1940 *Present :* **Howard C.J. and Soertsz J.**

VANDERLAN *et al. v.* VANDERLAN.

47-8—D. C. Chilaw, 10,841.

Co-owner—Use of common property by some—Lease of premises by some of the co-owners to third party—Liability of lessee.

A co-owner is entitled to the use and enjoyment of the common property in such a manner as is natural and necessary under the circumstances.

A co-owner who puts the property to such use is not entitled to appropriate more than his lawful share.

A lessee of a common property is liable to the same extent as the co-owner from whom he obtained the lease.

APPEAL from a judgment of the District Judge of Chilaw.

N. Nadarajah (with him *H. Wanigatunge*), for the second defendant, appellant.

E. B. Wikremanayake, for the added defendant, respondent.

H. V. Perera, K.C. (with him *J. E. A. Alles*), for the plaintiffs, respondents in S. C. No. 47.

E. B. Wikremanayake, for the added defendant, appellant.

N. Nadarajah (with him *H. Wanigatunge*), for the second defendant, respondent.

H. V. Perera, K.C. (with him *J. E. A. Alles*), for the plaintiff, respondents in S. C. No. 48.

Cur. adv. vult.

August 2, 1940. HOWARD C.J.—

This is an appeal from a judgment of the District Judge of Chilaw in favour of the plaintiffs for Rs. 325 with costs and dismissing the added defendant's claim in reconvention with costs. The facts so far as material are as follows :—The plaintiffs, the first defendant, the second defendant-appellant, one Rosa Maria Vanderlan, and one Medalis Vanderlan are the co-owners of a fibre mill in the respective proportion of one-fourth, one-fifth, one-tenth, one-fifth, and one-fourth shares. By an indenture of lease dated December 18, 1935, the added defendant-appellant, who was the son of the second defendant-appellant, and the first defendant leased from Rosa Maria and Alexander Fernando their interests in the fibre mill. The plaintiffs alleged in their plaint that the defendants on or about September 15, 1935, entered into possession of the said mill and premises to the exclusion of the plaintiffs. They, therefore, claimed a sum of Rs. 412.50 which sum is calculated as the share of the plaintiffs in the rents and profits of the said mill. In this connection the plaintiffs maintained that the mill and premises are reasonably worth Rs. 150 per *mensem* of which their share would be Rs. 37.50 per mensem. The plaintiffs, moreover, claimed a further sum of Rs. 37.50 for each month or part of a month elapsing between the date of action and the date of decree. In giving judgment in favour of the plaintiffs the learned District Judge fixed Rs. 150 per mensem as a reasonable rent for the entire mill. He further found that the defendants had been in possession of the plaintiff's one-fourth share from March 15, 1936, to December 5, 1936, and they should pay to the plaintiff's sum of Rs. 325 together with costs. The added defendant's claim for repairs in reconvention was dismissed with costs. The period during which the defendants have been in possession of the mill was fixed by the learned Judge by reason of an admission by the added defendant that he and the first defendant started working the mill from March 15, 1936, and continued working it either themselves or through one Marcellinu working on their behalf till about December 5, 1936.

The finding of the learned District Judge is challenged by the second defendant on the ground that the latter did not in any way participate in the working of the mill. Reference was made to the lease 2 D 1 to show that the second defendant signed that deed as surety for the value of the machinery and not at lessee, and was not therefore liable to pay any rent. The second defendant also claimed that the sum of Rs. 150 per mensem fixed by the Judge as rent was excessive inasmuch as the rent on the face of the deed was Rs. 125 per mensem.

The added defendant has also appealed against the judgment of the learned District Judge on the ground that there was no contract or agreement between him and the plaintiffs. He further maintained

that he could not be regarded as a trespasser in unlawful possession inasmuch as he entered into possession with the leave and licence of some of the co-owners and along with another co-owner the first defendant-respondent. The added defendant also contended that the plaintiffs could only claim after an accounting and complained that the learned Judge was wrong in refusing to grant relief for the cost of repairs which had been claimed in reconvention.

