1932 *Present :* **Garvin S.P.J. and Jayewardene A.J.**

CHELLIAH *et al. v.* KUTTAPITIYE TEA AND RUBBER CO.

178—D. C. Ratnapura, 4,774.

Kandyan law—Marriage registered in diga*—Wife acquiring* binna *rights—Character of marriage—Rights of husband—Property of deceased child—Inheritance.*

Where a Kandyan woman whose marriage was registered as *diga* avoids a forfeiture of her rights in the paternal inheritance by preserving or subsequently acquiring *binna* rights, it does not alter the character of the marriage itself.

In such a case, the *diga* husband is heir to his child in respect of land devolving on her from the mother, who had inherited the property in virtue of the retention of her *binna* rights.

ACTION for declaration of title to a ½ share of a certain *panguwa* originally owned by one Appuhamy Lekama who died in 1874. He was survived by a son, Rataranhamy, two *diga* married daughters Yahapathamy and Kirimenike, and another daughter, Punchimenike, whose marriage in 1882 to G. V. Kirimenika was registered as a *diga* marriage. Rataranhamy died in 1894 and his only child, Appuhamy, died in 1895. Yahapathhamy and Kirimenike died leaving respectively Pullihamy and Punchimenike, through whom the defendant company claimed title.

Punchimenike, who was married in 1882 to G. V. Kirimenika, died in 1898 leaving a daughter Ramalhamy who died in 1899, and in 1927 G. V. Kirimenika conveyed the entirety of the ½ share of the *panguwa* to the plaintiff's predecessors in title.

On December 20, 1927, the plaintiff instituted this action against the defendant company for a declaration of title to ½ share. Plaintiff's action was dismissed.

H. V. Perera, for plaintiff, appellant.—The entry of the marriage contracted between Punchimenike and G. V. Kirimenika as a *diga* marriage in the register kept under the provisions of the Kandyan Marriage Ordinance, No. 3 of 1870, is the best evidence of the nature of the marriage and binds the parties to the marriage and their representatives in interest (section 39 of Ordinance No. 3 of 1870; *Mampitiya v. Wegodapola* [1]). A Kandyan woman, though married in *diga,* may still preserve her *binna* rights through not incurring the forfeiture which results when she is conducted away from the mulgedera or she may reacquire *binna* rights. In neither case would the husband's rights under the marriage contract be affected; he would continue to have the rights of a *diga* married husband (*Seneviratne v. Atalangoda* [2]).

The defendant company is a representative in interest of Ramalhamy and therefore of Punchimenike. The evidence in the case shows that Punchimenike never lost her *binna* rights, and if that is so, then on

[1] 24 *N. L. R.* 129. [2] 22 *N. L. R.* 472.

the death of Appuhamy (Rataranhamy's son) his share passed to Punchimenike, who, thereupon, became vested with the entirety of the ½ share and this, on her death, passed to Ramalhamy. On Ramalhamy's death G. V. K. was entitled at least to a life interest in the ½ share (*Appuhamy v. Hudu Banda* [1]), but it is further submitted that G. V. K. is entitled to the ½ share absolutely both because the *diga* marriages of Yahapathhamy and Kirimenike place them, as regards Punchimenike's intestacy, in the position of strangers, and because G. V. K. would be entitled to the dominium by virtue of the principle of *Jatake Uruma* (*Perera's Armour p. 76; (1852) Austin 155*).

The defendant company cannot rely on prescriptive possession because the evidence does not clearly establish that they have been in possession for 10 years and the deeds by which Pullihamy and Punchimenike conveyed to the defendant company's predecessors date respectively no further back than 1919 and 1920. Moreover, the defendant company cannot claim that its possession from about November, 1917, was adverse since it recognized the claims of Pullihamy and Punchimenike by purchasing from them subsequently.

The defendant company cannot claim to be compensated for improvements because its possession cannot be regarded as *possessio civilis* inasmuch as when it entered on the land it could not have believed that it was entitled to the land. It is, therefore, a *mala fide* possessor. The improvements fall in the class of *impensae utiles* and not *impensae necessariae,* and only the latter class gives a *mala fide* possessor a right to compensation.

