

1905.
March 28.

Present: Sir Charles Peter Layard, Kt., Chief Justice, and
Mr. Justice Moncreiff.

SILVA *et al.* v. SILVA *et al.*

D. C., Galle, 6,462.

*Partition suit—Claim for damages—Misjoinder of claims—Ordinance
No. 10 of 1863.*

It is not competent for a plaintiff in a partition suit to join in such suit a claim for damages arising from a wrongful act committed by one of the co-owners.

Samarasinghe v. Balahami (5 N. L. R. 379) followed.

APPEAL from a judgment of the District Judge of Galle. The facts and arguments sufficiently appear in the judgment.

Sampayo, K.C. (*E. Jayewardene* with him), for appellants, (21st and 124th defendants).

H. J. C. Pereira, for respondents, (plaintiffs).

Cur. adv. vult.

28th March, 1905. LAYARD C.J.—

In this case the plaintiffs brought an action in the District Court of Galle for the purpose of partitioning a certain land under the provisions of Ordinance No. 10 of 1863. They further prayed for

an injunction restraining the 21st and 124th defendants from building a house on the land pending this action.

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With regard to the injunction prayed for, it is only necessary to say that, although the plaintiffs asked for an injunction pending the action, they never sought to take out the injunction, and it is unnecessary for us in this suit to decide whether or not a plaintiff would be entitled to ask for an injunction in a suit instituted under the Ordinance No. 10 of 1863.

Certain of the defendants came forward and filed an answer or answers. By agreement between the parties an issue was settled. Are the 21st and 124th defendants entitled to the house No. 17 in plan filed with the plaint and No. 2 in deed or to any compensation therefor? The issue on the face of it was a clear issue. The District Judge on that issue gave the plaintiffs damages against the 21st and 124th defendants. These two defendants object to the order and appeal to this Court, and they submit that damages are not recoverable in a partition suit, and that the learned District Judge was consequently wrong in awarding them damages. How this question of damages, which was not claimed by the plaintiffs and was not in issue in the Court below, came to be decided by the District Judge is not clear. It, however, enabled him to point out how he considered that this Court had erred in the case of *Samarasinghe v. Balahamy* (1), and it remains for us to decide in view of the conflicting decisions in this Court whether in our opinion the judgment which the District Judge has been pleased to over-rule is sound or not. Admittedly there have been conflicting decisions in our Court. The decisions in conflict with the decision above quoted have certainly not been followed for some years, because my brother Wendt, who had an extensive practice at the Bar for twenty years before he mounted the Bench, in his judgment, in that case stated that it was novel to him that in an action under the Partition Ordinance the plaintiff should join a claim for damages. It may be, as pointed out by Mr. Jayewardene in his book on the Law of Partition, that there was at one time a practice to join a claim for damages with an action under the Partition Ordinance. A predecessor of mine on the Bench so far back as 1890 pointed out in the case of *Siyadoris v. Adrian* (2) that he frequently expressed the opinion that a partition suit should not be encumbered with claims in the nature of accounts between the co-owners. That was the view of Chief Justice Burnside, and I believe also of my distinguished predecessor Chief Justice Bonser. It may be however that the law of these distinguished Judges may be wrong, and the

(1) (1902) 5 L. N. R. 379.

(2) S. C. Min. June 10. 1890.

