Present: Bertram C.J.

1921.

FERNANDO *v.* FONSEKA.

576—P. C. Panadure, 70,376.

Mischief—Demolishing latrine on land which was claimed by two adjoining owners—Bona fide *claim.*

The complainant bought one of two lots, which corresponded to an undivided share, in a property of which there was an informal division. The accused objected to the use by the complainant of a latrine on what he claimed to be his lot. He gave six weeks' notice and demolished the latrine.

Held, that in the circumstances the accused was not guilty of mischief.

"The fact that complainant himself asserted a *bona fide* claim does not affect the position of the accused.

"I should be very sorry to hold that a person cannot demolish a latrine on his own land which he claims to be a nuisance because it was erected by a person who wrongly claims an interest in the land."

THE facts appear from the judgment.

B. F. de Silva, for appellant.

J. S. Jayawardene, for respondent.

June 16, 1921. BERTRAM C.J.—

In this case an appeal arises only on a point of law, and the point of law submitted by Mr. de Silva is that there is no legal jurisdiction in the circumstances of the case for a conviction for mischief. The

[1] *(1893) 2 C. L. R. 193.*
[2] *(1909) 2 S. C. D. 59.*
[3] *(1910) 3 Bal. Reports 64.*
[4] *(1916) 2 C. W. R. 292.*

1921.

BERTRAM C.J.

Fernando v. Fonseka

facts are that the complainant bought one of two lots, which corresponded to an undivided share, in a property of which there appears to have been an informal division. That question may arise as to the precise direction of the line of division. But it is agreed that both the appellant and the respondent own separate lots. The appellant finds, upon what he claims to be his lot, a latrine in use by the respondent. He considers that latrine a nuisance. He gives six weeks' notice, and on the expiration of that six weeks he demolishes the latrine. The learned Magistrate has convicted him of mischief, saying he has acted *malâ fide* and highhandedly. The learned Judge, nevertheless, says that it is possible that the latrine may ultimately be found to fall within the boundaries of the lot purchased by the accused. If that is possible, clearly the appellant's claim to the land is *bona fide*, and I do not understand the learned Judge when he finds that the appellant acted *malâ fide* in the assertion of what he practically admits to be a *bona fide* claim.

The law has been laid down in the case cited by Mr. de Silva, *Porolis v. Romanis*,[1] where Pereira J. says: "It is only where a person acts wantonly that he can be said to be guilty of mischief . . . . In other words, he should act spitefully, maliciously, or wantonly." Hutchinson C.J., in another case cited, used these words: "Supposing it should turn out afterwards and be decided by a Civil Court that the complainant had no right to put up the fence, that it was a wrongful encroachment on the appellant's land, it would be absurd that the appellant should be convicted for the criminal offence of committing mischief by taking away an encroachment that he had a right to take away."

Mr. Jayawardene raises two points: He says, in the first place, that, if the respondent on her side is also asserting a *bona fide* claim, the appellant is not entitled to take the law into his own hands. That appears to be the view of the Magistrate himself. But I do not think that it is tenable in law. In the next place, he says that the appellant could have no right to demolish the latrine, because the respondent may have a claim for compensation in that respect. I do not understand that the appellant destroyed the materials. I should be very sorry to hold that a person cannot demolish a latrine on his own land which he claims to be a nuisance, because it was erected by a person who wrongly claims an interest in the land. I, therefore, allow the appeal.

Set aside.

[1] *(1913) C. A. C. 163.*