A. E. Keuneman (with him *F. C. W. van Geyzel*) for defendant, respondent.—The case where *binna* rights are reacquired is different from the present case. There must be a point of time—the date of the marriage—when the rights or status of both husband and wife must be the same, either *binna* or *diga.* The entry in the marriage register was held not to be conclusive of the nature of the marriage in *Ran Etana et al. v. Nekappu et al.*[2] and in *Dingirihamy v. Mudalihamy* [3]. Here the plaintiff seeks to show that, at the time the marriage between Punchimenike and G. V. Kirimenika was made and registered as a *diga* marriage, Punchimenike had *binna* rights and G. V. Kirimenika had the *diga* rights which the registration of the marriage as a *diga* marriage conferred upon him. Either both parties must be bound by the register or if one of them seeks to contradict by evidence the nature of the marriage as registered then the other party must be allowed to show the real nature of the marriage. The principle is that a man cannot both approbate and reprobate the same transaction. (See the judgment of the Judicial Committee in *Shah Mukhun Lall v. Baboo Sree Kishen Singh* [4].) In this case G. V. Kirimenika giving evidence said, " It was in fact a *binna* marriage and I was a *binna* husband." That being so, he cannot claim any interest in Ramalhamy's estate (*Appuhamy v. Dingiri Menika* [5] *and Ran Menika v. Mudalihamy* [6]). If, on the other hand, both parties are bound

[1] *7 N. L. R. 242.*
[2] *14 N. L. R. 289.*
[3] *16 N. L. R. 61.*
[4] *12 Moore's Indian Appeals 157 at 185 and 186.*
[5] *9 S. C. C. 34. Full Bench.*
[6] *6 N. L. R 131.*

by the register, then the ½ share of Rataranhamy's son Appuhamy would go equally to Yapahathamy, Kirimenike, and Punchimenike, and on Ranmalhamy's death her property (being ancestral property derived from her mother) would revert to the next of kin in her mother's family Yahapathhamy and Kirimenike, on the principle that such property reverts to the source from which it was inherited (*Seneviratne v. Halangoda* [1]), subject of course to a life interest in favour of G. V. Kirimenika.

It is submitted that the finding in favour of the defendant company on the issue of prescription is correct. G. V. Kirimenika himself said, "It must have been cleared about November, 1917," and this is supported by the evidence of the defendant company's agent, Craib. The fact that after entering into possession the defendant company recognized the claims or titles of Pullihamy and Punchimenike by buying from them in 1919 and 1920 does not mean that the defendant company's possession was not adverse, and the defendant company is entitled to rely on its possession prior to 1919 and 1920. To succeed on the ground of prescriptive possession, it is not necessary to show a title adverse to the whole world (*Raki et al. v. Lebbe et al.* [2]).

It is submitted that the defendant company had the *possessio civilis* because it possessed with the intention of holding the land as owner, but, even if its possession is held not to be *possessio civilis* inasmuch as it is not derived from *ajustus titulus* and the defendant company is, therefore, not a *bona fide* possessor, it is nevertheless entitled to a *bona fide* possessor's rights to compensation because G. V. Kirimenika has stood by and acquiesced in the improvements effected. He might, and should, have brought a vindicatory action (*Nugapitiya v. Joseph* [3]). Further, the presumption of law runs in favour of possession being *bona fide* and the burden of proving it *mala fide* is on the party alleging it, in this case the plaintiff (*Walter Pereira, Compensation for Improvements, 23 and Carimjee v. Abinchena* [4]). The plaintiff has done nothing to discharge that onus save to rely on the protests made by G. V. Kirimenika when felling on the land began.

August 31, 1932. GARVIN S.P.J.—

The parties are agreed that the interests in dispute once belonged to one Appuhamy Lekama who died in 1874 leaving him surviving a son Rataranhamy and three daughters Yahapathhamy, Kiri Menike, and Punchi Menike. The son Rataranhamy died in 1894 leaving him surviving his son Appuhamy who died in the year 1895. Yahapathhamy died leaving a daughter Pullihamy and Kiri Menike also left a daughter Punchi Menike. By deed D 1 of 1919 Pullihamy purported to convey what she claimed to be her interests to one Ferdinando who in the year 1921 sold and conveyed to the defendant company. Similarly Punchi Menike, the daughter of Kiri Menike, purported to convey the interests claimed by her to one Tennekoon by deed D 3 of 1920. In the year 1921, Tennekoon by the deed D 4 sold to the defendant company.

