1895.
Oct. 4 and Nov. 15.

NICHOLAS DE SILVA *v.* SHAIK ALI.

D. C., Colombo, C 5,684.

Christian marriage—Non-registration—Ordinance No. 6 of 1847—Rei vindicatio—*Alienation by wife of property in community without knowledge of husband—Estoppel—Claim by heir to property invalidly sold to third party—Right of such party to plead the* exceptio rei venditæ et traditæ —Jus retentionis—*Rules as to* impensæ utiles.

The 4th section of the Ordinance No. 6 of 1847 came into operation when Her Majesty's confirmation of the Ordinance was notified in the *Government Gazette* of 8th December, 1849.

A marriage solemnized by a minister of the Christian religion under the provisions of that section does not become null and void for want of registration.

A wife, who lives apart from her husband by mutual consent, cannot validly alienate property belonging to the marriage community.

Semble, per BONSER, C.J.—If the husband knew of the sale by his wife and raised no objection to its completion, he would be estopped from denying its validity.

Per BONSER, C.J., and WITHERS, J. (*dissentiente* BROWNE, A.J.).—A claiming as heir of B a moiety of a property which B in her lifetime had sold and delivered, without the knowledge of her husband, to C for value, may be successfully opposed by C pleading the *exceptio rei venditæ et traditæ.*

Where a possessor, who has made improvements on a land believing it to be his own, sells it with the improvements thereon to another, he must be taken to have sold with the land the right to such improvements, and with them the right to defend possession of them by every available means, among which is the *jus retentionis* till the *impensæ utiles* are refunded.

The *jus retinendi* passes in the sale from one *bonâ fide* possessor to the other without a special cession.

The money which a *bonâ fide* possessor pays in discharge of a mortgage, which encumbered the property when it came into his hands, is *utilis impensa.*

The rules as to the extent to which the *impensæ utiles* can be recovered from the owner are :—

(1) When the outlay has exceeded the permanent advantage to the property, the owner is only liable to the extent to which the property has really been rendered more valuable by them.

(2) And not even to that amount if the outlay has been very much greater than the owner would himself have made; in which case, it is left for the judge to determine on a consideration of all the circumstances and persons how much should be recovered.

(3) If at the time of the suit the improved value of the property caused by the expenditure exceeds the amount so laid out, still only the sum actually expended can be recovered from the owner.

(4) When a claim is made for compensation, an account has to be taken of the mesne profits received ; and only so much of the expenditure, whether made on the production of the fruits or on the property itself, as exceeds the amount of these profits or *fructus* can be allowed, subject, however, to the preceding rules.

1895.
Oct. 4 and Nov. 15.

(5) And in taking this account, fruits which have been consumed as well as those which are still extant must be set off against the clause for expenditure. The fruits of the expenditure itself however—*fructus ex ipsa melioratione percepti*—are to be excluded from the accounting and not to be set off against the claim.

PLAINTIFF alleged that one Rodrigo, being the owner of a certain allotment of land with the buildings thereon, died intestate in October, 1888, leaving him surviving an only daughter, Johanna; that Johanna married Don Juan Harmanis Appu and continued in possession of the said property from 1888 till she died intestate in November, 1891; that her husband, being entitled to an undivided half of the property, sold his moiety to plaintiff in January, 1894; that plaintiff was appointed administrator of Johanna's estate in April, 1894; and that defendant held unlawful possession of the property since January, 1894, and refused to deliver it to plaintiff. He prayed, for himself and as administrator of Johanna's estate, for a declaration of title to the whole of the said property and for ejectment and damages.

The defendant, admitting that Rodrigo was the original owner and Johanna was his daughter, denied the other allegations of the plaintiff, and pleaded that Rodrigo mortgaged the property to one Silva Mudaliyár in January, 1888; that after the death of both Rodrigo and Silva Mudaliyár, Johanna, who was the wife of one Carolis Silva (and not Harmanis Appu as alleged by plaintiff), sold it to Celestina Hamine in December, 1888, and out of the proceeds of the sale paid the amount of the mortgage to the administrator of Silva Mudaliyár; that Celestina Hamine sold the property to one Ahamat in September, 1893, who sold it to defendant in December, 1893; and that Celestina, Ahamat, and the defendant effected in succession necessary repairs and useful improvements at a cost of Rs. 2,000. Defendant prayed that plaintiff's action be dismissed, or in the event of the plaintiff being declared entitled to any interest in the said property, it be further declared that he be not entitled to the possession thereof as against the defendant until plaintiff paid to defendant the amount of the mortgage debt paid to the administrator of Silva Mudaliyár, with interest, and the sum of Rs. 2,000 expended for repairs and improvements as aforesaid.

