

1919.

Present: Ennis A.C.J. and De Sampayo J.

KATHONIS *v.* SILVA.

212—D. C. Galle, 15,011/C.

Co-owner—Right to build on common land—Right to eject another co-owner from house.

A co-owner has the right to build and live on the common land.

If a co-owner exercises his right and builds a house for his private use on the land, he may eject any other co-owner who attempts to occupy that house without his permission.

It is possible that a co-owner may have the right to enter the house built by another co-owner for certain purposes, but not to claim one of the rooms for his own personal residence.

THE facts appear from the judgment.

A. St. V. Jayewardene (with him *F. de Zoysa*), for the appellant.

E. W. Jayawardene, for the respondent.

October 28, 1919. ENNIS A.C.J.—

This was an action for declaration of title to a house for ejectment and for damages. It appears that the parties are co-owners in a certain land, the plaintiffs owning at least 7/10 and the defendant a small share in the remainder. It appears that one of the co-owners, many years ago, built a house on the land. This house was purchased by one Odiris Appu, also a co-owner. Odiris, on January 6, 1893, sold the house and his share in the soil to one Babun Hamy. Babun Hamy was the wife of the first plaintiff and the mother of the other plaintiffs.

The defendant's case was that the house now on the land was not the one dealt within Odiris's deed, but a new one put up by himself. His story was that the old house fell down, that he provided the money to the first plaintiff to build a new house, and that the first plaintiff built the new house, which is on the land, for the defendant. The learned Judge found that the house at present on the land was not exactly the same as the old one. He says that the old one " was completely replaced by the removal of the old walls, posts, and roof, and the erection of a stone masonry and tiled building on the identical site. "

It is suggested by the appellant that this is a finding that the house is a new one completely. I do not so read it. It is rather a finding that the present house is a reconstruction of the old one.

The Judge further held that the plaintiff could not claim more against a co-owner than a declaration of their right to the improver's interest and damages for ouster, and that they cannot claim absolute ownership or the eviction of the defendant without proving that the defendant was without a vestige of co-ownership in the soil. Two questions were raised on the appeal: First, the question of fact as to who built the present house; and the second, the question of law as to whether one co-owner can maintain such an action as the present one against another co-owner? On the question of fact I see no reason to interfere with the finding of the learned Judge that the plaintiff built the present house, that the present house is in substitution for the old one sold by Odiris in 1893, and that the defendant has failed to prove that he contributed for the expenses of building.

The question of law is not an easy one, more especially as the learned Judge declared the builder of the house and the plaintiffs entitled to damages at the rate of Rs. 30 per annum from January 1, 1917, but not for more than three years. The judgment is dated May 5, 1919. The period between January 1, 1917, and May 5, 1919, is not three years, and it could hardly be, therefore, that the Judge had in mind that damages could only be claimed for three years before the date of action owing to prescription.

The same order has been reproduced in the decree. It would seem, therefore, that at the end of three years from January 1, 1917, under the decree in the case, the plaintiffs will get no further payments. Exactly what is to happen after that is not clear. Neither is it clear as to whether the damages are to be taken as the equivalent of rent paid by the defendant. I have some doubt as to the accuracy of the learned Judge's statement that the plaintiffs could not evict the defendant without proving that the defendant was without a vestige of co-ownership in the soil. A co-owner has the right to build and live on the common land. Presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered. If a

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co-owner exercises his right and builds a house for his private use on the land, I am quite unable to see why he should not eject any other co-owner who attempted to occupy that house without his permission.

It seems to me that the right to build a house on the common land and live in it must carry with it a right to keep the house private, and to that extent an order for ejectment could be made. It is possible that a co-owner may have the right to enter the house for certain purposes, but not, as in the circumstances of this case, to claim one of the rooms for his own personal residence.

Assuming that the Judge has granted damages on the basis of rent, it is difficult to say whether it is to be for a lease from year to year or what it is. The difficulty in the case is mainly due to the fact that the plaintiffs have not appealed from the order made.

But counsel for the plaintiffs has pointed out that the limitation of the damages to three years is presumably an error, and has asked us to rectify it. If merely a clerical error, it is the duty of the District Court to put it right. The appellant has raised this question of law, although in his answer in the Court below he claimed to exercise as against the plaintiffs the very right which he now would deny an action for. In view of the facts that the appellant has raised the question that the decree is difficult to follow, and that the dispute between the parties could hardly be satisfactorily settled on the basis of that decree, I would deal with the matter in revision, and allow damages up to the date of judgment, and thereafter until possession is given by the defendant at the rate fixed by the learned Judge from January 1, 1917. I would affirm the judgment that the plaintiffs are entitled to a declaration of their right to the improver's interest, and go further and say that in the circumstances of this case they are entitled to an order ejecting the defendant from the house. The appellant should pay the costs of the appeal.

DE SAMPAYO J.—I agree.

Varied.