Both Yahapathhamy and Kiri Menike, who were the predecessors in title of the defendant company, were married in *diga*.

[1] *24 N. L. R. 257.*
[2] *16 N. L. R. 138.*
[3] *28 N. L. R. 140.*
[4] *8 C. W. R. 18.*

Punchi Menike, the daughter of Appuhamy, married Gampaha Vidanalage Kiri Menika. She died in the year 1898 leaving a daughter Ramalhamy who died in the following year. Kiri Menika the surviving husband of Punchi Menike conveyed the entirety of the interests which originally belonged to Appuhamy in the year 1927 to Don William Jayamaha and Don Peter Jayakoddy, and in the same year Jayamaha sold to the second plaintiff and Jayakoddy to the first plaintiff. The two plaintiffs claim that by virtue of the conveyance in their favour they are entitled to the entirety of the interests which once belonged to Appuhamy, to the exclusion of the defendant company.

By reason of the marriages of Yahapathhamy and Kiri Menike in *diga* they lost their rights to succeed to any part of their father's estate. There remained then two children, Rataranhamy and Punchi Menike, the wife of Kiri Menika. Rataranhamy as the son would undoubtedly be an heir.

The question we have to decide first is whether Punchi Menike, the remaining daughter, was also an heir or whether she had lost her right to the inheritance as her other sisters had done. The position of the defendant company in relation to Punchi Menike is, that she was a daughter married in *binna*. If so she would clearly be an heir of her father and upon the death of her brother Rataranhamy and his son Appuhamy, would be entitled to succeed to the interests of Appuhamy as well. She would thus have become entitled to the entirety of her father Appuhamy's interest. The company contends however that these interests passed from Kiri Menika to his daughter Ramalhamy and that when Ramalhamy died in 1899 the interests passed to Pullihamy and Punchi Menike, the daughters of Yahapathhamy and Kiri Menike, to the exclusion of Ramalhamy's father Kiri Menika through whom the plaintiffs claim. If the marriage of Punchi Menike and Kiri Menike was a marriage in *binna* it is not disputed that in the circumstances of this case Kiri Menika as a *binna* married husband would not be the heir of his daughter Ramalhamy in respect of the *paraveni* property inherited by her through her mother, and that those interests would therefore pass to her mother's next of kin.

The plaintiffs on the other hand claim that Kiri Menika and his wife Punchi Menike were married in *diga*, but that she either preserved her rights of succession or reacquired them and as a result, ultimately succeeded to the entirety of the interest of her father Appuhamy. Those interests admittedly passed to Ramalhamy as I have said earlier and it was urged that Kiri Menika being a *diga* married husband was the heir of his child.

A copy of the entry of the marriage in the register kept under the provisions of the Kandyan Marriage Ordinance, No. 3 of 1870, shows that Punchi Menike and Kiri Menika were married on August 7, 1882, and that the marriage contracted by them was a marriage in *diga*. Section 39 of that Ordinance constitutes this entry the "best evidence" of the marriage contracted and of the other facts stated therein. If therefore regard be had to what the law constitutes "best evidence" theirs was clearly a marriage in *diga*.

Kiri Menika who was called as a witness stated that after the contract of marriage had been entered into and recorded in the register, he and his wife returned to her father's house and lived there continuously till his wife died in 1898, when he returned to his own house. Three children were born to this marriage. All of them were born in the house of Punchi Menike's father Appuhamy. The whole family lived together and there is evidence that Kiri Menika and his wife possessed and enjoyed the fields and gardens and lands belonging to Appuhamy. The lands in dispute in this case were chena lands and speaking with reference to them Kiri Menika said " when the chenas were cultivated I got a share of the produce ".

These facts are relied on by the plaintiffs as showing that notwithstanding that Punchi Menike and Kiri Menika intended to, and did contract a marriage in *diga*, the former never lost her right of succession to her father's property on his death, and that if she did by the mere fact of having contracted a marriage declared to be in *diga* sustain a forfeiture she reacquired those rights and was fully revested with them at the time of her father's death.