Upon evidence taken and considered, the Acting District Judge (Mr. Grenier) found that Johanna was lawfully married to Don Juan on the 28th October, 1850, at the Roman Catholic Church at Peliyagoda; that after the solemnization of the marriage they lived together as man and wife; that they subsequently separated by mutual consent, when Johanna lived with Carolis Appu; that the plaintiff was the issue of the latter union; that Johanna and Don

1895. *Oct. 4 and Nov. 15.*

Carolis had no right to sell the property or to pay off the mortgage debt to the administrator of Silva Mudaliyár's estate ; and that he was not satisfied that any repairs or improvements had been made by Celestina or others. The Court therefore entered judgment for plaintiff as prayed with costs.

Defendant appealed.

The case came on for argument on the 4th October, 1895.

Layard, A.-G. (with him *Rámanathan, S.-G.*), appeared for appellant : The alleged marriage of Johanna with Don Juan seems to fall under the Ordinance No. 6 of 1847, which by section 4 enables Christian ministers to solemnize a marriage "in any "place of worship ....., either consecrated or ..... licensed "for that purpose, in writing under the hand of the Governor "and gazetted as such." There is no proof that the place where the parties were said to have been married was either consecrated or licensed. Don Juan swears that his marriage took place in the Roman Catholic Church at Peliyagoda in Siyané kóralé, but he does not know even the name of the priest, nor signed any book in the church after the marriage, nor got any certificate of marriage. The marriage register produced is not signed by the parties or the priest who performed the marriage ceremony, and the Regulation No. 9 of 1822, section 21, makes the register of marriage sole legal proof of marriage. Thus the evidence of the solemnization of marriage is altogether defective. Even if proof on that point be assumed to be satisfactory, it would not help the plaintiff, as he failed to prove that the place where the marriage was solemnized was a place of worship either consecrated or licensed for that purpose under the hand of the Governor and gazetted as such. English decisions show that proof of one marriage ceremony, or one religious service held in a place, is insufficient to raise a presumption that such a place was duly consecrated or licensed ; and there is no proof in this case that any other marriage or religious service was solemnized in what is called the Roman Catholic Church at Peliyagoda than the ceremony between Don Juan and Johanna. But assuming that the parties were lawfully married, Don Juan did nothing to prevent Johanna from alienating the property in 1888 for the purpose of paying off the joint debt due by him and her to Silva Mudaliyar. He stood by and permitted her to sell the property, and so ratified her act (*Grotius, p. 28*, Masdorp's translation). In any case, the defendant was entitled to retain possession till plaintiff compensated him for the necessary and useful expenses laid out on the property by his predecessors in title, his vendor having received

1895.
Oct. 4 and Nov. 15.
BONSER, C.J.

from him an enhanced price in consideration of such expenses. And the mortgage debt paid off should be considered *utilis impensa* (*Voet, XVI. 2, 20; 3 S. C. C. 31*). Judgment of Berwick, D.J., in D. C., Colombo, 62,563 (3rd November, 1873).

Dornhorst, for plaintiff respondent. [BONSER, C.J.—We shall not trouble you as to the question of Johanna's marriage with Don Juan, but we should like to hear you on the other points.] The passage cited from *Grotius* does not go far enough to support the contention that by the husband standing by, when the wife signed the deed, he ratified it. But there is no evidence that Don Juan knew anything about this deed. Even if he had known of it, *Sande I. c. I.* clearly says that a woman cannot alienate without the authority or consent of her husband, and that from his mere presence at the time of alienation such authority or consent cannot be presumed. Her conveyance is therefore bad, and does not justify defendant's possession under her. Hence she has no *jus retentionis* till the expenses laid out are paid. (Van Leeuwen's *Cens. For. IV. 38, 1; Rámanáthan, 1877, pp. 313, 333.*) Defendant has not suffered any damage at all. If he has, he has his remedy against his vendor for breach of warranty. There is no ground for holding that plaintiff and Johanna should be treated as one. The case for the plaintiff rests upon the fact that Johanna could not convey the property by herself. The defendant's title is thus without any foundation whatever.

Layard, in reply, cited Story's *Equity, sections 388 and 389.*

Cur. adv. vult.

15th November, 1895. BONSER, C.J.—

This is an appeal from a decree of the District Court of Colombo. The action was one in which the plaintiff sought to vindicate certain immovable property of which the defendant is in possession. The facts as found by the District Judge or admitted by the parties are shortly these. The property originally belonged to a widow named Christina Rodrigo, who acquired it by purchase in 1870. She had an only child, Johanna, married in 1850 to one Don Juan. In 1888 Christina died, having previously mortgaged the property for Rs. 1,100. At this time Johanna was living with one Carolis Silva as his wife, having many years before separated from her husband Don Juan, who was also living with another woman. Shortly after Christina's death, Johanna and Carolis Silva, as husband and wife, jointly sold and conveyed the property to Celestina Hamine for Rs. 2,400, and the mortgage was paid off out of the purchase money. In 1891 Johanna died intestate, and

1896. *Oct. 4 and Nov. 15.*

BONSER, C.J.

