1954 *Present :* **Rose C.J. and Sansoni J.**

J. D. LIYANAGE, Appellant, *and* L. H. THEGIRIS, Respondent

S. C. 139—D. C. Galle, 4,593

Partition action—Improvements made by a co-owner—Scope of his right to be allotted portion which contains the improvements—Partition Ordinance, No. 10 of 1863, ss. 4, 5.

In an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule ; it will not be followed if it involves substantial injustice to the other co-owners.

Where, therefore, co-owner A wrongfully demolishes a building put up by co-owner B and erects on its foundation another building, A will not, in preference to B, be allotted the portion of the land on which the building stands. The question as to who should get the lot with the building may be decided at the stage of partition if there is no provision in regard to it in the interlocutory decree.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *Cyril E. S. Perera, Q.C.*, and *A. W. W. Goonawardana*, for the 7th defendant appellant.

C. G. Weeramantry, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1954. SANSONI J.—

This is an appeal by the 7th defendant in a partition action who is dissatisfied with the scheme of partition ordered by the learned District Judge. The dispute has arisen because of the building No. 1 which the Surveyor in his report, attached to the preliminary plan, described as "a partly constructed masonry-walled and thatched garage (not completed)". Lying under this building is an old foundation. It is common ground that building No. 1 was constructed by the 7th defendant and the foundation No. 2 by the plaintiff. Under the interlocutory decree each of them received 780/12096 share of the land and in respect of the buildings the decree provided "No. 1..... to the 7th defendant, No. 2..... to the plaintiff". Obviously the Commissioner could not comply with both directions, if they are to be considered "special directions as to the partition" within the meaning of section 5 of the Partition Ordinance, No. 10 of 1863, since the building stands on the foundation. I would regard this part of the decree not as a direction but merely as a determination by the Court, under section 4, that these improvements were made by the parties mentioned. To that extent only the decree is *res judicata*, and compensation would accordingly become payable to the improver who does not receive a lot containing his improvement. The Commissioner was faced with the difficulty of partitioning the land and giving each improver his particular improvement, and he gave the 7th defendant lot A with the building and foundation and gave the plaintiff lot C which is bare land. The plaintiff objected to this scheme, and after inquiry the learned District Judge gave lot A to the plaintiff and lot C to the 7th defendant. The 7th defendant has appealed against this order.

It is important to bear in mind the considerations which led the learned Judge to make this order. The plaintiff had a 5 cubit thatched boutique standing on the foundation No. 2; he had transferred his share of the land and the entirety of this boutique to the 7th defendant by a conditional transfer in September, 1948, and the 7th defendant had re-transferred that share and the boutique to the plaintiff in September, 1949. On 27th June, 1950, the 7th defendant bought a share of the land from another co-owner and on the following night he pulled down the plaintiff's boutique and erected a shed on the foundation. The plaintiff complained of this to the Headman and charged the 7th defendant with mischief in the Magistrate's Court on 1st July. The criminal case did not proceed to trial, but the Magistrate advised the 7th defendant not to add to the building pending this partition action which had, by that time, been filed by the plaintiff. These are the facts as found by the learned Judge and they have not been canvassed in appeal. The learned Judge says in his order: "But for the 7th defendant's act in pulling the plaintiff's house down, lot A would have contained the plaintiff's house, and ordinarily that lot would have been allotted to the plaintiff. To allow the scheme to stand as it is would be to allow the 7th defendant to profit by his wrong doing". The main argument urged for the appellant is that the learned Judge should not have gone into the history of how the building No. 1 came to be erected, as it involved investigating events

which happened before the interlocutory decree was entered. It was also submitted that the Court should not set aside the scheme of partition proposed by the Commissioner except upon grounds which the Commissioner himself could have considered : in other words, the Court would act as an appellate authority considering only submissions which could have been made to the Commissioner. Both submissions involve the question whether a Court is precluded, when acting under section 6, from considering any grounds which could not have been considered by the Commissioner. Now I am willing to concede that it is only in exceptional cases that a Judge, who is considering the merits and demerits of a scheme of partition submitted by a Commissioner, will have need to, or be willing to, consider the earlier history of improvements effected on the land before he makes his decision as to how the land should be partitioned. In the majority of cases the principle acted upon is that in dividing the property it is no more than equitable that, when it can be conveniently done, the improving co-owner should be allotted the portion which contains his improvements. The main reason is that this course will render it unnecessary for the other co-owners to pay him compensation in respect of those improvements. But it is not an invariable rule, and it will not be followed if it involves substantial injustice to the other co-owners.

That there will be substantial injustice done to the plaintiff in this case if lot A were to be allotted to the 7th defendant is undeniable. The plaintiff's boutique had stood on lot A for some years. It presumably came up with the acquiescence, if not the consent, of the other co-owners and the 7th defendant has recognized the plaintiff's right to it in his transactions with the plaintiff in 1948 and 1949. Nothing that I can see would have stood in the way of the plaintiff getting lot A with his boutique, if the boutique had been standing when the interlocutory decree stage was reached. Can the 7th defendant have a better right to lot A, based as his claim must be solely upon his forcible and wrongful conduct in demolishing the boutique and hastily attempting to erect a garage upon the same site, despite the plaintiff's objections and in breach of the Magistrate's direction that there should not be an addition to the partially constructed building ? I find it impossible to condone such conduct, and I consider that he has acquired no superior equity or favour in the subsequent division of the property under such circumstances—see *Silva v. Corea* [1]. I would, moreover, stress that in this case the plaintiff has acted promptly in protesting against the series of wrongful acts of the 7th defendant, from the very first act of demolishing the boutique. The complaint to the Headman, the criminal prosecution, and the filing of this partition action were all closely related steps taken by the plaintiff to seek redress.

Is there any statutory provision which prevents the grant of redress at this stage ? If the plaintiff had contested the 7th defendant's right to get any compensation at all for his garage, as he might conceivably have done in the proved circumstances of this case, the learned Judge would have decided that dispute before entering the interlocutory decree ;

[1] *(1859) 3 Lor. 312.*

but since the plaintiff did not at that stage deny the 7th defendant's right to claim compensation I think it was not unreasonable for the question as to who should get the lot with the garage to be left to be decided only at the stage of partition. The 7th defendant did not at the trial claim that he should at the partition get a lot with his garage. There is nothing in the interlocutory decree which suggests that the garage should be allotted to the 7th defendant. It is generally premature for such a provision to be made in the decree. Up to that point, therefore, the matter was left open. When the stage of partition was reached, the Court was entitled to inquire summarily and decide whether the 7th defendant had infringed the rights of his co-owner to such an extent that he should not enjoy the privilege of getting a lot which contained his improvement.

I would, for these reasons, dismiss this appeal with costs.

ROSE C.J.—I agree.

Appeal dismissed.