The defendant company on the other hand has invited us to hold that notwithstanding the entry in the register the marriage contracted was a marriage in *binna* and not in *diga*. Certain answers were elicited from Kiri Menika in the course of his cross-examination which, it is said, proved that this was a marriage in *binna* and not a marriage in *diga*. " Although the marriage was registered in *diga* " said Kiri Menika " it was in fact a *binna* marriage and I was a *binna* husband ".

In *Mampitiya v. Wegodapola*[1] Bertram C.J. and Ennis J. having considered whether the character of a marriage solemnized under the provisions of the Kandyan Marriage Ordinance of 1870 can be proved to be other than it is stated to be in the register by oral evidence came to the following conclusion: " As between, or as against the parties. or their respective representatives in interest, the register of the marriage is conclusive of the intention with which the marriage was celebrated, unless the case is shown to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of section 92 of the Evidence Ordinance."

This view of the law was approved by de Sampayo J. and Schneider J. in *Seneviratne v. Halangoda*[2]. The contestants in this action are the successors in title respectively of persons claiming to be heirs of Ramalhamy, the daughter of this marriage. It would clearly not be competent for Ramalhamy to seek to contradict the statement in the register by leading parol evidence nor would such a course be open to those who claim to be her heirs and representatives in interest. Counsel for the defendant company sought to escape from this situation by claiming that Yahapathhamy and Kiri Menike were co-heirs with their sister Punchi Menike of Appuhamy the son of Rataranhamy in respect of the shares which devolved upon him on his father's death. But Yahapathhamy and Kiri Menike would not be heirs of Appuhamy unless Punchi

[1] *S. C. No. 293, D. C. Kandy No. 27,829, S. C. Mins. 20.6.1921, also (1922) 24 N. L. R. 129.*
[2] *(1921) 22 N. L. R. 472.*

Menike their sister was also married in *diga* and had also forfeited her right of inheritance. They would therefore have to affim the registration of this merriage as a marriage in *diga*. To impeach the register and prove that the marriage of Punchi Menike was a marriage in *binna* would be to divest themselves of every vestige of claim to be the heirs of Appuhamy.

If the defendant company is to succeed it can only do so by establishing that their predecessors in title Pullihamy and Punchi Menike were the heirs and representatives in interest of Ramalhamy the daughter of their aunt Punchi Menike upon whom the whole of her grandfather's estate had devolved through her mother. Ramalhamy is bound by the register and could only have claimed this inheritance upon proof that, though the marriage contracted by her parents was a marriage in *diga*, her mother did not in fact leave the roof of her parents, that there was no severance from the family and consequently no forfeiture of rights, or upon proof that if a forfeiture ever took place her mother reacquired the rights of a *binna* married daughter.

The decisions of this Court place the defendant company in the same position as Ramalhamy in regard to the declaration in the registration of the marriage of Ramalhamy's parents.

The learned District Judge treated this as a case in which there was a mistake in the register and this conclusion has for its foundation the statement of Punchi Menike's husband that theirs was in fact a marriage in *binna*. No attempt was made to ascertain how the marriage came to be entered by the officiating registrar as a marriage in *diga* if the parties declared it to be a marriage in *binna*, or how or by whom the mistake was made. Kiri Menika does not say that there was a mistake nor has he said that it was not his intention to contract a marriage in *diga*.

The statement somewhat adroitly elicited from this villager that his marriage was " in fact a *binna* marriage ", is not, in my opinion, evidence that the statement in the register that the intention of the parties expressed at the time of the solemnization of their marriage to contract a marriage in *diga*, was mistakenly entered. The statement of Kiri Menika is consistent with his position that his wife never in fact suffered the forfeiture of rights of inheritance by severance from her father's family usually involved in a *diga* marriage and that her position, in fact, was that of a *binna* married daughter notwithstanding that the marriage was contracted in *diga*.