the plaintiff is her son and heir, and also her legal personal representative. On 30th September, 1893, Celestina sold and conveyed the property to one Ibrahim Ahamat for Rs. 4,500, who again in December of the same year sold and conveyed it to the defendant for Rs. 6,000. In 1894 Don Juan sold his undivided share of the property to which he was entitled as Johanna's husband to the plaintiff. The plaintiff therefore claims one moiety through Johanna and the other through Don Juan. The defendant by his answer denied that Don Juan and Johanna were ever married, and alleged that the conveyance to Celestina Hamine was therefore valid. In the alternative, if the marriage be proved, he alleged that Don Juan maliciously deserted Johanna and lived apart from her for twenty-five years preceding her death in 1891, and that thereby Johanna became lawfully entitled to sell and convey the property. He further alleged that Celestina Hamine, Ibrahim Ahamat, and himself had effected necessary and useful improvements on the property, whereby it had increased in value to the extent of Rs. 2,000, and asked for a declaration that he was entitled to retain the property until payment by the plaintiff to him of Rs. 1,100, the amount of the mortgage, and Rs. 2,000 the value of the improvements.

Mr. J. Grenier, the Acting District Judge, gave judgment for the plaintiff and repelled the defendant's claim for retention as bad in law, even if the amount expended in improvements had been proved, which he held was not the case. He found that Don Juan and Johanna were lawfully married.

At the hearing of the appeal, the Attorney-General argued first that there was no proof of the marriage between Johanna and Don Juan. My brother Withers has gone so fully into this part of the case in his judgment that it is sufficient for me to say that I agree with what he has written. That, notwithstanding that both parties were living apart in adultery, they considered themselves, and were considered by their relations, to be man and wife is shown by the fact that in 1874, on the occasion of the marriage of their daughter Johanna, they executed a notarial agreement, in which they made a settlement on their daughter.

It was then argued that Don Juan by his conduct must be taken to have emancipated his wife as it were, and have held her out to the world as being entitled to deal with any property she might inherit as though she were a *feme sole*, and that therefore either the conveyance was valid in law or he was estopped from denying its validity. This argument does not seem to have been urged in the Court below, for the District Judge makes no reference to it in his judgment. No authority was cited to support the proposition

1895.
Oct. 4 and Nov. 15.
BONSER, C.J.

that, when a husband and wife are living apart by mutual consent, the wife can validly alienate the property belonging to the marriage community; and I am of opinion that it is not law. Had, however, it been proved that Don Juan knew of the sale by his wife and raised no objection to its completion, I should have been prepared to hold that he was estopped from denying its validity. But not only is there no evidence of any such knowledge on his part, but there is no evidence that he knew that this property had been inherited by his wife. I am therefore of opinion that this contention cannot be maintained.

There is, however, an objection to the plaintiffs' claim as regards one moiety of the property, which appears to me to be a good one, although it was not expressly raised by the defence or urged on the appeal. The plaintiff claims one moiety as the heir and personal representative of Johanna. Now, Johanna and Don Juan being married in community, the property on Christina's death devolved on the community in equal shares, and on Johanna's death her moiety devolved on the plaintiff. As it would have been inequitable for Johanna to have repudiated her own sale and conveyance, so also it is inequitable for her heir and representative to do so. He is bound to make good the act of his *auctor*, and the defendant may oppose to the claim the *exceptio rei venditæ et traditæ*. That this *exceptio* is available, as well to this defendant as to the original purchaser, Celestina, is clear from the following passage of Voet: *Utitur autem hac exceptione in primis quidem emtor, cui res vendita ac tradita fuit ..... ac præterea omnes illi, qui causam ab emtore habent, puta heredes ejus, ipsique etiam successores particulares, in quos ab eo res ex lucrativo vel oneroso titulo translata fuit; adeo ut emtor secundus autori seu venditori primo eam recte objecerit; licet emtor secundus adversus autorem primum ob rem sibi evictam agere nequeat, nisi actiones contra eum ab emtore primo cessæ sint; legibus scilicet facilius exceptionem atque retentionem quam actionem indulgentibus* (*XXI. 3, 4*). And that it is available not only against Johanna herself, but also against her successor, the plaintiff, appears from the following passage from the same author: *Opponitur hæc exceptio non tantum venditori primo, sed et omnibus illis, qui ab eo causam habentes evincere rem emtori primo annituntur quales sunt, quibus venditor jam dominus factus eandem rem rursus titulo sive oneroso sive lucrativo concessit. Sed et heredi venditoris recte opponitur sive defunctus ipse, dum adhuc superstes erat, dominium adeptus sit, et ex defuncti capite experiri heres cupiat, sive heres ipse rei per defunctum venditæ*

1895. Oct. 4 and Nov. 15. BONSER, C.J.

dominus fuerit, ut tamen posteriore casu non ultra repelli possit heres rem suam vindicans quam pro qua parte venditori successit (*XXI. 3, 3*). For although the case put by Voet is one where the deceased had sold property which at the time belonged to the person who afterwards became his heir, yet the principle that the heir is bound by the act of his *auctor* and is bound to make it good, or as Perezius Prælectiones, in *Cod. 8, 45, 2*, expresses it, *cogitur præstare factum defuncti*, to the extent of assets descended, even though it be his own property that was sold, will, *a fortiori*, apply to the case where his only title to the property is derived from the seller. I hold, therefore, that the plaintiff is estopped from claiming that moiety of the property which he derived from his mother.

