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MAHADAJI KARANDIKAR v. HARI D. CHIKNE.

In taking on himself the responsibility of departing from the decree sent to him for execution, a Collector acting by his own acknowledgment ministerially, when he delegates his function to an assistant or a mamlatdar, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment. In *R.* v. *Ingall* (1) it is said that "a person damnified by the failure to perform a statutory duty is entitled to maintain an action;" and in *Pickering* v. *James* (2) Bovill, C. J., says; "It is a general rule of law that where a ministerial duty is imposed, an action lies for breach of it, without malice or negligence." Some of the many cases of actions against sheriffs serve to illustrate this principle, and a Collector will do well to refer the parties concerned to the Court whenever questions arise in which his duty is not clearly marked out by the terms of the Code or other statute law, under which he may have to execute a decree or judicial order.

The Court that has made a decree or judicial order, which has then been transmitted for execution to a Collector, is not deprived of the judicial powers with respect to it which may still, at any particular time, be competent to such Court, and which it would have had, had the order been placed in the hands of its own ordinary officer, the nazir. These powers cannot often be called into exercise, but when they are, the Court has, and must have, authority to recall its own record transmitted to the Collector.

Costs of this reference to be paid by the judgment-debtor.

(1) L. R., 2 Q. B. D. at p. 207. (2) L. R., 8 C. P. at p. 503.

APPELLATE CIVIL.

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July 4.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

BALVANTRAV OZE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANPATRAV JADHAV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Co-owners of a forest—Tenancy-in-common—Mortgage by one co-tenant—Mortgage in possession—Licensees from mortgagor and co-tenant—Cutting and removinge produce—Rights of licensees—Remedy of mortgagee—Damages—Account.

* Second Appeal, No. 255 of 1882.

The first defendant G. and A. were co-owners of a forest. G. mortgaged his interest in the forest to the plaintiff and put him into possession. The mortgage was registered. Subsequently, G. and A. joined in a license to the second and third defendants to cut and take wood in the forest, which the latter accordingly did. The plaintiff sued G. and the other two defendants to recover, as damages, the value of the wood removed, and for an injunction restraining the defendants from removing more wood.

Held that the claim would not lie, neither for the whole of the damages claimed, nor for such part of them as was equivalent to G.'s interest in the value of the wood removed,—the only remedy open to the plaintiff being a suit against A., his co-tenant, for an account.

Though G., being out of possession to the knowledge of the licensees, could convey to them no right, yet A. could. And a license from A. gave a right to cut wood in the whole of the forest, since a co-tenant may lawfully enjoy the whole property in any way not destructive of its substance so as to amount to an ouster of the other co-tenants, and whatever a co-tenant may do himself he may license another to do. The licensees, therefore, did no wrong in acting on their license, and no suit lay against them; nor did G.'s joining in the license do the plaintiff any distinct injury for which an action for damages would lie against him.

Quære—whether plaintiff might not, however, have a right of action against G. to recover any sum which G. had obtained by assuming falsely a position and rights belonging to the plaintiff.

THIS was a second appeal from the decision of J. W. Walker, District Judge of Thana, reversing the order of the Subordinate Judge of Kalyan.

The defendant No. 1, Ganpatrav Jadhav, and one Anapurnabai were the undivided owners of a forest in the village of Hedavali, in the Thana Collectorate. The former mortgaged his interest in it by a deed, duly registered, to the plaintiff, and placed him in possession,—himself continuing to help the plaintiff in the management. Ganpatrav and Anapurnabai next granted a license to defendants Nos. 2 and 3 to cut wood in the forest; whereupon the mortgagee brought the present action against the mortgagor and the two licensees to recover Rs. 3,001 as damages for the wood cut, and for an injunction restraining the defendants from cutting any more wood, or otherwise interfering with the plaintiff in his possession and enjoyment of the forest. The defendants contended that the plaintiff was never in possession, and could not bring the suit.

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The Subordinate Judge decreed that the plaintiff should recover the wood, or its value Rs. 3,001, but rejected the claim as to the injunction. The District Judge rejected the entire claim. The plaintiff appealed to the High Court.

Kashinath Trimbak Telang and *Shantaram Narayan* for the appellant.—The plaintiff in fact claimed damages in respect of the cutting in the part of the forest in his possession. By the terms of his mortgage, plaintiff was in possession, and defendant No. 1 managed for him. If the plaintiff had claimed damages for the whole forest, and Anapurnabai had either one-half or a quarter share in it, the Court below should have inquired into that: *Wilkinson* v. *Haygarth* (1): and the plaintiff should have been awarded damages in proportion to his interest. The plaintiff, as a registered mortgagee, held priority over the subsequent licensees, the second and third defendants. The plaintiff was not bound either to include Anapurnabai as a party to the suit, or to have first sued his mortgagor.