Whether a marriage is to be in *diga* or in *binna* would naturally be determined during the negotiations which precede the marriage. From the point of view of the wife, a *binna* marriage leaves her rights intact, whereas a *diga* marriage and the departure from her family which it involves result in a forfeiture of her rights of inheritance to her father's estate. On the other hand a *binna* marriage places the husband in a position of great inferiority as compared with a *diga* married husband, especially in regard to his rights of inheritance to the property of his wife and the property of his children inherited from her.

Prior to the legislation relating to the registration of Kandyan marriages, it was in the nature of things almost impossible to obtain evidence of the type of marriage which the parties intended to contract

at the time of their marriage. In practically every case in which a question arose as to whether a marriage was contracted in *binna* or in *diga*, its decision depended on whether after the marriage the wife was conducted from and lived away from her father's house or whether she and her husband continued to live under her father's roof.

But it is conceivable that in many such marriages the intention with which the parties entered into a marriage may have been that it should be a marriage in *diga*, the husband refusing to accept the position of a *binna* husband, and that notwithstanding that the marriage contracted was in *diga* the parties continued to reside in the house of the wife's father. In such a case the wife presumably would retain her rights of inheritance to her father's estate and the husband the rights he contracted for when he insisted on a marriage in *diga*. But the difficulties of proof were in the past, frequently, insurmountable.

Since the legislation to which I have referred there is a clear contemporaneous record of the type of marriage entered into by the parties which the law declares to be the " best evidence ", and it is now possible to prove that a marriage was in *diga* notwithstanding that the wife remained in her father's household and perhaps never sustained a forfeiture of her rights and that the husband remained a *diga* married husband with all the rights he intended to secure for himself, when he contracted that the marriage should be in *diga*.

A case in point is that of *Seneviratne v. Halangoda* (*supra*) in which it was sought to prove that, though registered as in *diga*, the marriage was in fact a *binna* marriage. De Sampayo J. there held that the marriage was a marriage in *diga* as registered and that " the only consequence of a *diga* married daughter preserving or subsequently acquiring *binna* rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in *binna*. It does not alter the character of the marriage itself. The *diga* marriage remains a *diga* marriage so far as other results of such a marriage are concerned. The husband does not cease to be a *diga* married husband and begin to be a *binna* married husband ".

With this statement of the law I entirely agree. This is Kiri Menika's position in law. He was married in *diga*. In fact his wife never left her parents' house and preserved her rights of inheritance. He appears to have accepted in cross-examination the suggestion that in such circumstances his marriage was in fact a *binna* marriage and he a *binna* husband. Manifestly, assuming he realized what he was saying, he was mistaken in his view of his position in law. I may add, however, that inasmuch as he claimed to be the heir of his child when he sold these premises to the two plaintiffs it is extremely doubtful whether he even did intend to say or at least that he realized what he was saying when he accepted the position in cross-examination that as the husband of a wife who was " in fact " married in *binna* he was a *binna* married husband. But whatever his impressions may have been there can be no doubt on the evidence of the register that his marriage was a marriage in *diga* and that Kiri Menika therefore is entitled to all the rights of a *diga* married husband. The evidence is overwhelming that Kiri Menika and his wife Punchi Menike lived continuously in the house of her father Appuhamy

that all her children were born there and that she herself died there long after her father's death leaving her surviving her daughter Ramalhamy and her husband. It was Kiri Menika who cultivated the fields which belonged to Appuhamy and it was he who shared in the profits obtained by cultivating the family chenas.

From these facts the conclusion is inevitable that Punchi Menike was fully vested with rights of inheritance and did in fact inherit her father's property which at her death passed to her daughter Ramalhamy.

We have next to determine to whom this property passed on the death of Ramalhamy. The rival claimants are her father and her maternal cousins. The property with which we are concerned is the landed property of Appuhamy, the grandfather of Ramalhamy and her cousins, which came to her through her mother.

Sawers in a passage which will be found in *Modders Edition p. 12, s. 33, says*—"A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property, which the son derived or inherited from or through his mother. At the father's death, such property goes to the son's uterine brothers or sisters, if he have any, and failing them, to the son's nearest heirs in his mother's family".

In *Appuhamy v. Hudu Banda*[1] Middleton J. held that a *diga* married father was entitled to a life interest in the property of his three deceased children inherited by them from their mother.

