1932 *Present :* **Garvin S.P.J. and Akbar J.**

DIAS *et al. v.* SILVA.

*57—D. C. Kalutara, 15,156.*

*Contribution among co-debtors—Discharge of mortgage by one*—Impensa utiles—*No real charge on property—Remedy of co-debtor.*

Where one of the several co-debtors of a debt, secured by a mortgage, has discharged the debt, the property does not become burdened with a real charge in favour of the debtor who has paid the debt, for a proportionate share of the contribution due from the others.

APPEAL from a judgment of the District Judge of Kalutara.

*N. E. Weerasooria* (with him *Amaresekere*), for appellant.

*H. V. Perera* (with him *Rajapakse*), for respondent.

March 10, 1932. GARVIN S.P.J.—

The facts material to this appeal are these. One Clementina de Silva was the owner of four distinct allotments of land. She died intestate leaving her surviving her husband Cornelis and three children, Harriet, Vincent, and Grace. Harriet and Vincent joined their father Cornelis in

executing a conveyance of all their interests in favour of Grace in two of these allotments. Prior to the execution of this conveyance two mortgages had been executed in the year 1919; by the first three of these allotments and by the second the fourth allotment were charged with mortgages in favour of one Mr. Seneviratne and a Mrs. de Livera respectively. Grace died in July, 1920, and her interests, in the two allotments, which belonged exclusively to her by reason of the transfer earlier referred to, devolved as to a half on her surviving husband the first defendant, and as to the remaining half on her other intestate heirs. On May 7, 1923, a hypothecary decree was entered in favour of Seneviratne in respect of the mortgage in his favour. To satisfy this decree and the outstanding debt on the mortgage of Mrs. de Livera, a further mortgage was executed on August 21, 1920, over all the four allotments of land, hereinbefore referred to, by Cornelis Vincent, and Harriet in favour of one Perera and the same parties on August 9, 1923, executed a second mortgage charging the same premises also in favour of Perera. Both these bonds were put in suit. Decree was obtained by Perera and the sale of the premises was fixed when the plaintiff Harriet paid the whole debt and thereby satisfied the hypothecary decree entered in the case.

The present action was brought by Harriet against the first defendant and also as against the second defendant, who, subsequent to the payment above referred to, purchased from first defendant a half share of the two allotments which once belonged to Grace. The learned District Judge gave judgment for the plaintiff as against the first defendant but he has dismissed the action so far as it related to second defendant.

Upon this appeal it was argued that the second defendant was liable to pay the debt, and further that the premises purchased by him from the first defendant were charged with a liability to pay a proportionate part of the amount which the plaintiff had expended in the payment and discharge of the hypothecary decree which bound the premises.

It is, of course, sound law that one of several co-debtors may pay a debt jointly due by them and obtained cession of action from the creditor. The action on these bonds proceeded to the stage of judgment and decree and the effect of the payment made by the plaintiff was to discharge the liabilities arising from the judgment. Nevertheless, the position of the plaintiff is at least as good as that of one of a number of debtors who has paid without demanding a cession of action. Such a person is not debarred from claiming in his own right from each of his co-debtors a share of the debt for which each is liable. (See *Sande's Cession of Action*; *Sande's translations pp. 123 and 124*). On this basis alone plaintiff's claim as against the first defendant for contribution is well founded, but this principle is insufficient to entitle the plaintiff to claim contribution from the second defendant, who, as I have already said, purchased the premises after the burden created by the mortgages referred to and the decree entered thereon had been removed by payment and discharge. Counsel for the appellants has therefore been compelled to seek another basis for his claim. He contends that the discharge of the mortgage decree was an improvement and that Harriet, who paid the money, which went in discharge of it is an improver and as such entitled to the right to retain possession of the premises until she is compensated.

In *Nicholas de Silva v. Shaik Ali*[1] it was held that money which a *bona fide* possessor pays in discharge of a mortgage which encumbered the property when it came into his hands is *utilis impensa,* and it is upon the authority of this judgment that the contention is based that such a payment is *utilis impensa* and that Harriet was entitled to the *jus retentionis.* But the question whether the discharge of a mortgage is *utilis impensa* is not altogether free from doubt, and there are cases in which a doubt has been expressed as to whether the improvements contemplated in the branch of the Roman-Dutch law relating to compensation for improvements include anything more than actual material improvements to the land or premises in respect of which claim is made; but however that may be *Nicholas de Silva v. Shaik Ali* (*supra*) is not an authority for the proposition that a claim for improvement made by him is maintainable by one co-owner as against a purchaser from another co-owner.

The current of authority appears to be definitely in the opposite direction. There are several judgments, of which *Silva v. Silva*[2] is one, in which the view has been expressed that the full rights of an improving co-owner could only be asserted in a properly constituted partition action. So also is the case of *Wickramaratne v. Don Bastian*[3] and the judgment of Ennis J. in *Wijesuriya v. Wijesuriya*[4] "I am quite unable" said the Judge "to see how one co-owner can, by making improvements without the consent of his co-owners, claim to be compensated therefore unless there is a partition action in which everybody is to be considered".

There are obvious difficulties in the way of treating a co-owner, who happens to make improvements on the common estate which may perhaps extend beyond the fractional share to which he may be entitled, as a person who is an improver within the meaning of the Roman-Dutch law for compensation for improvements. It is of course possible to conceive of cases where an improving co-owner by reason of consent or acquiescence on the part of his fellow co-owners may be brought into such a relationship with his other co-owners as to give him a right to some measure of compensation. This, however, is not such a case nor does it appear to be a case in which improvements have been made such as are contemplated by section 2 of the Partition Ordinance, for those manifestly are material improvements to the land which it is sought to partition. Nor is this a proceeding under the Partition Ordinance. This is merely a case in which one of a number of co-debtors of a debt secured by a mortgagee has paid and discharged the debt and that as a consequence the premises under mortgage have been released from that burden. Her remedy is against her co-debtors. She has obtained a judgment for the proportionate share of that debt payable by first defendant her co-owner.

I am aware of no principle on which it can be contended that the second defendant is under any liability or any joint liability with the first defendant to pay a share of the debt proportionate to the interest which he has acquired nor do I know upon what principle of law it can be held that the premises which were clearly free of the mortgage which the plaintiff paid off at the time of his purchase became burdened with a real

[1] *1 N. L. R. 288.*
[2] *15 N. L. R. 79.*
[3] *4 Bal. Notes of Cases 41.*
[4] *5 C. W. R. 146.*

charge in favour of the plaintiff for the proportionate share of the contribution which his predecessor in title the first defendant was under a liability to pay.

The appeal will stand dismissed with costs.

AKBAR J.—I agree.

*Appeal dismissed.*