1906. *April* 12.

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

THE GENERAL CEYLON TEA ESTATES Co., LTD. *v.* PULLE.

D. C., Kandy, 16,458.

Mala fide possessor—Compensation—Impensæ utiles—Impensæ necessariæ—Jus retentionis—Roman-Dutch Law.

A *mala fide* possessor is not entitled under the Roman-Dutch law, as administered in Ceylon, to compensation for *impensæ utiles*; he is only entitled to *impensæ necessariæ*.

Possession is *bona fide* when the possessor entertains any probable or apparent right of property to the thing possessed; possession is *mala fide* when he does not entertain the same.

WOOD RENTON J.—The Courts ought to scan jealously the evidence of *mala fide* possession, and to insist that the *conscientia rei alienæ* should be clearly proved.

THE plaintiffs claimed title to a certain plot of land. The defendant denied the title of the plaintiff company, and in the alternative claimed Rs. 500 as compensation for valuable improvements made by him. The District Judge (J. H. de Saram, Esq.) decided in favour of the plaintiffs, both on the question of title and on the

(1) (1905) 8 *N. L. R.* 223.

question of compensation for improvements. His judgment on the latter point was as follows:—

" The last issue is as to compensation claimed by the defendant. Mr. Vanderwall argued that the defendant being a *mala fide* possessor is not entitled to compensation.

" The defendant was warned against planting the land till the question of title is settled. He elected to plant notwithstanding that warning. In the view I take he knew the land does not belong to him, and that he had no right to plant it. Pereira, Acting Puisne Justice, said in an action of this Court No. 16,147 (1): 'A *mala fide* possessor is one who possesses well knowing that he has no right to do so, inasmuch as the property possessed belongs to another, and it would be unreasonable to allow him to force on the true owner improvements which, very useful though they be, are effected according to his own taste or within his fancy, and may be such as the true owner himself would never have cared to effect.'

" The defendant is a *mala fide* possessor, and cannot therefore compel the plaintiffs to pay him compensation. The plaintiffs' property is a tea estate, but I understand they are unwilling to take over the plantation made by the defendant and pay him compensation.

" The Roman-Dutch Law (3 Burge 33) and the Kandyan Law (Armour, page 218) are to the effect that a person in the position of the defendant is permitted to take away such improvements as can be removed without detriment to the land. He may therefore remove it.

" When the issue as to compensation was framed it was understood the plaintiffs might prove the damages they sustained by the defendant's unlawful act in taking possession, and that if they are held liable to pay compensation the damages sustained by them be deducted from the amount they have to pay. In the circumstances, as I hold the defendant not entitled to compensation, I have to award plaintiff's damages. In assessing these I go by the Ratemahatmaya's evidence, as to the quantity of firewood defendant took from this land. I put it down at 100 yards, which according to Mr. Tyler was worth Rs. 2.50 a yard.

" I give the plaintiffs judgment for the land in question, viz., plot A 6 acres and 16 perches in extent, as shown on plan B with Rs. 250 as damages and costs. The defendant is to be permitted to remove the tea planted by him within one month from this date.

(1) 2 *Balasingham* 149.

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In the event of his failing to do so, the Fiscal will be directed to remove it, the costs incurred by him to be paid by the defendant."

The defendant appealed.

Dornhorst, K.C., for defendant, appellant.

Van Langenberg, A. S.-G., for plaintiffs, respondents.

Cur. adv. vult.

12th April, 1906. LASCELLES A.C.J.—

The question for determination is whether the *mala fide* possessor of land is entitled to compensation for useful outlay.

We are also asked to review the finding of the Court below that the appellant was in fact a *mala fide* possessor. On this latter point I will only say that after a careful perusal of the evidence I am not prepared to say that the experienced Judge who tried this case has come to a wrong conclusion.

With regard to the question of law, the rule of the Civil Law is that the possessor of another property, whether *bona fide* or *mala fide*, is entitled to remain in possession until he is paid his necessary outlay on the property, but that a *bona fide* possessor alone is entitled to compensation for useful as distinguished from merely necessary outlay.

The Roman-Dutch Jurists are however divided in opinion on this point. Voet, Van Leeuwen, and others hold, on grounds of natural equity, that a *mala fide* possessor is on the same footing as regards useful outlay as a *bona fide* possessor. Grotius and Van der Keessel on the other hand hold that the *mala fide* possessor is only entitled to necessary expenses. The former view seems to have been adopted by the Courts in Cape Colony.

I do not think that a detailed examination of the opinions of the Roman-Dutch Jurists and of the reason on which they are based will assist us in determining the question under consideration.

The point is rather one of usage. Was the Roman-Dutch Law, which has been introduced into Ceylon and acted upon for upwards of two centuries, the law as expounded by Voet and Van Leeuwen or the law as expounded by Grotius and Van der Keessel?

The reported decisions are not numerous.