With regard to the other moiety, the case is different, but whether or not he would be liable to make good the sale of this moiety to the extent of the assets descended it is unnecessary now to decide, for it does not appear that any assets did descend.

With regard to the mortgage, I am of opinion that it should be treated as a *utilis impensa*. The property came into the community burdened with the mortgage. It was paid off out of Celestina Hamine's purchase money, and that payment improved the property just as much as if the money had been laid out in material additions to the property. The question then arises, Has the subsequent purchaser a *jus retentionis* in respect of *impensæ utiles* made by his vendor? Although I can find no direct authority in the Roman-Dutch writers on this point, it would seem to be equitable that should be so, and the passage which I have cited from Voet (*XXI. 3, 4*) favours this view, as also does the following: *Nec dubium, quin illi, quibus jus retentionis a lege vel consuetudine datum est, id ipsum tum ad heredes suos tum ad successores particulares quibus vendiderunt, donarunt, legarunt, aut aliter cesserunt mercedis exigendæ sumtuum ve recuperandorum jus, transmittant* (*Voet, XVI. 2, 20*). I consider that where a possessor, who has made improvements on a land believing it to be his own, sells and conveys that land with the improvements to another, he must be taken to have sold with the land the right to the improvements, and with them the right of defending his possession of them by every means which was available to himself, including the *jus retentionis*; and this appears to have been the opinion of that eminent jurist Paulus, *Dig. X. 3, 14*. See also *Cod. 8, 45, 28: Emtori etiam venditoris jura prodesse non ambigitur. Si igitur vobis propter rei proprietatem mota fuerit quæstio, tam propriis, quam venditoris defensionibus uti poteritis.* The question as to the amount expended as *impensæ*

utiles does not appear to have been sufficiently discussed in the Court below, owing probably to the view taken by the Acting District Judge that the defendant was not entitled to any *jus retentionis* in respect of them.

The rules as to these *impensæ* are correctly summarized by Judge Berwick in his judgment in 62,563, District Court, Colombo, as follows : "The rules as to the extent to which *impensæ utiles* "can be recovered from the owner are given in *Voet, VI. 1, 36,* "*37, and 38,* and may be abbreviated as follows : (1) When the "outlay has exceeded the permanent advantage to the property, the "owner is only liable to the extent to which the property has really "been rendered more valuable by them, (2) and not even to that "amount, if the outlay has been very much greater than the owner "would himself have made ; in which case, it is left for the judge "to determine on a consideration of all the circumstances and "persons how much should be recovered. (3) If at the time of "the suit the improved value of the property caused by the expen- "diture exceeds the amount so laid out, still only the sum actually "expended can be recovered from the owner. (4) When a "claim is made for compensation, an account has to be taken of the "mesne profits received ; and only so much of the expenditure, "whether made on the production of the fruits or on the property "itself, as exceeds the amount of these profits or *fructus* can be "allowed, subject, however, to the preceding rules. (5) And in "taking this account fruits which have been consumed as well as "those which are still extant must be set off against the clause for "expenditure. The fruits of the expenditure itself however— "*fructus ex ipsa melioratione percepti*—are to be excluded from "the accounting and not to be set off against the claim."

Unless the parties can agree to a sum—which, if they are well advised they will do—the case must go back to the District Court in order that the amount of *impensæ utiles* made by the defendant and his predecessors in title, Celestina Hamine and Ibrahim Ahamat, may be ascertained, in accordance with the foregoing rules, the mortgage being included in the category ; and it must be remembered that after the date of the *litis contestatio*, or filing of the answer, the defendant cannot be regarded as a *bonâ fide* possessor of the plaintiff's moiety ; and he must therefore account for the profits that he might have received as well as those which he actually received.

The order will be that the decree be varied by directing that the plaintiff do recover from the defendant one undivided moiety of the immovable property claimed in this action, with a declaration that the defendant is entitled to retain the same until

1895.
Oct. 4 and Nov. 15.
WITHERS, J.

the plaintiff pays to him such sum as may be ascertained to be due for *impensæ utiles* in respect of such moiety. As to the costs, the plaintiff will retain the decree for the costs of the action, but the defendant will have the costs of the appeal. The subsequent costs will be dealt with by the District Court.

WITHERS, J.—

The subject-matter of this action is a small piece of house property abutting on Hulftsdorp street, Colombo.

The plaintiff seeks to vindicate this from the defendant, who is in *bonâ fide* possession of it and claims to be proprietor.

