KATHERINA *v.* JANDRIS.

C.R., Galle, 2,629.

1904.
February 16.

Land—Rights of soil owner and house builder—Seizure in execution—Prescription.

Where A built a house on a land owned in common with others, and then sold his share in the land to his co-owners but kept possession of the house till his death, and where B, a creditor of A, seized in execution of his judgment against A the house he had occupied, and in which his son and daughter-in-law were living,—

Held, that the house in question was the property of the soil owners; that he had only a right to compensation against them; that this right was not kept alive by his continuing to occupy the house; that the right to compensation was prescribed in three years after his alienation of his share of the land; and that B had nothing to seize in execution.

THE first defendant (Jandris), having a money judgment against the second defendant (Sarnelis), and Salo, the father of the second defendant, seized in execution of his judgment a house apart from its site as property belonging to Salo, because he had built it. Thereupon the plaintiff, the wife of Sarnelis, claimed the house as having been built by her previous deceased husband, Endoris, a brother of Sarnelis. The claim having been disallowed, the plaintiff brought this action against the writ-holder and the execution-debtors to have her own right declared.

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The Commissioner (Mr. G. A. Baumgartner) found that Salo, and not Endoris, had built the house. He held that this fact did not confer on Salo any right of property in the house, but only a right to compensation, because Salo had parted with his interest in the land itself twenty-four years ago; and that no saleable interest in the house devolved on Salo's son, the second defendant. The Commissioner refused to allow the first defendant execution against the fabric of the house. His judgment was as follows:—

"A house becomes the property of the owners of the soil on which it is built, and the builder's sole right is right to compensation (*De Silva v. Harmanis, 3 N. L. R. 160*). That being so, Salo's right to anything beyond compensation ceased twenty-four years ago, when he parted with his interest in the land itself.

"This right to compensation constituted a claim against the co-owners of the land, and should have been enforced against them many years ago, as it is a claim that becomes prescribed in three years under section 8 of Ordinance No. 22 of 1871, and is, in my opinion, not kept alive by the fact of the builder continuing to occupy the house. Such occupation cannot be construed as amounting to a promise by the owners of the land to pay the compensation (*5 S. C. C. 78*) or as payment of interest.

"I, therefore, hold that Salo's claim to compensation vanished before his death, and did not devolve on his son, the second defendant. If it did survive, I doubt whether such an unascertained claim could be the subject of seizure. It seems to me to fall in the same class as 'mere rights to sue for damages', which by section 218 (*a*) of the Civil Procedure Code are not liable to seizure under writ.

"Assuming that such a claim can be seized, the procedure for seizing it would be that under sections 229 and 230, not seizure of the house itself under section 237, the procedure adopted in this case. Notice would have to be served on the owners of the land against whom the claim to compensation is alleged to exist, and they would have to be dealt with under section 230.

"It is further to be noted that sections 241 to 247 do not apply to seizures under section 229, at least so it has been held in India (*Ind. L. R. 4 Bom. 323; Pereira's Inst., p. 337*).

"I dismiss the plaintiff's action. I refuse the first defendant any execution against the fabric of the said house".

The plaintiff appealed.

The case was argued on 15th February, 1904.

Samarawikrama, for first defendant, appellant.

No appearance for respondent.

Cur. adv. vult.

16th February, 1904. MONCREIFF, J.—

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I think the Commissioner is right in this case. The claimant failed to establish one part of her contention; her husband Endoris had nothing to do with the building of, and did not live in, the house. He held also that Sarnelis, brother of Endoris, and present husband of claimant, had no claim to the house. He found that the father of the two men built this house and lived in it for a considerable time, but that the house belonged to the soil owners. The claimant and her son were entitled to $\frac{1}{16}$ of the land. The Commissioner refused to allow the claim, but he also refused to allow the defendant to levy execution on the house. Inasmuch as the Commissioner found that the judgment-debtor had no interest in this house, and that the claimant was entitled to $\frac{1}{16}$ as being a co-owner of the soil, I think, looking at the terms of sections 244 to 245 of the Civil Procedure Code, that there is no alternative to what the Commissioner did.