

1945

*Present : Soertsz A.C.J. and Canekeratne J.***HENDRICK**, Appellant, and **GIMARAHAMINE**, Respondent.72—*D. C. (Inty.) Matara, 14,800.**Partition—Scheme of Commissioner—Rival scheme by Surveyor—Remittal of the scheme to Commissioner to modify his scheme—Partition Ordinance, s. 5.*

Where a scheme of partition submitted by a Surveyor is found to be better than that submitted by the Commissioner in the case, the proper course to adopt would be to remit the scheme to the Commissioner appointed under section 5 of the Partition Ordinance with a direction to him to modify the scheme on the lines prepared by the Surveyor.

**A** PPEAL from an order of the District Judge of Matara.

*N. E. Weerasooria, K.C.* (with him *C. J. Ranatunge*), for the plaintiff and eighteenth defendant, appellants.

*L. A. Rajapakse, K.C.* (with him *H. W. Jayewardene*), for the seventeenth, nineteenth and twentieth defendants, respondents.

November 7, 1945. SOERTSZ A.C.J.—

The question, on this appeal, is whether the trial Judge preferred a scheme of partition that was not satisfactory in comparison with the scheme the appellants desired to have adopted.

We have examined the two schemes and the distribution of the plantations and buildings, and we find that in respect of the distribution of buildings and plantations the scheme that commended itself to the trial Judge is the better scheme. As he points out that scheme breaks up the land into more satisfactory blocks than does the scheme of the Commissioner.

It is not correct to say that the lots given to the appellants consist of entirely owita land. But as I observed in the case S. C. 27/D.C. (Inty.) Matara, No. 154/13,628\* in which judgment was delivered today, the proper course for the District Judge to follow is to remit the case to the Commissioner appointed under section 5 with directions for him to modify his scheme on the lines, more or less, of the scheme prepared by Surveyor Amarasekere and to submit it with a schedule of appraisement. It is undesirable and indeed irregular to substitute another Surveyor for the Commissioner appointed by Court. I fix costs payable to the seventeenth, nineteenth and twentieth defendants in respect of this inquiry in the two courts at Rs. 52·50.

CANEKERATNE J.—I agree.

*Order varied.*