There seems no reason to doubt that a *diga* married father is at least entitled to a life interest in the landed property of a deceased child which such child inherited through his mother. Kiri Menika is therefore entitled at least to a life interest in the lands involved in the action.

It was submitted, however, that he is entitled to inherit such deceased child's property without any limitation it being premised that such child died without issue. This is a point upon which the Kandyan law is far from being clearly ascertained and I am not sure that it is necessary for the purpose of this case to decide the question.

Kiri Menika the plaintiffs' predecessor has been shown to have had an interest in the premises whereas the defendant company's predecessors in title have none. We have not even been told whether they are alive today; we certainly cannot undertake to say that they will survive Kiri Menika and ultimately at his death be found to be Ramalhamy's next heirs in her mother's family.

Inasmuch however as the question has been raised and argued at some length it is perhaps desirable that we should express our views upon the point. The question, therefore, is whether a father is heir to his child born in a *diga* connection in respect of landed property inherited through the mother who inherited in virtue of her retention or reacquisition of her rights of inheritance to her father's estate.

In *Dingiri Menika v. Appuhamy*[2] a Bench of two Judges (Wendt J. and Middleton J.) held that where a Kandyan whose parents were married in *diga* died intestate and without issue leaving him surviving his father, his mother's mother, and two uterine half sisters of his mother, and where the intestate's estate consisted exclusively of lands inherited by

[1] *(1903) 7 N. L. R. 242.* [2] *(1907) 10 N. L. R. 114.*

him from his mother, who had inherited them from her father, the intestate's father was sole heir to his estate and that the uterine half sisters of the intestate's mother were not entitled to any share thereof.

Wendt J. who delivered the principal judgment in the case recognizes the "undoubted difficulty" caused by the passage from Sawers quoted earlier in this judgment and which he quotes in *extenso* but bases his conclusion on a passage in Armour (*Perera's Edition, p. 76*) that "the father (by *Jatake Uruma*) is entitled to inherit the lands and other property, which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother".

This proposition is illustrated by a case in which a mother who inherited her child's *paraveni* property has a son by a second marriage who inherits the property from her : this son dying in his father's care that father was held to inherit the property in preference to the representatives of the original owner from whom it had descended to the first child.

As is pointed out in *Hayley on Kandyan Law pp. 414–415* both in the passage from Armour and in the case given by way of illustration the father is preferred to "the person from whom that property is derived to the mother" but nothing is said of the mother's relations.

The general rule of the Kandyan law would seem to be that in the case of a person who dies intestate unmarried and without issue the property reverts to the source from which it came—the property derived from the father or mother reverts to them respectively ; where the mother is dead and the father alone survives his child born in a *diga* connection he takes a life interest in the property derived from or through the mother which at the death of the father reverts to the child's nearest heirs in his mother's family—*vide* Sawers, *Modders Edition p. 32, s. 33.*

The case referred to in the judgment of Middleton J. is *D. C. Kandy, case No. 23,620.*[1] There the property had descended from one Sarana to his daughter Rangkiri and from her to her daughter Belinda. On Belinda's death a contest arose between her father and the defendants the children of her grandfather Sarana's sister Poossamba. The father was preferred. The reasons for the decision are not stated. *Hayley at p. 413* suggests that if Poossamba was married in *diga* her children might have been considered too remote. This is a possible explanation for the preference of the father who it must be assumed was a *diga* married husband.

In *Ranhotia v. Bilinda*[2] it was held that the father took an absolute estate in the acquired property to the exclusion of the deceased's brother.

The weight of judicial decision would seem to favour the view that the father is heir to the property of his child who dies intestate and without issue not merely to a life interest therein but to the full dominium.

