

1899.

March 2.

FERDINANDIS v. DON DAVITH.

D.C., Matara, 1616.

*Partition Ordinance No. 10 of 1863, s. 19—Piecemeal determination of issues as to title between several co-owners—No appeal till general preliminary decree entered.*

Where several separate contests as to title arise in an action for partition, and are disposed of at separate hearings,—

*Held*, that though each order of the Court determining the title between parties is appealable under section 19 of the Partition Ordinance, 1863, yet the progress of the suit should not be interrupted by appeals in which the greater number of the parties to the suit have no interest.

The Supreme Court is in the habit of refusing to entertain appeals against orders, which are *not* conclusive between all the parties, but will await the entry of the general preliminary decree.

The decision of the lower Court in each piecemeal investigation of title should not take the form of a decree.

**I**N this case the plaintiff brought his action on 26th October, 1895, claiming 96/360 of the field Polwattagodella, and he asked for partition thereof, assigning the other shares among the eight defendants.

The seventh defendant, however, claimed adversely to the second defendant the share assigned to the latter.

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The ninth, tenth, and eleventh defendants came in on 31st January, 1896, as added parties, claiming adversely to the plaintiff the same share he had claimed.

The twelfth to eighteenth defendants came in on 25th August, 1896, as added parties, claiming shares adversely to some of the original parties.

Three other defendants, the twenty-sixth, twenty-seventh, and twenty-eighth were added by the Court during the course of the hearing on 31st July, 1899, and 17th August, 1899.-

The case came before the District Court on 7th January, 1897, for trial of the issues raised (1) between the plaintiff and the ninth, tenth, and eleventh defendants; (2) between the seventh and second defendants.

The Judge recorded that it was not clear what the issues were between the twelfth to eighteenth defendants. He heard evidence, but found that further information was necessary as to the pedigree of the parties whom he ordered to be produced. He proceeded, however, to dispose of the issue between the plaintiff and the ninth, tenth, and eleventh defendants which depended on documents and possession only.

Judgment was given in favour of the plaintiff on this issue on 21st January, 1897, and a decree was entered declaring the plaintiff entitled, as against the ninth, tenth, and eleventh defendants, to the share in contest between them.

An appeal was filed by the ninth, tenth, and eleventh defendants, but was dismissed by the Supreme Court on 19th May, 1897, for default of appearance.

Further proceedings took place in the District Court on 15th December, 1897, when the Judge framed the issue between the second and seventh defendants, and recorded that all the other parties admitted the claims of the twelfth to eighteenth defendants. He dismissed the claim of the seventh defendant as against the second defendant, and entered a decree declaratory of the right of the seventh defendant as reduced. The decree declared no other rights, and no general preliminary decree was entered, though all the claims then on the record had, in the opinion of the District Judge, been disposed of.

The seventh defendant appealed. The case was argued on 28th February, 1897.

Bawa, for appellant.

Van Langenberg, for second defendant, respondent.

*Cur. adv. vult.*

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In the course of this partition suit it was necessary to examine the titles of the parties interested, and on the 21st January, 1897, the District Judge of Matara entered a formal decree as between the plaintiff and the ninth, tenth, and eleventh defendants, that the plaintiff was entitled to one-third of four-fifths of the land. Against this decree an appeal was taken, which came before this Court on the 19th May, 1897, when the appeal was dismissed for want of appearance.

The case went back, and the District Judge, after another investigation, on 23rd December, 1897, ordered and decreed as between the second and seventh defendants, that the seventh defendant is entitled only to one-fifth of the land, and the second defendant was held liable in costs.

Against this an appeal was taken, which came before us on the 28th February, 1899. So that the progress of this suit has twice been interrupted by appeals, in which the greater number of the parties to the suit had no interest.

The decision of the District Judge in examining the titles of the parties should not take the form of a decree, and we order the formal decree to be deleted. We would make the same order as to the decree of 21st January, 1897, were the parties before us.

There remains the judgment: "The seventh defendant is not entitled to any larger share than the one-fifth he purchased from the Crown, and I dismiss his claim to one-sixth of four-fifths. Seventh defendant will pay costs of his contention". Is this an appealable order? Strictly speaking, I hold it is.

The Partition Ordinance enacts, section 19: "All decisions and orders, of any Court made under the authority of this Ordinance shall be subject to appeal to the Supreme Court, and every such appeal shall be brought or prosecuted in such manner and shall be subject to such regulations as now exist and shall hereafter be made by law".

The Courts' Ordinance, No. 1 of 1889, gives the Supreme Court a jurisdiction in appeal which extends to the correction of all errors in fact or law which shall be committed by any District Court. But, though the jurisdiction is very wide, and though there may be an appealable order, we are in the habit of refusing to exercise jurisdiction and to entertain appeals against judgments which are not conclusive between the parties to the suit.

In partition actions the share of none of the parties can be said to be finally decided until the partition decree be signed. For example, here the seventh defendant has been found entitled to no more than one-fifth, as in question between him and the second

defendant, but it is, at least, possible, that after an examination of the titles of other parties, the share of the seventh and of the second defendants may be increased or diminished.

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In the general case an appeal should not be entertained against determination on the titles of parties to a partition suit, made prior to the partition decree, because the determinations are not conclusive, and do not bind all the parties.

When the decree of partition is entered, any party to the suit injured or dissatisfied may then appeal, and all the parties would be respondents.

I recommend that we order the decree of 23rd December, 1897, to be deleted, and that we remit to the District Judge to proceed with the partition according to law.

BONSER, C.J.—I agree.

[After further proceedings in the District Court, during which the twenty-sixth, twenty-seventh, and twenty-eighth defendants were added as parties, general preliminary decree was entered on 28th August, 1899, again rejecting the claims of ninth, tenth, and eleventh defendants as against the plaintiff, and the claim of the seventh defendant as against the second defendant.

Appeals were filed by these unsuccessful parties. That of the ninth, tenth, and eleventh defendants was dismissed on 26th October, 1899; that of the seventh defendant was held entitled to succeed on the same date.

Final decree entered 2nd June, 1900.]

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