Mangi v. Sedera (1) is perhaps a case where a *mala fide* possessor was allowed compensation for *impensæ utiles*, but the facts are very briefly reported.

In the *Dodangala estate* case (2) the Supreme Court clearly recognized the view that a *bona fide* possessor was alone entitled to *impensæ utiles*.

(1) (1859) 3 *Lor.* 291. (2) (1873) 3 *Grenier* 45.

Tikri Banda v. Gamagedera (1) was a case of a *bona fide* possessor. Mr. Berwick seems to have adopted Voet's view, but the Supreme Court expressed no opinion.

N. de Silva. v. Shaik Ali (2) was also a case of a *bona fide* possessor. The judgment of Bonser C.J. contains nothing in favour of the contention that a *mala fide* possessor and a *bona fide* possessor have the same rights.

Muttiah v. Clements (3), and *Ukku v. Bodia* (4), are again cases of *bona fide* possession.

In *Endorissa v. Andorissa* (5), Moncreiff J., after granting an adjournment to enable the defendant's counsel to produce authority for his contention that a *mala fide* possessor was entitled to compensation for useful outlay, dismissed the appeal.

In *D. C., Kandy*, 16,147 (6) Pereira, Acting Justice, came to the conclusion that a *mala fide* possessor was not entitled to compensation for *impensæ utiles*. Layard C.J. expressed no opinion.

The inference which I draw from these authorities is that a *mala fide* possessor is not entitled under the Roman-Dutch Law, as hitherto understood and administered in Ceylon, to compensation for useful outlay.

Cases of the *mala fide* occupation of land are very common in Ceylon, and if it were the law that persons so occupying property are entitled to compensation for useful expenditure, it is incredible that no reported case can be cited in which this right has been distinctly laid down.

There can be no question that the considerations drawn from convenience are in favour of the view of the law which I have indicated as being in force in Ceylon. In this Colony at any rate it is not desirable to encourage persons to occupy property which they know is not their own.

I would dismiss the appeal with costs.

MIDDLETON J.—

This was an action to vindicate title to a piece of land forming part of a tea estate, the property of the General Ceylon Tea Estates Co., Ltd., and for damages and costs.

The defendant's case was that the land in question had been the lawful property of one A. de Silva, who being indebted to the defendant about 22 years ago, made it over to the defendant promising to give him a notarial transfer therefor thereafter, which he had not

(1) (1880) 3 *S. C. C.* 33.
(2) (1895) 1 *N. L. R.* 228.
(3) (1900) 4 *N. L. R.* 158.
(4) (1902) 6 *N. L. R.* 45.
(5) (1902) 6 *N. L. R.* 350.
(6) 2 *Balasingham* 149.

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done, and the defendant claimed a title by prescription to the said land. The defendant had planted the land in question, which was in extent about 6 acres and 16 perches, with tea.

The issues agreed upon were:—

(1) Whether the land in dispute is part of the land purchased by John Perera Ranasinghe from the Crown in the year 1858 ?

(2) Whether the defendant has acquired a title by prescription to the land in dispute ?

(3) What compensation, if any, is the defendant entitled to recover ?

The District Judge in giving judgment found on the first issue in the affirmative. On the second issue the District Judge declined to believe the evidence adduced by the defendant, and expressed himself satisfied that the defendant did not enter into possession until very recently.

As regards compensation the District Judge held on the authority of a dictum of Pereira A.P.J. in *D. C., Kandy*, 16,147 (1) that the defendant was a *mala fide* possessor and could not therefore compel the plaintiffs to pay him compensation for the tea he had planted on their land.

The Judge gave judgment for the plaintiffs for the land in question and Rs. 250 as damages for the firewood which the defendant had taken from the land, giving leave to the defendant to remove the tea planted by him within one month of the date of judgment; in the event of his failing to do so, the Fiscal to be directed to remove it, the costs incurred by him to be paid by the defendants.

Against this judgment the defendant appealed, and it was argued on his behalf—first, that he had not been proved to be a *mala fide* possessor; and second, that if he were a *mala fide* possessor he was still entitled under authorities quoted on the Roman-Dutch Law to be allowed *utiles impensæ* as well as *impensæ necessariæ*.

According to Grotius (section 1., Herbert's Trans. p. 71) " possession *bona fide* is when the possessor entertains any probable or apparent right of property to the thing possessed," and section 11, p. 71, " possession *mala fide* is when he does not entertain the same."

In the present case the District Judge has found in no uncertain terms that the defendant is a *mala fide* possessor, and in view of his opinion so definitely expressed upon the evidence by and on behalf of the defendant it is extremely difficult for this Court to say that the defendant was not, as the learned Judge finds him, a *mala fide* possessor.

(1) 2 *Balasingham* 149.