While I am myself inclined to think that it is more in keeping with the principles of intestate succession so far as they are discernible in the Kandyan law that the father should only take a life interest in the property which his deceased child inherited from his mother the balance of judicial decision is the other way. In this particular case since the property of the child was originally that of her grandfather it may well

[1] *(1852) Austin 155.*

[2] *(1909) 12 N. L. R. 111.*

be that in the absence of closer relations of the intestate child's mother the father would be preferred to the children of the child's mother's sisters who by contracting *diga* marriages had excluded themselves from participating in that inheritance. In the result therefore Kiri Menika has been shown to be vested with a definite interest in these premises whether it be only an estate for life or full dominium while the defendant company's predecessors in title had no immediate interest in the premises at the time of the execution by them of the conveyances relied upon by the defendant company and have not been shown to have any interest even at the date of this action. The weight of judicial decision favours Kiri Menika's claim to an absolute estate.

If the defendant company is to succeed it must be by proof of a title by prescription. The title of the plaintiffs being superior the onus is on the defendants to establish if they can that they have had 10 years' adverse and uninterrupted possession prior to the institution of this action before they can claim a decree in their favour.

The action was instituted on December 20, 1927. The defendant company in its answer dated August 8, 1928, paragraph 13, pleaded as follows:—"The defendant company and its predecessors in title have been in the undisturbed and uninterrupted possession of an undivided ½ share of the said lands for upwards of 10 years by a title adverse to and independent of that of all others and claims the benefit of section 3 of Ordinance No. 22 of 1871".

Now the defendant company acquired the interest they claim in 1921 from two persons of the names of Ferdinando and Tennekoon. Ferdinando purchased from Pullihamy in 1919 while Tennekoon obtained a conveyance from Punchi Menike in 1920. There is no evidence of any possession by either Pullihamy or Punchi Menike, Ferdinando or Tennekoon, the defendants' predecessors in title. The defendant company and its predecessors have not therefore been shown to have had 10 years' possession and the plea fails.

Kuttapitiya Estate with which these lands have now been incorporated consists of 1,650 acres. A beginning was made with the clearing and planting in November, 1917, and the 1,650 acres now forming Kuttapitiya Estate were opened and planted between that date and the year 1929. Mr. Craib, Manager of the Kuttapitiya Estate Co., says that 225 acres were opened in 1917. Early in his evidence he stated generally of these lands that they must have been opened in November, 1917. He was certain that they must have been opened then. He did not however produce any books or plans or company's reports or any document which would have enabled him to swear that these lands were opened in November, 1917, nor did he say that they formed part of the 225 acres opened in 1917. Now Mr. Craib and the defendant company, if he was their agent at the time and even this we do not know, were trespassers and if they are to succeed as against the person entitled to the lands they must give strict proof of adverse and uninterrupted possession from some date prior to December 20, 1917. The opening of this large extent of 1,650 acres commenced some date in November, 1917, but I am not prepared to hold that these lands which together are said to amount only to about 60 acres "must have been" cleared prior to December 20, 1917.

When this case first came up in appeal attention was specially drawn to this point and the defendant company was given a further opportunity of supplementing its evidence on the point in particular by proof that these lands were part of the 225 acres said to have been opened in 1917. They have adduced no further evidence and rely on Kiri Menika's admission that inasmuch as the land was planted "about February, 1918," it must have been celared "about November, 1917". This does not seem to me to carry the case much further. The defendant company have not adduced evidence as to the date when these lands were entered upon and cleared presumably because they have no evidence to adduce.

The defendants' case on this point can hardly be put higher than that Mr. Craib and they have kept plaintiffs out of possession for about 10 years; the period may be just above 10 years, it may be just below 10 years. They have not proved affirmatively that they have had 10 years' adverse and uninterrupted possession and are not therefore entitled to a decree in their favour.

Earlier in this judgment it was pointed out that the defendant company under the title pleaded by it could not carry its possession further back than the years 1919 and 1920 and that inasmuch as their predecessors in title have not been shown to have had any possession at all their plea failed.

Had Pullihamy and Punchi Menike been proved to have been in possession it would have been competent for the defendant company to tack on to their possession that of their predecessors for the purpose of their plea of prescription. But what they are now seeking to do is very different. To the possession upon the title which they plead they acquired from Pullihamy and Punchi Menike they are seeking to tack on possession for a period of about 3 years prior to that acquisition by Mr. Craib. The plea is materially different from that taken up in the answer in which they ascribe their possession to the title they plead and seek to add to their own possession the prior possession of those under whom they claim.