The plaintiff claims in a three-fold capacity, namely, (1) and (2) as the heir and administrator of the estate of one Johanna *alias* Johanna Silva, deceased, and (3) as purchaser from one Don Juan *alias* Harmanis Appu, husband of the said Johanna.

According to the plaintiff, this property formed part of the common estate of the said Harmanis and Johanna, which the latter brought into the community about October, 1888, on the death of her mother, one Christina Rodrigo, to the estate of whom dying intestate he succeeded as the sole next of kin.

The last mentioned fact is not contested. Johanna's marriage with Harmanis is disputed by the defendant, and at the trial this issue was tried and determined in the plaintiff's favour. That issue, it seems to me, was well decided.

A *primâ facie* case of a legal marriage by a Christian minister in a consecrated building between Johanna and Harmanis about the year 1850 is clearly made out by the testimony of Paulis and Silva, who witnessed its solemnization. The governing Ordinance at that time for marriages solemnized by a minister of the Christian religion was the Ordinance No. 6 of 1847. The 4th section of that Ordinance came into operation when Her Majesty's confirmation of the Ordinance was notified in the *Government Gazette* of December 8, 1849.

A marriage duly solemnized as the one in question must be taken to be good and valid in law.

The 4th section referred to required that, immediately after the solemnization of a marriage according to its provisions, an entry thereof should be made by the officiating minister in a book to be kept for that purpose, in such form and material as the Governor, with the advice of the Executive Council, might prescribe, &c.

I can find nothing in the Ordinance, assuming that the whole of its provisions had come into operation in the district where this marriage was solemnized, which is very doubtful, providing that the marriage solemnized by a minister of the Christian

religion should be null and void for want of registration. The 6th section of the Ordinance, which nullifies to a certain extent unregistered marriages, does not apply to marriages solemnized by a minister of religion under the provisions of the 4th section.

The attempt to prove later marriages, by Harmanis with another woman and by Johanna with another man, did not destroy the *primâ facie* case of a legal marriage between Harmanis and Johanna. If they were contracted they were bigamous, but, in my opinion, the evidence falls short of proving a later marriage contract by either of these parties.

Then two points were made by the Attorney-General on the assumption of a legal marriage between Harmanis and Johanna. He argued, in the first place, that the facts disclosed such a public abandonment of his wife by Harmanis as amounted to a complete surrender of all control over her person and property. She was virtually emancipated, so to speak, and left free to dispose of her person and property as she pleased.

There would be considerable force in this contention if this view of the case was warranted by the facts, but it is not, in my opinion. Whatever the reason of the spouses for not cohabiting together permanently after their marriage, it is in evidence that the husband used frequently to visit his wife after her return to Colombo, and that as late as 1874 the husband and wife joined in an act of dowry to their daughter Juliana, and that Harmanis, Johanna, and her mother Christina were present at the marriage of Juliana that year.

The second point was that Harmanis acquiesced in his wife's disposal of the house property, and that therefore he and his privy in estate cannot now be heard to say that Johanna had no right to dispose of the property. That argument would have much to recommend it, if there was evidence that Harmanis was present and cognizant of the disposition and acquiesced in it tacitly or otherwise. But this has not been proved. This disposes then of the naked title in the premises.

The next contention for the defendant was that he was entitled to retain possession of the premises until he had received compensation from the plaintiff for necessary and useful expenses effected on the premises. He had not incurred this expense himself, but he had paid for it in the purchase money and had received possession of the premises from his vendor.

Does this *jus retinendi* pass in the sale from one *bonâ fide* possessor to the other without express mention, or does it require a special cession? In his chapter *De Com. XVI. tit. 2, 20*, Voet seems to say that it does pass in the sale, and the authorities to

1895. *Oct. 4 and Nov. 15.*

WITHERS, J.

which he refers clearly say so. (See *Dig. de Com. disivando, lib. X., tit. 3, 14, 1.*)

There remains the question, Can the plaintiff, who represents his mother Johanna, recover at all the moiety he derives from his mother as her sole next of kin, which she sold for value to Celestina, and Celestina sold for value to Ahamat, and Ahamat sold for value to the defendant? These contracts of purchase and sale have been specially pleaded in the answer. Is not that a sufficient answer to the claim? If A sells for value and delivers to me a land which does not at the time belong to him; if he acquires it afterwards and brings an action to re-vindicate it, I may defeat him by saying, "But you sold and delivered it to me." I may plead "sale and delivery" with equal effect against the true proprietor who, inheriting the land from my vendor, seeks to re-vindicate it, and this plea is available to those to whom I sell for value and their assigns. (See *Dig. de XXI. tit. 3, 3.*)

I take the principle on which these pleas rest to be this. The title, whether acquired by the vendor in his lifetime or by the heir on the death of the vendor, relates back to the date of the sale for the benefit of the purchaser for value. Hence, in my opinion, the plaintiff's action for a moiety of the premises must be dismissed.

The representative of Johanna is in no better position than Johanna as to her moiety, and her action could have been well met by the exception of sale and delivery.

