UKKU *v.* BODIA.

1902.

August 25, and 28.

C. R., Panwila, 1,036.

Mortgage—Payment thereof by one of the heirs of the deceased mortgagor—Utilis impensa—Right of person paying off the mortgage to recover from his co-heirs their shares—Right of such person to remain in exclusive possession till such contribution is made.

A co-heir who has paid off in full the amount of a mortgage granted by his deceased parent has the right to recover from the co-heirs their respective shares of that amount as *utilis impensa*, but he cannot exclude his co-heirs from possessing the land till their quota is paid.

THE four plaintiffs in this case sued their elder brother, the defendant, for a declaration of title to an undivided four-fifths of certain lands, alleging that the lands belonged to their father, who died intestate in 1886, when the plaintiffs were minors. The defendant answered that the deceased intestate had mortgaged the lands mentioned to one Punchappu in 1877, and that the defendant had paid and settled that debt, and was holding possession of the lands till his brothers, the plaintiffs, paid to him the four-fifths of the amount of the mortgage bond.

The only issue tried was whether the defendant had a right to keep possession of four-fifths of the lands referred to.

The Commissioner, Mr. W. Dunuwille, held that defendant was not justified in excluding his brothers from their respective shares, and that, as regards the amount paid by him in settlement of the mortgage, he should sue the plaintiffs for the shares due by each.

Defendant appealed.

H. Jayawardene, for appellant.—As a co-owner, defendant was entitled to pay and settle his father's mortgage bond. He could not offer to the mortgagee his own share of the mortgage amount,

1902. August 25 and 28.

so he paid off the whole mortgage. It was needless for him to put the bond in suit against his brothers, because the payment of the mortgage has been held to be an improvement (*De Silva v. Sheik Ali, 1 N. L. R. 228*), and a person paying the mortgage is as much entitled to remain in possession as a person who has improved the land, until he has been reimbursed the money laid out by him (*ibid. p. 234; Voet, XVI. 2, 20*). The plaintiffs should not be enriched at the expense of the defendant. So long as they do not pay the amount due to the plaintiff, he would be justified in keeping possession of the lands.

Bawa, for plaintiffs, respondents.—The case cited does not apply. There the man in possession was under the *bonâ fide* belief that he was the owner of the land, and that being so, the Court held he should be paid the value of the improvements effected by him. In the present case, the defendant knew that he was not the owner of four-fifths of the land. His payment therefore does not give him any *jus retentionis*. He sets up a right which the mortgagee himself had not, because the bond shows that the mortgagee did not hold possession of the lands on account of interest. Even if the mortgagee were a usufructuary mortgagee, he could not have resisted an action for ejectment by the plaintiffs. This is not a case of *utiles impensæ*, for such expenses are recoverable only by a man in possession, by one who possesses *bonâ fide ut dominus*. The plaintiff had no such possession. If he was foolish enough to pay the whole amount of his father's debt without entering into an agreement with plaintiffs, he must take the risk himself. Plaintiffs do not want to enrich themselves at defendant's expense. It is open to the defendant to sue them for their share of the money, but he should not be allowed to keep the plaintiffs out of possession of the lands in question.

28th August, 1902. MONCREIFF, A.C.J.—

The plaintiffs in this case were four children of one Hawadia. The defendant was the eldest brother, being also a son of Hawadia. The five children on the death of their father inherited from him two lands, each child being entitled to one-fifth of the two lands. Hawadia had mortgaged the properties, and on his death the eldest brother, the defendant, paid off the mortgage, and having done that he took possession of the four-fifths belonging to his brothers and sisters. That happened in 1885. At the time some of the plaintiffs, if not all of them, were minors; there is no question of prescriptive possession in the case. The defendant refusing to surrender the four-fifths to the plaintiffs

unless they paid him their shares of the money with which the mortgage bond was paid off, this action was brought for a declaration of title to four-fifths of the land and damages. The defendant says that he is in the position of a person who is in *bonâ fide* possession of the land, and has done *utiles impensæ* upon it; that he is therefore entitled to retain the land until he has received compensation for the improvements he has made. *Utilis impensa* is any improvement or any benefit done to the land which enhances its selling value, and it has been expressly held by this Court in *De Silva v. Sheik Ali* (*3 N. L. R. 234*) that the benefit to property arising from the redemption of a mortgage bond, which frees it from the encumbrance, is *utilis impensa*. The paying off of the mortgage being *utilis impensa*, the defendant is undoubtedly entitled to call upon the co-owners to defray their share of the expenses to which he has been put. But that is not all the defendant claims. He claims the right, having paid off the mortgage bond, to take possession of the shares of his co-owners until he has recovered the amount due to him from them in respect of the mortgage. He seems to think that he is in the position of a person who, while in *bonâ fide* possession, has done *utiles impensæ* on the land. It was objected that he was not in possession when he paid off the mortgage bond. It was, however, urged for him that he was in possession, because a co-owner cannot be tied down to any separate part of the land. He is the co-owner of all. I think, however, that, while that is true, he is only co-owner to the extent of one-fifth. His ownership may extend over the whole, but his possession and his rights are the possession and enjoyment of one-fifth of the whole. I think, therefore, that he cannot properly be said to have been in possession of the four-fifths of the property of the plaintiffs at the time he paid off the mortgage bond.

For these reasons I think that the conclusion to which the Commissioner came is right. As for damages, that is a matter which can be settled when the question of adjustment of the claims and liabilities of the plaintiff is brought up for determination in an appropriate proceeding.