Present: Lascelles C. J. and Middleton J. 1911.

SILVA *et al v.* SILVA *et al.*

243—D. C. Galle, 10,057.

Action for declaration of title by co-owner—Improvement of land by co-owner—Decree declaring improving co-owner to jus rententionis *over portion planted.*

In an action by a co-owner against the other co-owners for declaration of title to an undivided share of a land, the Court declared that plaintiff entitled to an undivided share, but at the same time declared a co-owner who had planted a portion of the land entitled to a *jus retentionis* over the portion planted by him until he was compensated.

Held, that the order as to *jus retentionis* was irregular, as it was inconsistent with the fundamental rights of co-owners.

LASCELLES C.J.—"It is well settled that a co-owner is entitled, subject to certain conditions and limitations, to compensation for improvements effected by him on the common holding, and it is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be excluded from the benefit of the *jus retentionis*. But a good deal turns on the form in which the *jus retentionis* is asseted. It is one thing for an improving co-owner to claim a right to retain the portion of the common property which he has improved until the compensation due to him, as ascertained in a partition suit, has been paid, but it is a different matter when the claim takes the form of refusing to give up possession, while the property is still undivided, until a specific sum is paid by the other co-owners as compensation. To a claim of the former kind I see no objection on principle or authority. But I confess that.

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as at present advised, the difficulty of reconciling a claim of the latter kind with the Partition Ordinance seems to me to be unsurpassable."

A co-owner who is entitled to a *jus retentionis* over the portion planted as against another co-owner can enforce his right against the alienee of a co-owner.

MIDDLETON J.—"Whether an alience of the original co-owner is responsible or not for compensation must, I think, depend on the circumstances of the case. *Primâ facie*, I should say that he ought not to be, and is not, and can only be made so if he knew or had reason to believe that the property he was buying was liable to such a claim, and so bought it cheaper."

THE facts are set out in the judgment of Middleton J.

Bawa (with him *Zoysa*), for the plaintiffs, appellants.—A co-owner has no right of *jus retentionis* over the portion improved by him. If he plants only a portion equal to his share he may have a *jus retentionis*, but when he plants up a portion in excess of his share he is no more a *bona fide* possessor, and he cannot claim a *jus retentionis*. See 107—D. C. Chilaw, 31,718;[1] *Mohammado v. De Silva*[2]; *Costa v. Abeyakoon*;[3] *The General Ceylon Tea Estates Co., Ltd., v. Pulle*;[4] *Ukku v. Bodia*;[5] *Wighton v. Brown*;[6] *Cornelis v. Endoris*.[7]

van Langenberg (with him *Jayatileke*), for the first defendant, respondent.—The effect of placing the defendant in the position of a *mala fide* possessor and of denying him the *jus retentionis* would be to deprive him altogether of the right to compensation for *impensæ utiles*. But it has been held that a co-owner is entitled to the value of his improvements. See, for example, *Newman v. Mendis*.[8]

The plaintiffs' predecessor in title knowingly permitted the defendants to improve the land without objection; the defendants are therefore entitled to both compensation for improvements and to the *jus retentionis*. See *Eliatamby v. Sinnatamby*:[9] *2 Mass. 55*. The cases cited by the appellants are not directly in point, and may be distinguished.

A. St. V. Jayewardene, for second, third, and fourth defendants.—It may be inferred from the passage quoted by Baumgartner D.J. in *9 N. L. R. 119* (*para. 24*) that where a co-owner improves a portion of the common land he may claim a *jus retentionis;* it is only where a co-owner acts *mala fide* that he loses the *jus retentionis*. Counsel cited *Moldrich v. La Brooy*,[10] *2 Maasdorp 55*.

Bawa, in reply.

Cur. adv. vult.

[1] *S. C. Min., Nov. 9, 1910.*
[2] *(1906) 3 Bal. 248.*
[3] *(1908) 4 Bal. 25.*
[4] *(1906) 9 N. L. R. 98.*
[5] *(1902) 6 N. L. R. 45.*
[6] *(1889) 8 S. C. C. 203.*
[7] *(1907) 3 A. C. R. 13.*
[8] *(1900) 1 Br. 77.*
[9] *(1909) 2 S. C. D. 54.*
[10] *(1911) 14 N. L. R. 331.*

September 28, 1911. LASCELLES C.J.—

It is unnecessary to recapitulate the facts of this case, which have been set out in full by my brother Middleton.