In my opinion, the money which went to relieve the property of the burden of the mortgage should be included within a necessary or useful expenditure. Hence the defendant is entitled to retain possession till the plaintiff, as the assign of Harmanis, has paid or secured the repayment of half the mortgage sum, Rs. 1,100. As such assign, plaintiff is further obliged to pay or secure half of the necessary and useful expenses incurred by the defendant's predecessors in possession other than the discharge of the mortgage. These have not been assessed by the District Judge; and the case should go back for this purpose. I concur in the order as to costs proposed by the Chief Justice.

I have had the advantage of reading Mr. Acting Justice Browne's judgment; and while I quite concur with him in regarding the sale of her moiety of the premises by Johanna as no sale at all, I only differ from him in thinking that Johanna could not be heard to say she had not sold it if she had survived her husband and endeavoured to vindicate her moiety from the defendant. If she could be met by a plea of sale and delivery, it seems to me her legal representative or heir-at-law can be likewise.

1895.
Oct. 4 and Nov. 15.
BROWNE, A.J

BROWNE, A.J.—I regret that I am unable to concur with my Lord the Chief Justice and my brother in limiting the rights of the plaintiff to recover only a moiety of the premises in claim. In proof of the first issue—the alleged marriage of Juan and Johanna on the 28th October, 1850—there were adduced the certificate A which asserts (if the translation be correct) that they were members of the Catholic Church, and that a certain minister solemnized their marriage "at the said church." The name of the church is not given in the extract: it may have been at the head of the page or volume of which the extract is a part. But the deficiency is supplemented by the oral proof, which not only showed that the place was the Roman Catholic Church of Peliyagoda, but sufficiently proved the ceremony to have been a Christian one. Had it not been a marriage to which the provisions of Ordinance No. 6 of 1847 was applicable, but (as the learned Attorney-General contended by the want of the Proclamation, which section 5 thereof required) one the validity of which was to be determined by the provisions of Regulation No. 9 of 1822, any defect in the legality of it for want of registration required by the Regulation was cured by the 3rd section of Ordinance No. 13 of 1863, so long as no proof were given of any subsequent legal marriage of either party with another. Such proof has not been offered here of a legal marriage with Carolis, nor has it been contended that the proviso to that section to protect rights acquired through the invalidity of the first marriage had application here. I however agree with my brother that the provisions of Ordinance No. 6 of 1847 are those by which the rights of the marriage should be proved or challenged, since its applicability to Christian marriages was not made contingent upon proclamation of it, but specially exempted therefrom. And while that Ordinance specified what should be the best proof of any marriage solemnized by a registrar, it did not so prescribe in regard to Christian marriages, so that want of proof of registration is not fatal. Even if it were, however, section 3 of Ordinance No. 13 of 1863 would have the same curative effect.

I therefore agree that the first contention for the appellant cannot be sustained. As to the second and third contentions, I know of no authority for the position that the wife ever could become emancipated from the power of her husband, even though she might have left him for his fault or with his will, and further might have herself lived in adultery. By divorce alone could she in his lifetime have been so freed from his authority, and all her contractual acts thereafter can be of no validity against him when he survived her, save such as she has entered into with his consent

1895. *Oct. 4 and Nov. 15.* BROWNE, A.J.

and authority, or those when he was *præsens atque sciens*, of which here no proof has been given. I fail, however, to see how his *fictus consensus* by mere presence and knowledge if proved could so supplement her notarial acts as to pass title by her deed. Before entering into the consideration of the ulterior questions, I would wish to have it remembered—what the judgment of Mr. Berwick, D.J., quoted by my Lord the Chief Justice, indicates to me should be borne in mind—that the *bonâ fide* possessor may on eviction have his claim for compensation partly against his evictor and partly against his vendor; and that even though plaintiff here is as to a moiety the administrator of a vendor, defendant's predecessor in title, Johanna, was only one of two such vendors, and that it might be possible that a Court before whom Celestina's ultimate action might be tried might feel itself justified in giving judgment against Carolis solely and not against her, so that plaintiff ought not now to be regarded as aught save an evictor.

In the absence of all authority from her husband, I feel it incumbent upon me to hold that the alleged sale and conveyance by Johanna to Celestina fell under the general rule. Voet (*XXIII. 2, 42*): *Ex hujusmodi contractibus neque maritus neque uxor stante aut soluto matrimonio, conveniri queant sed contractus ipso jure nullus fit.* To this rule there were possibly exceptions in two instances,—when the contract of the wife was regarded as *in suspenso usque ad mortem viri quo tempore mulier jam sui juris effecta possit ex contractu a se inito ..... quia res pervenerit ad eum casum a quo incipere potuerat* (*Sande Dec. Fris. II. 4, 2*), and when both the *maritus et uxor locupletiores facti sunt* (*Voet, ibid, 44*) by the result of her transaction. This case is not within either exception. The husband survived her and may be even still alive. She never became *sui juris* to enable the results consequent thereon to follow; and I find no authority that in a case of this kind, on her death first occurring, her half of the community or her heir had that which till then was ineffective made effective against them. And when her paramour and she pocketed the Rs. 1,300, net surplus of the price Celestina paid after thereout paying the Rs. 1,100 mortgage, the husband certainly did not become *locupletior* thereby. I do not indeed see that the mere realization of the net cash value of any of the property of the matrimonial community could be said to make the spouses *locupletiores*. Even if it could be so regarded in some cases, has the husband here in truth been at all enriched? When now seven years after his wife's alleged sale of the property he seeks to reclaim it, he can do so (as we are now holding) only after repaying the money