The rights of co-owners to deal with the undivided property have been discussed in a number of cases. Whilst the matter is governed by Roman-Dutch law, the English law is not unhelpful on a consideration of the principles that should be applied. In *Job v. Potton*[1] the plaintiff, a tenant in common of a coal mine, had notice of a negotiation which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal with licence to work the coal. Under this licence some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further licence was on foot, when, in October, 1872, the plaintiff filed the bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised, an account against all the defendants as trespassers; for an injunction and receiver; and for damages. It was held that the working was not a trespass and the plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one-third to plaintiff. Bacon V.-C. in giving judgment in this case asked how is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal. The only restriction upon him is that he must not appropriate to himself more than his share. Reference was made to *Job v. Potton* (*supra*) in the case of *Siyadoris v. Hendrick*[2]. In this case Bonser C.J. stated that fortunately the rights of co-owners of landed property in Ceylon are governed by the Roman-Dutch law and not by the English Common law, for unless the plaintiff were ousted by his co-owners and forcibly prevented from enjoying the land, his remedies under the English Common law would be doubtful. The learned Chief Justice, however, later stated the Roman-Dutch law by reference to a passage from *Voet* and remarked that this was in substance the law laid down by Bacan V.-C. in *Job v. Potton* which is not inconsistent with Roman-Dutch law and in accordance with good sense. The passage cited by *Voet* is as follows:—

> "Invito autem uno socio nihil novi per alterum potest fieri in re communi meliorque prohibentis conditio est; adeo ut, si quid novi per alterum socium invito altero factum sit, aut fieri mandatum, is cogi possit ad id in pristinum status restituendum." (Bk. 10, 3, 7).

By this Bonser C.J. understood that it is not competent for one co-owner against the will of the other to deal with the property in a manner

[1] *L. R. 20 Eq. 84.*

[2] *6 N. L. R. 275.*

inconsistent with the purpose for which the joint ownership was constituted, but he did not understand the law to prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. In *Siyadoris v. Hendrick* (*supra*) the land was purchased for the purpose of getting plumbago contained in it. It was not suggested that the usual and customary method of getting plumbago was departed from or that the lessee was improvident, or the royalty inadequate. In *Silindahamy et al. v. Peris et al.*[1] it was held that when a co-owner carries on mining operations on the common land, he is entitled to appropriate to himself the whole output, less the ground share of the other co-owners. In *Goonewardene v. Goonewardene*[2] Wood Renton J. formulated the law as follows :—

There is no doubt but that, by the common law of this Colony, one co-owner cannot build a house on a land held in common without the consent of the other co-owners. Where such consent is withheld, a co-owner is not without a remedy. He can institute an action for partition. There is, however, a class of exceptions to the general principle which I have just stated. It is defined by Sir Charles Layard in *Silva v. Silva*[3], and by Sir John Bonser in *Siyadoris v. Hendrick* (*supra*). These decisions stand by their own authority, but they have constantly been followed in later cases. The class of exceptions referred to may be defined in this way. The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. For example as in *Siyadoris v. Hendrick* the land had been purchased for the express purpose of digging plumbago contained in it, it would have been unreasonable that any co-owners should have been prohibited from digging for plumbago without the consent of the other co-owners. Sir Charles Layard gives another illustration in *Silva v. Silva* (*supra*). If the land were fit for paddy, it could scarcely be contended that any one co-owner would be entitled to prevent the other co-owners from cultivating it in that way ".

In *Silva v. Silva,* the question for decision was whether the plaintiff was entitled to build a house on the land owned by him in common with the defendant. In dismissing the plaintiff's claim the learned Judges did not expound any principle inconsistent with the law as formulated in the other cases cited in this judgment. In *Silva v. Silva* it was held that the building of the house by the plaintiff was an act prejudicial to the community of the land and converted part of the land to another use from that to which it was previously devoted.