Accepting the finding of the learned District Judge, the position of the co-owners, as regards the plantations on the suit property, was as follows. The whole land comprised 74 acres. Of this, 2 acres were planted jointly by Lenora, the plaintiffs' predecessor in title, and the first defendant; 48 acres were planted by the first defendant alone, the cost of this being assessed at the rate of Rs. 65 per acre; 12 acres were planted by the second, third, and fourth defendants at a cost of Rs. 40 per acre; whilst the balance of 12 acres remained unplanted.

The decree is that the plaintiffs are entitled to one-third of the land, but that the first defendant is entitled to possess the 48 acres, and the second, third, and fourth defendants are entitled to possess the 12 acres, until they are respectively compensated at the rates which I have mentioned. It seems to me clear that this decree is on its face inconsistent with the fundamental rights of co-owners. A co-owner is at any time entitled to claim a partition, and to ask that his undivided share in the *corpus* shall be converted into a specific share. If any of the co-owners have made improvements, the land on which the improvements were made will be allotted, as far as circumstances permit, to the improving co-owner. But the improving co-owner is, in certain cases, entitled to compensation, if land improved by him is allotted to another shareholder. Thus, the right of an improving shareholder to obtain compensation from his co-owner is dependent upon the precise allotment which is made on a partition, and cannot be ascertained unless and until the allotment has been carried out. To decree that the first defendant, for example, is entitled to possess 48 acres until compensation is paid by the plaintiff at the rate of Rs. 65 per acre is to preclude the plaintiff from having his rights and liabilities adjusted under the Partition Ordinance. I should, therefore, be content to set aside so much of the judgment as allows the defendants to remain in possession until compensated by the plaintiff, on the ground that such an order is inconsistent with the plaintiffs' right as co-owners under the Partition Ordinance.

Though it is not strictly necessary, for the purpose of deciding this appeal, to discuss the general question whether the *jus retentionis* is enforceable between co-owners, I am unwilling, after the able arguments addressed to us on both sides, to leave the question untouched. But, first of all, a preliminary question arises as to whether the *jus retentionis*, assuming it to have existed between the original co-owners, can be enforced against the alienee of one of them. *2 Maasdorp (1) 54* answers this question in the affirmative, and I think it would be difficult to contend, however inconvenient the result may be, that a purchaser of an undivided share does not,

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as a general rule, acquire title subject to the liability of his vendor for the improvements effected by the co-owners.

Bonser C.J., in *De Silva v. Shaik Ali*,[1] discusses the converse case, namely the right of a subsequent purchaser to a *jus retentionis* in respect of *impensæ utiles*, and his reasoning seems to me applicable to the liability of a purchaser, who, I think, must stand on the same footing as regards the *jus retentionis* of the other co-proprietors of the property. But there is authority as well as good reason for the proposition that a possessor loses his right of retention, if, having notice of intended sale of the property, he stands by without protesting, and allows the sale to go on without giving the purchaser notice of his claim (*Maasdorp's Institutes, vol. II. p. 56*). But does our law acknowledge the *jus retentionis* as between co-owners, and if so, to what extent? The absence of any direct authority in favour of the existence of such a right is remarkable.

The Chilaw case [2], which was cited as an authority for this proposition, turns out not to have been a case of co-ownership at all. In *Newman v. Mendis*[3] the judgment of Browne A.J., as I understand it, does not directly deal with the question of *jus retentionis*, and Moncreiff J., in the same case, appears to have founded his decision on principles of good sense and equity rather than on any ground depending upon the *jus retentionis*. *Ukku v. Bodia*[4] is at first sight an authority for the proposition that the *jus retentionis* does not exist between co-heirs, but the case seems to have turned principally on the point that the defendants could not properly be said to have been in possession of the four-fifths of the plaintiff's property when they discharged the mortgage debt.

It is well settled that a co-owner is entitled, subject to certain conditions and limitations, to compensation for improvements effected by him on the common holding, and it is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be excluded from the benefit of the *jus retentionis*. But a good deal turns on the form in which the *jus retentionis* is asserted. It is one thing for an improving co-owner to claim a right to retain the portion of the common property which he has improved until the compensation due to him, as ascertained in a partition suit, has been paid, but it is a different matter when the claim takes the form of refusing to give up possession, while the property is still undivided, until a specific sum is paid by the other co-owners as compensation.