Whether a trespasser who after a few years' possession acknowledges a title in another obtains a conveyance from that other and possessed threafter by virtue of that title for a further period of years can claim when he finds himself defeated on the question of title to tack on the period of possession he enjoyed before he acknowledged and acquired that title for the purpose of making up the period of 10 years' possession necessary to the success of a plea of prescription is a question which does not really arise since in any event the two periods have not in this case been proved to extend together to a date 10 years before action. There is this difference between the two periods of possession—the first was merely the possession of a trespasser, adverse to every body and without acknowledgment of title in any body, the second follows the acknowledgment of title in another and the acquisition of that title and the possession thereafter is by virtue of that title. Whether the two periods together can be treated as one period of adverse and uninterrupted possession within the meaning of section 3 of Ordinance No. 22 of 1871 is a question upon which I should prefer to reserve my opinion until a case arises in which it is necessary to decide the point. In addition to the reasons

given by me there is the further difficulty that there is no evidence that the company was in existence in 1917. Indeed the District Judge says that Mr. Craib entered upon the land in 1917 in anticipation of the flotation of the company in 1918. Mr. Craib could not have been the agent of the company in 1917 if it did not come into existence till 1918 nor could the company have had possession for 10 years prior to December 22, 1927. Even if it be assumed that Mr. Craib entered into possession of the land in dispute in November, 1917, he was not the predecessor in title of the company and such possession does not therefore avail the defendant company.

There remains the alternative prayer of the defendant company for compensation in respect of the plantations made by them. They claim the rights of *bona fide* possessors. Mr. Craib in his evidence said "When I opened the lands I believed that we were entitled to them". This evidence given at the first trial has not been supplemented in any way at the second trial. The grounds for this belief are not stated. On the other hand the evidence in the case shows that the company did not acquire the title they rely on until July, 1920, as to ¼ of these lands and September, 1921, as to the other ¼ share. Even their immediate predecessors to whom it is said money was advanced to make the purchases did not obtain their transfers till December, 1919. If, as they say, these lands were cleared "about November, 1917," and planted early in 1918 it is impossible upon the evidence on record to understand how the company or its agents could possibly have believed that they were entitled to them. The only possible conclusion is that these village chenas were entered upon, cleared, and planted without any title at all. It may well be that there was always the intention of buying off any claimants who might appear and prove title to them but the defendant company certainly had no title and Mr. Craib could not therefore have believed that they were the owners.

There is the further fact that the company had notice of Kiri Menika's claim. Kiri Menika says "I asked the defendant company not to clear the lands". He said further "I heard of the felling but did not know it was my share. When I found it out I protested; that was when the police came".

A witness, Juwanissa, said "I remember the lands being opened by defendant company. Kiri Menika and the other villagers objected and the police had to interfere; that was when Kiri Menika's lands were cleared, a portion at a time". That this is substantially in accord with fact is proved by Mr. Craib who said "There was no opposition to our opening up the land. I had to take the police there on one occasion because we feared trouble". It is not surprising that these villagers were unable to assert their objections more vigorously. The company succeeded in bringing the police to the scene fearing that there would be trouble when they commenced felling and in resisting the attempt of Kiri Menika and other villagers to assert their rights to possession.

It is quite impossible in these circumstances that the company or its agent, if Mr. Craib was their agent, could have been under the honest belief that they were entitled to these chenas when they proceeded to clear them and make these plantations. They were trespassers without

any shadow or claim of title, they had notice of Kiri Menika's claim and were therefore *mala fide* possessors at the time they cleared the lands and planted them and at least for two to two and half years thereafter until they acquired the title which it is possible they believed to be good.

Whatever their position may be after their purchases of 1920 and 1921 I cannot see how it is possible to treat the possession prior thereto as other than *mala fide*. The plantation may be a useful but cannot be considered a necessary improvement, and it is settled law in Ceylon that a *mala fide* possessor is not entitled to compensation for useful improvements.

For these reasons I would set aside the judgment under appeal and direct that judgment be entered declaring the plaintiffs entitled to a half share of the premises described in the plaint with damages as agreed at Rs. 50 a year and costs both here and in the Court below.

JAYEWARDENE A.J.—I agree.

Appeal allowed.