Applying the principles laid down in the cases I have cited to the facts of the present case, it is clear that the first and second defendants in working the fibre mill were not as co-owners dealing with the property in a mannar inconsistent with the purpose for which the joint ownership was constituted. The added defendant inasmuch as he was a joint lessee of the rights of two other co-owners was in a similar position. The next point for consideration is the attitude assumed by the plaintiffs towards this working of the mill. In giving evidence the first plaintiff states that after the period of the lease P 2, in favour of his father had expired he

[1] *21 N. L. R. 129.* [2] *17 N. L. R. 143.* [3] *6 N. L. R. 225.*

brought the Vidane Arachchi and gave over possession to the other co-owners. Moreover that he told the other co-owners to give him another lease and if not, asked them to take over the entire mill and premises on a lease. He also states he saw the first and second defendants at the mill and carters were bringing husks and unloading them. Later he met the first and second defendants on the spot and they said that although there was no writing they would give the plaintiff's their share of the rents. No amount was fixed and the first and second defendants did not give the plaintiffs any share according to the promise. The first plaintiff also states that he did not object to their working the mill. In view of the evidence of the plaintiff and the fact that the property was dealt with by the defendants in accordance with the purpose for which the joint ownership was constituted, the user by the defendants and added defendant was lawful but in excess of the restriction imposed by law that they must not appropriate to themselves more than their share.

In the circumstances the defendants can be regarded as being in default only in so far as they have failed to pay the plaintiffs their share of the profits for working the mill. The first defendant admitted his liability and consented to judgment. The second defendant denied any connection with the working of the mill. In evidence, however, he admitted that he asked his son to work his share of the mill free of rent. He also signed the lease as a guarantor holding himself responsible for the machinery. Moreover he sold the mill's fibre at Colombo and Lunuville. The learned District Judge was in these circumstances right in holding that the added defendant was merely the nominee of the second defendant in the lease, and must be held liable equally with the other defendants.

The added defendant maintains that the remedy of the plaintiffs, if any, was against the other co-owners. This proposition cannot be maintained inasmuch as the lessees entered the premises and worked the mill by virtue of the lease and must therefore as regards the rights of the plaintiffs be held to stand in the shoes of the lessor co-owners. The learned Judge was, therefore, correct in holding the added defendant liable.

The final question for consideration is the extent of the defendants' liability to the plaintiffs. The latter in their plaint claimed a sum of Rs. 37.50 per mensem as their share in the rents, issues and profits of the mill and premises which are stated to be reasonably worth Rs. 150 per mensem. This figure of Rs. 150 per mensem has been accepted by the Judge and on this basis he has awarded the plaintiffs a sum calculated on possession by the defendants during the period March 15, 1936, to December 5, 1936. The period of liability as fixed by the Judge is in accordance with the evidence and there is no substance in the point taken by Counsel for the second defendant that no rent can be given for any period after August 28, 1936, the date of claim. The question that now requires elucidation is whether the plaintiffs can maintain a claim for rent or whether their claim in law is merely for the share of the profits from the working of the mill during the period of occupation by the defendants. In view of the fact that the acquiescence of the plaintiffs in the working of the mill was on the understanding that they should be given their share of the rent I am of opinion that the claim for rent is maintainable on the

ground that the defendants and added defendant had the use and occupation of the plaintiff's shares as monthly tenants. The plaintiff's relationship with the defendants and the added defendant will in these circumstances be on the same footing as that created by the deed of lease of December 18, 1935, between the other co-owners and the defendants and added defendant. The rent payable to the plaintiffs should, however, be assessed on the terms entered into by the other co-owners by virtue of the deed of lease. In that deed the rent fixed for the lessor's share, namely, 9/20th, is Rs. 56.20 a month or Rs. 6.25 a month for a 1/20th share. On this basis the plaintiff's share which is 5/20th amounts to Rs. 31.25 per month. The period during which the mill was worked is nine months. Hence the total amount of the plaintiff's share of the rent totals Rs. 9 × Rs. 31.25 or Rs. 281.25. The lessors or other co-owners have, however, agreed to waive two months' rent on account of repairs to the machinery for the two years during which the lease was to run. On this footing the plaintiffs should make a similar allowance for repairs. Their liability on this account may be assessed at 9/24 of Rs. 62.50 that is to say Rs. 23.44. In the result the plaintiffs should receive Rs. 281.25 less Rs. 23.44 or Rs. 257.81.

The decree of the District Judge is in these circumstances varied by substituting as the sum to be paid to the plaintiffs by the defendants and added defendants Rs. 257.81 for Rs. 325. Subject to this variation the appeal is dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.