1949 *Present:* **Nagalingam J. and Windham J.**

ROCKLAND DISTILLERIES, Appellant, *and* AZEEZ, Respondent

S. C. 14—D. C. Kalutara, 26,490

Co-owners—Action for damages caused to common property—Action by one co-owner—Need others be made parties ?—Civil Procedure Code, ss. 12, 17, 18.

One co-owner can institute an action for damages caused to the common property without joining the other co-owners either as plaintiffs or defendants.

APPEAL from a judgment of the District Judge, Kalutara.

H. W. Jayawardene, with *Wijeratne*, for the defendant appellant.

M. H. A. Azeez, for the plaintiff respondent.

Cur. adv. vult.

May 9, 1949. NAGALINGAM J.—

The question involved on this appeal is whether a co-owner can institute an action for damages caused to the common property without joining either as a party plaintiff or party defendant the remaining co-owners.

The plaintiff instituted the action without disclosing the fact that there was another co-owner of the property but in the course of trial it transpired that the plaintiff had subsequent to the date of the institution of the action but prior to the date of trial acquired the outstanding interest and he was at the latter date the sole owner of the land. On behalf of the defendant company objection was taken to the constitution of the action on the ground that the non-joinder of the other co-owner who admittedly had an interest in the land at the date of the institution of the action was fatal to the maintenance of the suit. The same objection has been pressed on appeal.

Section 12 of the Civil Procedure Code expressly permits one co-owner to institute an action in respect of his undivided share against a trespasser. The law in this sense has been laid down in a series of cases all of which are referred to in *Hewavitarane v. Duncan Rubber Co. Ltd.*[1] and Pereira J. in his judgment said:—

> " As regards the rights of owners of undivided shares of land to sue a trespasser I have always understood the law both before and after the coming into operation of the Civil Procedure Code to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land."

Mr. Jayawardene for the appellant, however, without challenging the correctness of this proposition contends that the present action is one where no title and no claim to ejectment is involved and therefore does not fall within the principle enunciated.

The action is not, it is true, one for declaration of title or ejectment of the defendant Company, for the defendant Company does not claim title to the land. The action, however, is one for damages caused to the plaintiff's land, which is a field, for the damage caused to it by the discharge of spent wash from the distillery of the defendant Company. The plaintiff claims not only damages sustained up to the date of institution of action but also continuing damages as well as an order on the defendant Company " not to discharge waste matter into the plaintiff's land." Mr. Jayawardene's contention is that the action is one for a declaration that the plaintiff's land is not subject to a servitude to have discharged into the land the spent wash from the distillery, more particularly as the defendant Company claims in fact such a servitude over the plaintiff's property ; and he argues that to such an action in any event every co-owner must be made a party as otherwise the action cannot be maintained.

But for the counter-claim of the defendant Company that it has a right of servitude the case of the plaintiff is simply that the defendant Company has committed waste on his property by draining into it noxious and deleterious waste matter from the distillery, which clearly constitutes a trespass on the plaintiff's land. The counter-claim of the defendant Company can have no bearing on the nature of the action instituted by the plaintiff. It is definitely an action for trespass and would therefore be covered by the authority above cited. But even if one does assume that the plaintiff seeks to have his property declared free of the servitude claimed by the defendant Company I do not think that any different principle can be applied to such an action, for a declaration that a property is not subject to a servitude is only a lesser right to which an owner who claims absolute dominium over this property is entitled. Absolute ownership implies and does not recognise the existence of any servitude over the property. An action therefore to have the land declared free of servitude is an action vindicating absolute title to the land.

[1] *(1911) 17 N. L. R. 49.*

Apart from these considerations, there is another view that is directly applicable to an action which has for its object a declaration that the property is not subject to a servitude. One co-owner cannot without the concurrence of the other co-owners create a servitude over a common land. Nathan [1] sets out the proposition as follows:—

> " All praedial servitudes whether urban or rural are classed among indivisible things whence they cannot be acquired, constituted or taken away (discharged) in part. Consequently one of two joint owners cannot against the will of the other lawfully impose a servitude on a common estate held indivisibly."

If, therefore, one of two co-owners cannot lawfully impose a servitude on the common estate it would follow that a co-owner who denies the existence of a servitude would be entitled to maintain an action for a declaration that the land is free of servitudes, for by doing so he would in no way be asserting a right greater than what he is entitled to by virtue of his undivided interest in the whole land. To such an action indeed no one of the other co-owners need be party for one can well imagine a case where the other co-owner or co-owners are willing or prepared to accept the existence of a servitude over the common land. But their willingness can in no event affect the right of the co-owner who denies the existence of the servitude. The analogy of one co-owner being permitted to maintain an action for ejectment of a trespasser from the entire land becomes evident.

If, therefore, this action is treated merely as one for a declaration that no servitude exists the other co-owner need not have been joined ; but the action is in fact something wider than that. There is also a claim for past and future damages. So far as the claim for damages is concerned the action is governed by the same considerations as those that would be applicable to an action for trespass and, as indicated earlier, maintainable without the addition of the other co-owners as parties to the suit.

It was also urged that the defendant Company would be subjected to another action by the other co-owner for damages sustained by the latter, should the plaintiff be permitted to proceed with this action and recover damages. Section 17 of the Code expressly enacts that no action shall be defeated by reason of non-joinder of parties and that the Court may deal with the matter in controversy so far as regards the rights or interests if the parties actually before it. This provision clearly contemplates that a party defendant may be sued by other persons who may have rights against him and who were not parties to the suit, for the action would only determine the rights of the parties before the Court and would not affect the rights of others.

It is, however, said that the policy of the law is to prevent a multiplicity of actions. The entire question of damages can very well be adjudicated upon in this case if the other co-owner is made a party. That does not mean that the plaintiff should make the other co-owner a party. The defendant, if he does not wish to be sued in another action by the other co-owner, may well apply to Court to have the other co-owner added a party defendant or the Court can *ex mero motu* in terms of

[1] *1804 ed., Vol. 1, Paragraph 694.*

section 18 of the Code add the other co-owner. But the proceedings had in the lower Court show that the defendant Company was not only not willing to have the other co-owner added a party defendant but also contended that the Court had no power to add the other co-owner as a party. In these circumstances if the defendant Company should find itself in the position of being sued a second time it has only itself or its legal advisers to be thankful to. But it is abundantly clear from what has already been said that the action as framed cannot be said to be badly constituted or that it cannot be maintained.

The decision of the District Judge on the preliminary issues tried by him is therefore right ; the appeal fails and is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.