disbursed in discharge of the mortgage and the various *impensæ* allowable against heirs, or may have to wait patiently for some years to come till the rents and profits recoup these to the *bonâ fide* possessor. Even though his interest on the former of these is reduced by 3 per cent., I cannot regard it to be proved that he has been enriched. I regret therefore that I cannot agree with my Lord the Chief Justice and my brother in holding either that the wife ever sold and delivered this property or so entered into any legal transaction, and that the exceptions thereof could be allowable to her purchaser and the plaintiff, thereby limited to a right to reclaim only the husband's half of the property after the death of the wife. I consider he should be allowed to vindicate the entirety on payment of all these charges. My regret is lessened by the consideration that such a ruling would be in maintenance of the original marital power, and that if the successive purchasers are driven to reclaim their moneys from their respective vendors, Carolis the paramour and other representatives, and not the plaintiff in his capacity of the wife's administrator, may be the one who will have to repay Rs. 2,400.

Defendant limited his further defence beyond title to this averment that Celestina Hamine, and thereafter his successors in title, including himself, had effected necessary and useful improvements and repairs [he claims no *impensæ voluptuariæ*] on the premises by erecting new buildings and otherwise, and that thereby the premises have been increased in value to the extent of Rs. 2,000. He filed no accounts particularizing the same, nor stating by whom they were effected, nor showing what rents and fruits therefrom came to him for which he might possibly be held liable to account.

The only proof offered on the subject is that Celestina Hamine, as to repairs, renovated the roof, two windows, and a door when they were rotten, and as to improvements, built two fresh walls, and pulling down one house built an upstair house in its stead.

These works cost Rs. 2,200, and the rent rose from Rs. 20 to Rs. 55 a month. The augmentation of rent would thus have repaid by this time the principal outlaid. The evidence thus shows that defendant himself expended nothing, and his claim to what would in effect be an hypothecary decree for retention till he had recouped outlay out of rents, rests solely upon the facts of Celestina's outlay.

While so far as I can see from Voet (*XVIII. VI. 9 and XXI. II. 17*), the right to sue (as in *3 S. C. C. 30*) for the value of improvements to land would have to be expressly ceded to a purchaser, I agree that the *jus retentionis* and the defence

1895. *Oct. 4 and Nov. 15.*

BROWNE, A.J.

thereof here pleaded passes under the authorities cited by my brother without such cession. But the question arises in respect of what items and their value will this right be allowed ?

In his judgment Mr. Berwick, D.J., pointed out as the result of a comparison of Voet (*V. III. 21 and VI. I. 36*), how much less both the correlative rights of retention and liabilities for past profits recovered are when property is recovered *rei vindicatione* from a *bonâ fide* possession than in the case of the recovery of the inheritance. In the former case, such as here, the possessor accounting only for fruits not yet consumed has right in accounting to claim for all *impensæ necessariæ*. As to *impensæ utiles* in so far as they rendered the property more valuable, he may recover the amount thereof when they do not exceed the amount of the increased value : when they exceed the *utilitas* or *melioratio* found at the date of action he may even recover the excess, unless, in the opinion of the Judge, founded on personal and other considerations, the excess is too great or the true owner would not have incurred them, in which cases, as also in the case of *impensæ voluptuariæ*, he may remove whatever would be of use to himself as far as he can *sine rei detrimento*, or else receive payment of as much as it may be held the true owner would have spent.

Unless therefore the parties shall agree as my Lord has suggested, the action must be remitted, and the defendant should, in my opinion, file schedules of all works done, distinguishing them into these three classes, and of all profits received since action brought. Though defendant does not admit any outlay was for luxurious purposes, plaintiff might so classify some of it, and the Court would have to classify all the several moneys outlaid, and determine which the plaintiff must pay. He then could be given the option of paying such amount, and in default thereof the Court would declare the respective rights of retention, and (on its expiry) of removal of the still useful subjects of the past *utiles et voluptuaria* outlay which plaintiff does not require, and defendant may remove without injury to the property. I agree that the Rs. 1,100 and legal interest should be included among the *impensæ utiles*, and that the property should be regarded as still ameliorated thereby, so that the *jus retentionis* shall obtain in respect of it, especially in view of the favour in which this Court regarded such payments *1 Lor. 128 and 3 Lor. 235.*

I would, however, make the relief thus allowed and rights declared applicable to the whole of the plaintiff's claim and the whole of the defendant's outlay in cash that shall be allowed.

