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*Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice, *Jan. 27, 1910*  
and Mr. Justice Middleton.

ABDUL AZIZ *v.* ABDUL RAHIM *et al.*

*D. C., Colombo, 26,976.*

*Appeal to Privy Council—Decree dismissing possessory action with liberty to plaintiff to amend plaint and proceed with action as a rei vindicatio action—Civil Procedure Code, s. 781.*

The Appeal Court dismissed plaintiff's possessory action and gave him liberty to amend his plaint and proceed with the action as an action to vindicate his title to the premises in dispute.

*Held,* that the decree was a final decree, and that it was open to the plaintiff to appeal to the Privy Council against that decree. A certificate under section 781, Civil Procedure Code, was granted to the plaintiff.

**T**HE Appeal Court by its judgment reported in *12 N. L. R. 330* dismissed plaintiff's possessory action and gave him liberty to amend his plaint and proceed with the action as an action to vindicate title to the premises in dispute.

<sup>1</sup> (1909) 2 *Ch.* 129.

Jan. 27, 1910 The plaintiff, with a view to appeal to the Privy Council, applied for a certificate under section 781, Civil Procedure Code.  
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*Bawa* (with him *F. M. de Saram*), for plaintiff.—An order dismissing a possessory action is a final order. An appeal lies to the Privy Council in a possessory action, if the value of the land regarding which the action is brought is above Rs. 5,000. *The O. B. C. Estates Co. v. Brooks & Co.*<sup>1</sup> Counsel also cited *The Ceylon Tea Plantation Co. v. Carry*.<sup>2</sup>

*Van Langenberg* (with him *H. A. Jayewardene*), for the defendants.—This case was sent back to the District Court, and liberty was given to the plaintiff to proceed with the action after amending his plaint. There is no final decree in the case. *Jackson v. Brown*.<sup>3</sup> Counsel also cited *Karonchihami v. Angohami*.<sup>4</sup>

*Bawa*, in reply.—The cases cited do not apply to the present case.

January 27, 1910. HUTCHINSON C.J.—

The decree of this Court in this action was that the decree of the District Court be set aside, and the plaintiff's claim as constituted be dismissed, with liberty to the plaintiff to amend his plaint and proceed with the action as an action to vindicate his title to the premises mentioned in the plaint; and it was ordered that if he should amend his plaint, the Court should at the further proceedings try certain issues therein mentioned. Perhaps this decree is not quite in accordance with the judgment of this Court, but I think that when it says that the action as constituted is dismissed, it means that the claim made in the plaint is dismissed. The plaintiff has not yet availed himself of the liberty given to him to amend his plaint. The respondent claims now that the order of this Court was not a final decree, and had not the effect of a final or definitive sentence, because if the plaintiff amends his plaint there will be a further issue to be tried, and the case will then be the same as if the plaint had originally contained two causes of action: (1) the claim as in a possessory action, and (2) a claim as in an action to vindicate title, and that no appeal would lie against an order dismissing one of such claims, until the other claim also is adjudicated upon, and the whole of the action so decided. If, however, the plaintiff does not amend his plaint, the decree which has already been made will be a final decree, finally disposing of the whole of the action, and I cannot see that it will make any difference that he has at present a right given to him by this Court to amend his plaint. I think I am bound to say that the decree of this Court is in effect a final judgment, and therefore the certificate must be granted.

<sup>1</sup> (1892) 1 S. C. R. 1.

<sup>2</sup> (1909) 12 N. L. R. 367.

<sup>3</sup> (1892) 1 S. C. R. 313.

<sup>4</sup> (1901) 5 N. L. R. 193.

MIDDLETON J.—

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In my opinion the decree here is a final and definitive sentence of this Court, and no less so from the fact that it is qualified with the option to the plaintiff to amend his plaint. That option is entirely his, and I think that we must take it that if he does not avail himself of it, he has chosen at any rate to treat the judgment against him as final and definitive as he now desires us to do in this application.

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*Application allowed.*

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