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question for me to decide is whether I should follow the later ruling of this Court, or whether I shall hold that a plaintiff can include a prayer for damages in an action for partition. I am wrong in expressing myself in that way, because the plaintiffs have not included in this case a prayer for damages, nor have they ever asked for such a remedy. What I have to decide is whether a Judge would be right in awarding a plaintiff damages in a partition suit, or whether a partition suit is limited to the remedies laid down and provided for in the Partition Ordinance. There is no doubt that if this action was brought under the Roman-Dutch Law as it existed before the introduction of any statutory law into the Colony providing for the procedure to be adopted in a partition suit and if this was an action *communi dividundo*, which is a mixed action, that is, a real action in so far as each co-owner in undivided shares sued for and vindicated thereby his own property or share belonging to him as owner, and personal in so far as it is allowed to owners at the same time to sue for and obtain in the same proceedings a settlement of their personal claims for damages. The right to recover damages in such an action was recognized by the Roman-Dutch Law. Our Partition Ordinance, however, provides that when any landed property is held in common it is competent for one or more co-owners to compel a partition of such property, or should such partition be impossible to apply for a sale thereof, and provides that one or more owners in any such case may file in the District Court a libel describing the property and stating the extent of his or their share or interest therein, the names and residences of all the co-owners, and the mortgagees and the extent of their respective shares or interest in the land, and also the improvements, if any, which have been on the property by any owner or owners so far as they are known to the person or persons filing the libel and praying for a partition of the property amongst the several owners or a sale thereof as the case may require. Whilst the Ordinance provides for a claim for compensation, it nowhere provides for any claim for damages, nor does it provide for an account being taken in respect of the profit taken by one co-owner to the detriment of another co-owner in the land. It is singularly silent with regard to any claim for damages being raised. It appears to me that the Legislature did not intend that a partition suit should be embarrassed by the inclusion thereof of a claim for damages in respect of some delict committed by one or more of the owners of the property. There is a great distinction between damages and compensation. Compensation for improvements is a thing necessary to be determined in a partition suit; otherwise there can be no proper division of the property amongst

the co-owners. Damages on the other hand result from a wrongful act on the part of one of the co-owners, and should be the subject of a separate suit as any other ordinary proceeding. I cannot see that because the law lays down that compensation should be given, which is for a rightful user of the property by a co-owner, that we must assume that the Legislature intended to include compensation or damages for a wrongful act on the part of a co-owner.

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The order of the District Judge, in which he directs the 21st and 124th defendants to pay the costs of the contest and a sum of Rs. 200 as damages, must be set aside, and the case remitted to the District Judge for him to determine the point in which the parties were really at issue, and on which they had asked his decision, namely, as to whether the 21st and 124th defendants are entitled to any compensation.

I am not sorry that I have been given the opportunity of once again approving the law as laid down by my brothers in my absence from the Bench. At the same time I cannot help expressing my regret that the parties should be put to the costs of this appeal by the action of the District Judge in raising a question, which was not the subject of issue on the pleadings nor of the issue settled at the trial, though it gave the District Judge the opportunity, which he appears to have desired, of pointing out where he thinks the judgment of this Court has erred. I am not convinced, however, that there is any error in the judgment to which he has taken exception.

The costs of this appeal will abide the final determination on the issue which the parties wished the District Judge to determine.

MONCREIFF J.—

I am of the same opinion. The allurements offered us by the District Judge have not altered the opinion which I formed when I sat with my brother Wendt three years ago to consider the question whether a claim for damages could be joined in a suit for partition of land. I thought then, and I think now, that such a claim is altogether out of place, and that the Legislature never intended that such a claim should be included in a partition suit according to the preamble of the Partition Ordinance; the object of the Ordinance is to provide for the partition or sale of land held in common. As the Chief Justice has pointed out, the ingredients of the plaintiffs' libel are carefully described in the 2nd section, and provision is made for compensation. Compensation being provided for, and there being no provisions for damages, I should have thought there was sufficient indication that the Legislature did not intend that there should be a claim for damages.

1905. The learned Judge however has, upon a canon of construction of
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MONCREIFF J. on this Bench, which extends for about five years, goes this is only
the second occasion, so far as I remember, on which this point has
been brought to my notice. I therefore repeat that so far as my
experience goes the attempt to claim damages in a partition suit is
unusual. At the same time I am aware that many irrelevant
matters are included in the plaints which came before this Court,
and possibly such claims may have been made in more cases than
I am aware of, and ignored as irrelevant by all persons concerned
including District Judges.

I believe there is no mention of partition suits in the Civil Proce-
dure Code, but we were informed that this Court has held that such
a suit is an action. Certainly it would be difficult to say that it was
not an application invoking the interference of the Court (section 6,
Civil Procedure Code).

In the Code the joinder of actions is dealt with in an exhaustive
manner, but I think there is nothing in it to countenance the
joinder of a claim for damages in a partition suit.
