entered a decree assigning to each of the parties shares as stated in the plaint and giving directions in respect of the plantations. Some time later the defendant appeared and moved the Court to set aside the decree and admit him to file an answer. The draft answer which he proposed to file indicates that the only extent to which he wished the decree varied was in regard to a certain plantation which he claimed to have made himself. The learned District Judge refused to permit the decree to be set aside or varied, and the defendant now appeals.

The main ground upon which this appeal was pressed upon us is that inasmuch as the defendant was not served with the notice of the day appointed for the trial the decree is not one which binds him, and that he is entitled to as of right to ask that that it be set aside and the answer he desires to file admitted. It is sought to support this argument by a reference to a decision of de Sampayo J. in the case of *Podi Sinno v. Coyanis* Appu[1]. His Lordship undoubtedly does in that case express the opinion that notwithstanding that a defendant has failed to keep in touch with the proceedings in a partition case to which he is a party and

[1] *6 C. W. R. 118.*

of which he has had notice, he is entitled to receive notice of the day appointed for the trial. The ground upon which de Sampayo J. bases his opinion is that at so important a stage as the trial in a partition proceeding it is desirable and apparently therefore necessary that the defendant should be present at the investigation into title which is the purpose of such a trial. And then in the later case of *Endiris v. Ancho* [1] there are some indications that he adhered to the opinion expressed by him in the earlier case, though I think that the order made in *Endiris v. Ancho* can be supported upon different grounds. It does not appear that at the argument of either of these cases His Lordship's attention was drawn to an earlier case, *Podi Singho v. Mohamadu* [2], in which Wood Renton C.J. expresses a very different opinion. He repelled the claim of a defendant in a somewhat similar position that a decree entered after a trial of which he had no notice although he had been fixed with notice of the earlier proceedings did not bind him and his opinion is expressed in the following terms:—" When once a party to a partition action has been brought before the Court it is his duty to keep himself in touch with the proceedings in the action, and if he suffers in consequence of his failure to do so he can make no appeal to us here as a matter of strict right ". I would respectfully observe that at the argument of the two cases previously referred to there was another matter to which de Sampayo J.'s attention had not been drawn, namely, the provisions of section 4 of the Partition Ordinance which explicitly contemplates and provides for the case in which a defendant served with summons makes default in appearance. What the court is required to do in those circumstances is to proceed to hear the evidence and investigate the title of the respective parties " in so far as may be practicable by any *ex parte* proceeding and shall, if the plaintiff's title be proved, give judgment by default decreeing partition or sale as to the court shall seem fit. That would seem to be exactly the course which was pursued in this case. In my humble opinion the law as stated by Wood Renton C.J., in the case of *Podi Singho v. Mohamadu* (*supra*) is more in accordance with the express provisions of the Partition Ordinance, and it is a view to which I would respectfully subscribe. I may add that the two cases of *Podi Sinno v. Coyanis Appu* and *Enderis v. Ancho* have been very fully and closely examined by the late Mr. Justice Jayewardene in his book on the *Law of Partition* at pages 97 and onwards. The conclusion to which he comes is also in accordance with the view I favour.

The appeal must therefore be dismissed with costs. But before leaving this case we would invite the attention of the District Judge to that portion of the decree under the head " Plantations ", which purports to determine the respective interests of the plaintiff and the defendant to the plantations in lots A and B in so far as " they are grouped together " and referred to as " paraveni by plaintiff ". The word " paraveni " would, I take it, ordinarily refer, when used with reference to plantations, to those plantations which are common to the co-owners. The expression " paraveni by plaintiff " is not therefore understood and may lead, if the decree is left as it is, to misapprehension and further trouble. It is suggested however by counsel for the respondent that the words have

[1] *8 C. W. R. 139.* [2] *4 Bals. Notes of Cases 46.*

been taken over and used, without a full appreciation of their effect, from the surveyor's report where they also appear but in circumstances which indicate that they were employed to indicate that the trees so grouped together were paraveni and that the person who claimed that they were paraveni was the plaintiff. It is desirable that this single point should be cleared up. All that appears to be necessary is the deletion of the words "by the plaintiff" in the expression "paraveni by the plaintiff".

DALTON J.—I agree.

Appeal dismissed.