1948 *Present :* **Basnayake J.**

SOPIHAMY, Appellant, *and* DIAS, Respondent

S. C. 24—C. R. Galle 25,966

Co-owners—Building by co-owner on common property— Seizure by creditor— Not liable in execution.

A building erected by a co-owner on common property cannot be seized and sold in execution of a debt of the co-owner who erected the building.

APPEAL from a judgment of the Commissioner of Requests, Galle.

C. R. Gunaratne for the plaintiff appellant.

No appearance for the defendant respondent.

Cur. adv. vult.

[1] *(1871) Vanderstraaten 180 ; (1881) 4 S. C. C. 29.*
[2] *Voet, 24–2, de Divort n 17.*
Grotius Introduction 1–5–40 et seq., 3–21 last note.

April 19, 1948. BASNAYAKE J.—

On September 29, 1945, the defendant-respondent (hereinafter referred to as the defendant) seized in execution of writ in D. C. Galle Case No. L. 503 " an undivided ¼ of 1/7 of 1/14 parts of the soil and trees " on a land called Jambugahawatta " together with the entirety of the 7 cubits wattle walled house " thereon said to be the property of his judgment-debtor, one Carolis. On October 9, 1945, the plaintiff-appellant (hereinafter referred to as the plaintiff), who is Carolis's sister, claimed an undivided one-eighth share of the land and the house by virtue of a deed of transfer No. 2,418 dated January 4, 1933, attested by J. P. Jayawardena, Notary Public. She also claimed that she built the house. On February 18, 1946, the District Judge upheld the plaintiff's claim to three-sixteenths of the land, but he held that the house claimed by her belonged to her brother Carolis and dismissed her claim thereto. On February 25, 1946, she instituted this action under section 247 of the Civil Procedure Code to establish the right which she claims to the house. The defendant seems to accept the finding of the court in the inquiry into the claim to the seized property and has not instituted an action under section 247 in respect of the shares in the land declared to be exempt from seizure.

The learned Commissioner of Requests has formed the view that Carolis is a co-owner of the land and that he built the house. Carolis himself who is the best witness on the question of his rights to the land, has not given evidence in these proceedings, and the only evidence that he is a co-owner is the bare word of the defendant that Carolis is entitled to soil rights by maternal inheritance. As against this is his failure to assert this claim by an action under section 247. I am unable therefore to uphold the finding of the learned Commissioner that Carolis is a co-owner. It seems to me that he has misdirected himself on this question, for, he says, " Counsel for the plaintiff has raised the question that Carolis not being the soil owner cannot be entitled to the house even if he built it, his rights, if any, being a right to compensation in respect of the house against the owners of the land. As a bare proposition I can find no fault with his argument, for it is based on the maxim *quicquid aedificatur solo solo cedit ;* but where is the evidence before me that Carolis is not a soil owner ? The onus of proving this is on the person who asserts this, i.e., the plaintiff. There is no doubt that the plaintiff and his witness Hendrick Dias have said in their evidence that Carolis is not a soil owner. I cannot, however, accept that kind of evidence particularly because there is the evidence on the other side that Carolis is a soil owner."

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.[1] In order to ascertain on whom lies the burden of proof in this matter, one has only to examine the issue thereon which reads " Is Carolis entitled to any soil rights in this land ? " Clearly, the plaintiff cannot fail if no evidence at all were given on either side as to Carolis's interest in the land. She does not assert in her plaint that Carolis is a co-owner, nor does the

[1] *Section 102, Evidence Ordinance.*

defendant do so in his answer. As it is no part of the plaintiff's case tha Carolis is a co-owner, the burden of proof does not lie on her. The learned Commissioner is therefore wrong in holding that the plaintiff should have proved that Carolis is not a co-owner. Not only has the defendant failed to pursue the claim to the share of the property he caused to be seized but he has also failed to prove that Carolis is entitled to any other share. The plaintiff's claim that she built the house in question is supported by her evidence and that of Hendrick Dias. The defendant's evidence that Carolis built the house rests on his bare statement. No attempt has been made by him to support his claim with the evidence of Carolis himself who knows best whether he built the house or not. Even if Carolis built the house, as he has built it on land of which he is not even a co-owner, the defendant cannot seize and sell it in execution because the building is the property of the persons who own the soil.[1] The rights of a person who builds on another's land are thus stated by Grotius [2] :—

> " Again, if any one builds with his own timber or stone on another man's land, he loses his ownership in the materials, which thereupon go to the owner of the land, but the owner of the land is bound to make him compensation, if he built under the impression that the land belonged to himself, or even as usuary of the land, unless indeed the building was erected not for necessary or useful purposes, but merely for purposes of pleasure, in which case the owner of the land has the option of either retaining the building and giving compensation, or of allowing the person who built it to remove it. If, however, a person has built *mala fide*, he is not entitled to claim any but necessary expenses."

On the same question Van Der Keessel [3] says :—

> " CCXII. He who has built on another's land of which he was in possession *bona fide*, may by the Law of Holland, on losing possession, recover the *useful* expenses incurred by him, even by action.
>
> " CCXIV. Many authors maintain, contrary to the opinion of Grotius, who has followed the rule of the Civil Law, that a *mala fide* possessor may deduct the useful expenses also. Their opinion cannot, however, be admitted."

In the case of *De Silva v. Siyadoris et al.* [4], Lascelles C.J. stated :—

> " But the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners (*Silva v. Silva*, 6 N. L. R. 22), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under sections 2 and 5 of Ordinance No. 10 of 1863."

[1] *Samaranayake v. Mendoris et al., (1928) 30 N. L. R. 203 at 206.*
[2] *Grotius, The Introduction of Dutch Jurisprudence, p. 76 Maasdorp's Translation.*
[3] *Van Der Keessel Seleci Theses Lorenz's Translation, p. 73.*
[4] *(1911) 14 N. L. R. 268 at 270.*

The same opinion has been expressed in D. C. Tangalla, No. 1,540 S. C. M of April 2, 1917, and in the case of *Wijesuriya and others v. Wijesuriya and another* [1]. The foregoing statements of law lead to the conclusion that a building erected by a co-owner on common property cannot be seized and sold in execution of a debt of the co-owner who erected the building. It would seem therefore that even on the learned Commissioner's view of the facts the house which was seized in execution by the defendant cannot be sold in execution of the decree against Carolis. The judgment of the learned Commissioner must therefore be set aside.

The plaintiff's prayer is that she be declared entitled to the house in dispute and that it be declared exempt from seizure and sale in execution of the decree against Carolis in D. C. Galle, Case No. L. 503.

As the plaintiff is, on her own admission, not the sole owner of the land on which the house stands, I am not prepared to declare her entitled to the house. She is a co-owner who has built on common property and the house has acceded to the soil and become part of the common property. But the second part of her prayer is one that can be granted. I set aside the judgment of the learned Commissioner and declare the house in dispute as not liable to seizure in execution of the decree against Carolis in D. C. Galle, Case No. L. 503. The plaintiff is entitled to her costs in both Courts.

Judgment set aside.