

Present: De Sampayo J.

PETERSON v. FERNANDO.

125—C. R. Colombo, 48,607.

Improvement of house by one co-owner—Bona fide belief that he was sole owner—Jus retentionis—Partition action—Compensation.

Where a co-owner improves a house in his possession, under the mistaken impression that he is sole owner, he has no right of action against his co-owners, his only remedy being by way of retention of the property in his capacity as *bona fide* possessor, until a proportionate share of the expenditure has been refunded to him.

In the event of a partition action, the improving co-owner will have compensation allowed him in the scheme of partition.

THE facts are set out in the judgment.

Bartholomeusz, for plaintiff, appellant.

A. St. V. Jayewardene, for defendant, respondent.

Cur. adv. vult.

May 30, 1916. DE SAMPAYO J.—

The point for consideration on this appeal is whether the Commissioner is right in holding that the defendant is entitled to compensation for improvements and to *jus retentionis* pending payment thereof. The facts were not disputed, and the only question is one of law. The plaintiff has been found to be entitled to one-twelfth share of a certain house, the entirety of which has been possessed by the defendant on the footing of sole ownership. The defendant considerably improved and practically rebuilt the house, and the Commissioner finds that the plaintiff's vendors were well aware of the defendant's possession and acts of improvement. If the plaintiff was the owner of the entirety of the premises, there is no question that the defendant would have been entitled to the whole of the improvements and to *jus retentionis* in respect of it. But Mr. Bartholomeusz, for the plaintiff, contends that the defendant, being only a co-owner, is not entitled to the latter remedy in respect of the plaintiff's share of the house, and cites *Silva v. Silva*¹ in support of his contention. When that decision is examined, however, it will be found that it was a case of undisputed co-ownership, and the principle underlying the decision appears to be that a co-owner in such circumstances is not in the position of a *bona fide* possessor, who alone is entitled to *jus retentionis* in respect of improvements. In a case where co-ownership is not only admitted, but the party

¹ (1911) 15 N. L. R. 79.

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in possession in good faith claims to have been entitled to the entirety, I cannot see on what principle he can be said not to be a *bona fide* possessor of the share which the other party is found to be entitled in the ultimate contest for title. Mr. A. St. V. Jayewardene, for the defendant, has submitted authorities which are in point. *Voet 10, 3, 3 (Samson's Translation 389)*, after dealing with the case of a person who knows that there is another co-owner with him, proceeds to say that the position is different if he spent the money on improvements thinking that the property was his alone, and that, though he has no direct action to recover the amount of compensation, he has the right "to retain the property as if he were the *bona fide* possessor of another's property until the other's *pro rata* share of the expense is made good to him." *Maasdorp's Institutes, vol. II., p. 133*, shows that this passage of Voet is good even at the *present day*, for he there says: "Where a person has incurred expense with respect to property in his possession, under the mistaken impression that it is his sole property. Voet lays down that he will have no right of action against his co-proprietors, his only remedy being by way of retention of the property in his capacity as *bona fide* possessor, until a proportionate share of the expenditure has been refunded to him." It thus appears not only that he has the *ius retentionis*, but that it is his only remedy, except, of course, in the event of a partition action, in which case under our Ordinance the improving co-owner may have compensation allowed him in the scheme of partition.

I think the Commissioner's judgment is right. The appeal is dismissed, with costs.

Appeal dismissed.