Branson and *Manekshah Jehangirshah*.—The plaintiff in any case claimed more than he was entitled to. The defendants cannot be treated as trespassers. Anapurnabai's license alone was sufficient authority. The case of *Wilkinson* v. *Haygarth* (1) is distinguishable. The District Judge has found that the plaintiff had no possession, either exclusive or joint. If so, he has no possible cause of action. If he was in possession, his remedy was against Anapurnabai, and she is not even made a party to the suit.

WEST, J.—In this case we think that the District Court has misconstrued the document No. 101. Properly interpreted that document does not imply that defendant No. 1 was in possession of the property mortgaged by him to the plaintiff, but that he was managing it for the plaintiff, or rather helping the plaintiff to manage it, as he was bound to do by the terms of the mortgage. This implies a possession by the mortgagee. The difference is important in this respect, that a mortgagor left in possession, though he would not as against his mortgagee have any right to deteriorate the property below the value which it had when

(1) 12 Q. B., 837.

mortgaged, might dispose of the annual felling or cutting in any way which would be consistent with good management (Fisher on Mortgages, 572). It is not contended in this case that the sale to defendant No. 2 was destructive of the estate so as to impair the security. As, then, the mortgagor in possession might properly sell, so a purchaser might properly buy, and should be protected in his purchase against any claims of the mortgagee upon the mortgagor in virtue of his mortgage.

Here, however, the mortgagee had possession,—that is, such possession as the mortgagor had previously held for himself, that of a tenant-in-common with Anapurnabai. She also had, and has, possession as tenant-in-common. Defendant No. 2 bought his license to cut wood from both her and the mortgagor ; the latter, as mere assistant of the mortgagee in possession, having no right to sell, as he did, on his own account. The mortgage was registered, so the defendant No. 2 had the opportunity of knowing the relations of his licensor, defendant No. 1, to the plaintiff. It is clear, then, that had the license been taken from defendant No. 1 alone, the licensee would have acquired no right, as the pretended licensor was not the mortgagee's agent for this purpose, and did not even profess to act on his behalf, but on his own. But Anapurnabai joined in the license, and it is well established that one of two or more co-tenants may lawfully enjoy the whole in any way not destructive of the substance so as to amount to an ouster of the other co-tenants—*Hole* v. *Thomas* (1); *Jacobs* v. *Seward*(2). What a co-tenant may do, however, he may license another to do. This, in fact, is in many cases the only feasible mode of enjoyment. Thus Anapurnabai had a right to license a cutting of the wood, not limited to her own share, but extending to the whole forest held in common. So, too, had the mortgagee. The licensee from either would do no wrong to the other in acting on his license. The rights of the co-tenants *inter se* would be to an account of the profits realized, and a distribution of them according to their proportions of the ownership. This principle has in England been embodied

(1) 7 Ves., 589. (3) L. R., 4 C. P., 328.

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in a Statute, 4 and 5 Anne, cap. 16, sec. 27, but it is one enforcible by equity—*Denys* v. *Shuckburgh* (1)—as resting on natural light, and, therefore, by the Indian Civil Courts.

Mr. Telang cited *Wilkinson* v. *Haygarth*(2) for a *dictum* of Lord Denman's—"the plaintiff can recover such damages only as are proportionate to his interest in the property"; but that was in a case of actual ouster, as part of the soil was carried away. This would ground an action against the co-tenant himself, but any user of the common property not excluding the plaintiff would not: *Martin* v. *Knowllys*(3). In the same case, Coleridge, J., says of the removal of the peat: "It is not the mere vestura, or growth of the land, that is taken," and, again, "Now, whatever one tenant-in-common might himself have done, he might license a third party to do, but no more." This shows that the suit in this case could not be maintained against the second defendant acting on a license from Anapurnabai: the plaintiff's remedy, if any, is against her. From defendant No. 1 the plaintiff sustained in this form no distinct injury, and, therefore, cannot recover damages. Whether he may recover from him in another suit any sum which he has obtained through assuming falsely a position and rights which belonged to the plaintiff, we need not express an opinion—*Lindon* v. *Hooper* (4), nor whether he could prudently join him a defendant in a suit for an account.

Decree confirmed with costs.

(1) 4 Y. & C., 42.
(2) 12 Q. B., 837.
(3) 8 T. R., 145.
(4) See *per* Lord Mansfield, 1 Cowp. at p. 419; Bac. Abr. Assumpsit (A) Vol. I, p. 256.