To a claim of the former kind, I see no objection on principle or authority. But I confess that, as at present advised, the difficulty of reconciling a claim of the latter kind with the Partition Ordinance seems to me to be unsurpassable.

In the result, I agree in the modification of the decree suggested by my brother Middleton.

[1] *(1895) 1 N. L. R. 228.*
[2] *S. C. Min., Nov. 9, 1910.*
[3] *(1900) 1 Br. 77.*
[4] *(1902) 6 N. L. R. 45.*

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In this case the plaintiffs, as the owners by purchase of an undivided one-third of a cinnamon land called Diggodukele, of 74 acres 1 rood 30 perches, sued the defendants, as the owners of the other two-thirds, to be declared entitled to and put in quiet possession of an undivided one-third share of the land, with all the plantations on it; that the defendants be ejected therefrom; and for damages.

The first defendant admitted the plaintiff's title to one-third of the soil, but denied his title to the planter's share, and claimed in reconvention either to be declared entitled to the planter's share of about 50 acres of the land, or for the expenses incurred by him in planting the same, exclusive of the amount he had received from the sale of cinnamon.

The other defendants, in their answer, admitted the plaintiffs' title to the one-third share of he land, recited their title to another one-third share, for which they admitted they were in possession of a lot of about 25 acres, of which they had planted 12 acres about two years ago, and, denying any disputes by them of the plaintiffs' title or possession, asked for the dismissal of the action as against them.

The issues agreed to were as follows:—

(1) Was the plantation of cinnamon, coconut, and jak referred to in the first defendant's answer made by him exclusively ?

(2) If so, is he entitled to the planter's share of same ?

(3) Did the first defendant spend the sums mentioned in the 10th paragraph of his answer in making the said plantation and the upkeep thereof ?

(4) If so, is he entitled to claim the same or any part thereof from plaintiffs ?

(5) If entitled, is his claim prescribed ?

(6) Did the second, third and fourth defendants plant 12 acres with cinnamon ?

(7) What damage is plaintiff entitled to ?

(8) Did second, third, and fourth defendants dispdute plaintiffs' right to anything beyond the young cinnamon plantation) ?

(9) What damages has plaintiff suffered through these defendants ?

On the hearing it was admitted for the first defendant that he was the joint purchaser with one Lenora, the predecessor in title of the plaintiffs, and with the father of the second to fourth defendants of the land in question from the Crown in equal one-third shares on a Crown grant dated 1900. This Crown grant, as an instance of inaccuracy, grants 71 acres 1 rood 30 perches according to the survey annexed, which survey delineates according to the letter-press on it an area of 74 acres 1 rood and 30 perches.

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The District Judge found affirmatively on the (1) and (6) issues as to 48 acres and 12 acres respectively, and assessing the compensation on the 48 acres at Rs. 65 per acre and on the 12 acres at Rs. 40 per acre, declared the plaintiff entitled to one-third of the land, but that the first defendant was entitled to possess the 48 acres until compensated for improvements, and the second to fourth defendants their 12 acres until compensated.

Against this judgment the plaintiffs appeal, and in my opinion it is wrong. as compelling the plaintiffs to pay the whole cost of the planting of all the land planted before they can get possession. So far, therefore, I can gather from the evidence, Rs. 65 and Rs. 40 were accepted as the entire cost per acre of planting the respective lots of 50 acres and 12 acres. It is clear that the plaintiffs are not liable to pay the entire cost of planting which the District Judge has ordered them to pay, or stand out of possession, and on this ground alone the judgment cannot be supported.

Again, the conveyance dated July 11, 1902, by Lenora to Justina, the immediate vendor to the plaintiffs, conveys the one-third part of the land she is entitled to on the Crown grant of June 16, 1900, and the one-third part she is entitled to of all the cinnamon now planted thereon. The conveyance by Justina dated January 20, 1910, to the plaintiffs conveys to them one-third of the fruit trees and plantations and of the soil described in the same Crown grant. There is no reservation in either conveyance, and it is clear law that whatever existed on the land in the shape of buildings or plantations was as to an undivided one-third conveyed by these deeds to the plaintiffs.

The plaintiffs are, therefore, under the Roman-Dutch law, on the principle that whatever is built or planted on another man's land belongs to the owner of the land,[1] the owners of one-third of the land and all thereon, and are entitled to a declaration to that effect and to be quieted in possession. On this principle they are also entitled to one-third of the rents and profits arising from the land and plantations from the date of the conveyance to them, and are undoubtedly entitled to the relief they seek in this section as regards a declaration of title and to be quieted in possession, the damages by way of *mesne* profits being subject, it may be, however, to the defendants' rights to the *fructus ex ipsa melioratione percepti*, if it be found they have a *jus retentionis* on the land for compensation as claimed for planting.