Van der Keessel (page 73, Thes. 214) says: "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 adding "their opinion cannot however be admitted." Van Leeuwen, as translated by Kotze (vol. I., p. 184) says: "But he, who possesses property *mala fide* well knowing it to belong to another can derive no profit therefrom, (*nemo enim ex suo scelere compendium habere debet*), and must not merely restore the property together with the fruits he has actually enjoyed, but also all that the owner might have derived from the property (the expenses being previously deducted)" and in note (A) the translator adds his opinion that "the statement of the author in the text is to be understood of *all expenses*, he having inserted the same within brackets to show that it differs from the laws of the Emperor Justinian cited by him immediately afterwards."

A note at page 180 of the same volume is to the following effect:— "As the *pœnæ legales* and punishments which deprive a person of his right are not in use among us, and no one may enrich himself at the expense of another, the rule has been introduced that he who *knowingly* builds upon another's land may claim and retain all *useful* expenses" referring to Groenewegen. The Courts of Cape Colony appear to have adopted the view of Groenewegen, Van Leeuwen, Voet, and Schorer, holding that a *mala fide* possessor is in the same position as regards compensation as a *bona fide* possessor, and that he is entitled to recover *utiles impensæ* incurred by him upon land occupied by him (see Maasdorp, vol. 2, p. 54, quoting *Bellingham v. Bloommetje*, 4 *Buch.* 36).

It seems to have been laid down also in *De Beer's Consolidated Mines v. London and South African Exploration Co.* (1) quoted by Maasdorp in vol. 2, p. 55, of his "Institutes of Cape Law," that "a *mala fide* possessor is in the position of a spoliator, who is bound before all things to restore that which he has obtained by spoliation, and therefore is not entitled to a right of retention, but is bound to restore the land before the question of compensation can be raised by him, but if the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim, the *mala fide* possessor will, through the fraud of the owner, be placed in the same position as a *bona fide* possessor and entitled to the same rights of retention."

My own view is that a *mala fide* possessor being in effect an intentional wrongdoer ought not to complain, if the *utiles impensæ* incurred

(1) 10 *S. C.* 359.

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by him should enrich the real owner of the property at his, the spoliator's, expense.

This would appear also to be the views of Moncreiff J. [*Endorissa v. Andorissa* (1)], and Pereira A.P.J. [*D. C., Kandy*, 16,147 (2)].

I would hold therefore that a *mala fide* possessor is not entitled to *utiles impensæ* except in cases where the owner of the property stood by and allowed the building or planting to proceed without notice of his own claim. In such a case I would put the *mala fide* possessor in the same position as a *bona fide* possessor and give him the same rights of retention.

In the present case in March, 1903, the Ratemahatmaya, at the request of the plaintiff's Superintendent, told defendant not to plant tea until the question of title was settled, to which the defendant replied that the land was his, but that he would give it up if the Superintendent would produce his plan.

According to the evidence the defendant subsequently was invited to view the plan at Gampola but declined to do so.

In 1903 the plaintiffs instituted an action for this land in the Court of Requests of Gampola, which was dismissed for want of jurisdiction as regard the value of the land.

Under these circumstances I think that the defendant has himself to thank for the position in which he now finds himself of having *mala fide* incurred *utiles impensæ* on the land of another person, and I would uphold the ruling of the District Judge on this point.

WOOD RENTON J.—I concur. The whole body of direct judicial decision in the Colony controverts the view expressed by Mr. Berwick in *Tikiri Banda v. Gamagedere Banda* (3) that a *mala fide* possessor is entitled to compensation for useful improvements; and notwithstanding the weight which must always attach to any pronouncement of that learned Judge on a point of Roman-Dutch Law, there are, I think, strong reasons why in this instance his opinion should not be followed. Mr. Berwick's *obiter dicta* (for the case in question was disposed of on the footing that the plaintiffs had a good, though defeasible, title, *i.e.*, were *bona fide* possessors), were not adopted by the other members of the Court (Cayley C.J. and Dias J.). Moreover, Mr. Berwick does not consider the controversy between the schools of Voet and Van der Keessel from the sole standpoint with which we are concerned, viz., which of the two conflicting doctrines had been introduced into Ceylon. I take it, as I have said already, that direct judicial authority is in favour of the views

(1) (1902) 6 *N. L. R.* 350. (2) 2 *Balasingham* 149.
(3) (1880) 3 *S. C. C.* 31 *at p.* 33.

of Van der Keessel [see *e.g.*, *the Dodangolla* case (1); *Endorisa v. Andorisa* (2)]. If it is permissible to consider whether, on grounds of policy, the more liberal or the stricter doctrine as to the legal position of the *mala fide* possessor ought to be adopted in this Colony, I fancy that the question admits of but one answer. It may be that the end which the milder view that seems now to prevail in South Africa (Maasdorp, vol. 2, pp. 53, 54) seeks to attain might be reached here in another way. I think that Courts of Law ought to scan jealously the evidence of *mala fide* possession, and to insist that the *conscientia rei alienæ* should be clearly proved. But when once that has been done, the *mala fide* possessor should be left to the rigour of the law, as Van der Keessel defined it.