I would allow plaintiff's costs in the lower Court hitherto incurred, and defendant have costs of this appeal.

In the Matter of HAYMAN THORNHILL, Insolvent.

D. C., Colombo, 1,822.

1895. *September 20.*

Appeal—Delay in forwarding appeal—Insolvency Ordinance—Civil Procedure Code, s. 438—Description of insolvent—Debt of petitioning creditor—Motion for annulment of adjudication of insolvency—Technical objections.

A District Judge has no right to delay the forwarding of a case in due course to the Supreme Court after the appeal has been perfected.

It is sufficient if a petitioning creditor's debt is proved in accordance with the form in the schedule to the Insolvency Ordinance.

The Civil Procedure Code does not affect proceedings under the Insolvency Ordinance, and an affidavit proving a debt in insolvency proceedings need not, therefore, be in accordance with section 438 of the Code, but may follow the form given in the schedule to the Ordinance.

In a petition to have a person declared insolvent it is not sufficient to state his name only, but his description and address should be given.

One of several partners of a firm having petitioned to have a person declared insolvent on the footing of a debt due to the firm, it was objected that the petition was irregular, inasmuch as the debt was not due to the petitioner only, and that he should have produced the power of attorney authorizing him to sign for the firm :

Held, that the objections were too technical to be given effect to, in the absence of some injustice suffered on the merits.

One partner of a firm may sign such petition for himself and on behalf of the others without a power of attorney from the latter.

THE facts of the case are set out in the following judgment.

Dornhorst appeared for the creditor appellant; *Bawa*, for insolvent respondent; *Chapman*, for petitioning creditor.

20th September, 1895. BONSER, C.J.—

This is an appeal by a creditor of a person who is described as Hayman Thornhill, of Colombo. Whether that person is male or female, or whether it has any occupation or business, does not appear.

The insolvent was adjudicated insolvent on the petition of one William Jenkins, who gives the vague address, Colombo. The appellant is a creditor, and he objected to the adjudication and moved that it be annulled. That application was refused, and he has appealed to this Court. The appeal was perfected on the 22nd July, but the papers were not transmitted to the Supreme Court until the 31st of August, and they were not received here till the 3rd of September, whereas they ought to have been sent on or soon after the 22nd of July.

This detention of the proceedings was quite irregular. The District Court has no right to take upon itself to delay an appeal.

1895. *September 20.*

BONSER, C.J.

That this was done intentionally appears from the fact that it is recorded that a motion was made on the 7th of August, 1895, by the proctor for the insolvent, that "the record be not forwarded "to the Supreme Court until after the 15th instant." The District Judge, instead of dismissing that motion with costs, allowed it to stand over for a few days. I mention this because I wish it to be understood that a District Judge has no right to delay appeals.

The objections taken to the jurisdiction were of a highly technical nature. The first was, as I understood it, that the petition was not the petition of the real creditor, but was only the petition of one of several joint creditors. The debt was not due to William Jenkins, but was due to him and his co-partners, who were trading under the firm of Cargill & Co. Strictly speaking, the petition ought to have been the petition of the three persons to whom the debt was due. But that objection is a purely technical one, and I do not think the Court is bound to give effect to it, unless some injustice has been done. It appears on the face of the petition that it was a debt due to the firm. Then it was said that the power of attorney ought to have been produced empowering Mr. Jenkins to sign the petition on behalf of his partners. But I do not see that that is necessary, for, in the form given in the schedule to the Ordinance (form B), there is a note which sets out "if the petition be by partners, alter the "form accordingly, and let it be signed by one on behalf of "himself and partners." Strictly speaking, either all three partners ought to have signed the petition, or it should have been signed by the one partner, William Jenkins, on behalf of himself and his two other partners; but that is a pure technicality which does not in any way affect the merits of the case.

Then it was said that there was no proper proof of the petitioning creditor's debt, but the proof given was in accordance with the form in the schedule, and was sufficient. Another objection was, that the affidavit verifying the petition does not state that it was signed, as well as sworn, before a Justice of the Peace as required by section 438 of the Civil Procedure Code, but we have held in a recent case that the Civil Procedure Code does not affect proceedings under the Insolvent Ordinance, and the form given in the Insolvent Ordinance does not require more than that the affidavit should be sworn before a Justice of the Peace Therefore that objection fails.

I think, therefore, there is no ground for setting aside this adjudication, and the appeal must be dismissed. At the same time I should point out that the petition appears to have been drawn

very carelessly. It is not sufficient merely to describe a person who is petitioned against as Ram Menika or John Smith of Colombo. The description and address of the person should be given so that creditors and other persons concerned may know that the person who is to be adjudicated insolvent is their debtor, and the person with whom they have had dealings, and in whose affairs they are interested. 1896. *September 20.*

The appeal will be dismissed, but there will be no costs.

WITHERS, J.—I agree.