The next question to be considered, then, is whether the defendants have proved a right to compensation and a *jus retentionis* arising therefrom. Now, I think it is clear law that the *jus retentionis* only arises in the case of a *bona fide* possessor, not in the case of a lessee or a tenant, it being an incident of the *possessio civilis* of the Roman-Dutch law.

[1] *Grot. 2, 10, 6, and 91.*

The defendants here are unquestionably *bona fide* possessors as regards the shares to which they are entitled of the land, *i.e.*, the first defendant as to one-third and the second to fourth defendants as to one-third, and would have a right to compensation and a *jus retentionis* on what they planted, even if they planted more land than they were entitled to plant for their shares with the acquiescence of their co-owners. The *jus retentionis* would, I think, follow the right to compensation resulting from a *conscientia rei suæ*. The question then is, if the right to compensation will affect the alienee of a former co-owner. In *Appuhamy v. Silva*[1] it was held that it would, but it appeared subsequently that in that case, when it returned to the Supreme Court,[2] it was found that the defendant who claimed compensation and a *jus retentionis*, and whose claim the Supreme Court had affirmed, had in fact only got possession as a monthly tenant, and therefore had no right to compensation and *jus retentionis* such as a *bona fide* possessor with *conscientia rei suæ* would be entitled to. The Supreme Court did not deny that an alienee might be responsible to a *bona fide* co-owner possessor, but declined to carry the doctrine as far as the case of a tenant. Whether an alienee of the original co-owner is responsible, or not, for compensation must, I think, depend upon the circumstances of the case. *Primâ facie*, I should say that he ought not to be, and is not, and can only be made so if he knew or had reason to believe that the property he was buying was liable to such a claim, and so bought it cheaper.

In the present case the District Judge has held that the defendants have proved that the planting here was done with the acquiescence of the co-owner Lenora, and at the expense of the defendants; while the plaintiffs endeavoured to show that the first defendant was in 1901 indebted to Lenora in the sum of Rs. 4,259.90 on accounts stated as to two Dikgoda lands. The first defendant said he had paid this sum in the course of other transactions with Lenora, but he got no receipt, and the District Judge failed to find whether this was true or not; and as the case stands on the record, it may be that first defendant did all the planting he contends he did and paid for it primarily, but on an adjustment of accounts it may be found that Lenora has paid this share of the planting by not having been paid the sum admittedly due on P 1 to him by the first defendant. If Lenora paid or agreed to pay the first defendant, he, the first defendant, could have no claim against the plaintiffs.

The burden of proof was on the first defendant, and in my opinion he did not discharge it, nor did the District Judge find formally that he did, although he has given judgment on the footing that Lenora neither paid nor agreed to pay the first defendant his expenses of planting.

[1] (1892) *1 S.C.R 71.*

[2] (1892) *1 S. C. R. 243.*

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The plaintiff says in his evidence that the first defendant was a bidder for the property when he bought it, and Justina, whom the District Judge rather sweepingly disbelieves, says she had offers from the first defendant to buy at a less price than that given by the plaintiffs. The first defendant nowhere in his evidence says that he ever made any claim against Lenora or Justina for the cost of the planting that he says he paid and there is no evidence on the record to show that plaintiffs knew or had reason to believe that they were buying the property subject to a claim for a compensation.

The cases of the defendants also involve claims, not only against the plantiffs, but also against each other, and these could far more conveniently be disposed of in a partition action under the Ordinance, which provides machinery for the adjustment of such matters.

In my opinion, therefore, the judgment of the District Judge should be varied by omitting therefrom all that part of it which declares the defendants' rights to *jus retentionis* and compensation, and in lieu thereof a direction should be ordered to the defendants to make such claims in a partition action, when the question which the District Judge has failed to decide may again be gone into. The judgment will, therefore, be for the plaintiffs, declaring them the owners of one-third of the land and plantations in question according to the prayer in the plaint; the question of damages by way of *mesne* profits to await the decision in the partition action (section 197, Civil Procedure Code), which may settle the rights to the *fructus ex ipsa melioratione percepti*.

The plaintiffs should have the costs of the action and the appeal.

Judgment varied.