Present : Bertram C.J. and Garvin A.J.

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APPUHAMY *et al. v.* THE DOLOSWALA TEA AND RUBBER COMPANY.

203—D. C. Ratnapura, 3,508.

Lease for ninety-nine years—Action against lessor and lessee for declaration of title—Claim for compensation for improvements by the lessee—May lessor claim compensation in respect of improvements effected by the lessee?—What amount may be claimed as compensation for improvements?—Kandyan law—Associated marriage—Two children—A third child born after the death of one husband—Inheritance.

The added defendant leased for ninety-nine years the land in dispute to the defendant company, who planted it with rubber. The plaintiff disputed the added defendant's title to a certain share, and instituted this action for declaration of title to that share. The defendant company, *inter alia*, claimed compensation for improvements.

Held, that the defendant company being a lessee was not entitled to compensation.

The case was sent back for an inquiry as to whether the added defendant (lessor) was entitled to claim compensation in respect of improvements effected by the lessee.

BERTRAM C.J.—"It could hardly be considered satisfactory that when both lessor and lessee were before the Court, the claim of the lessor, who had the *civilis possessio*, should be rejected because he did not make the improvements, and that of the lessee, who had made the improvements, should be rejected because he had not the *civilis possessio*, more particularly as in most cases, if not in every case, the lessor would be himself responsible to the lessee in damages."

"With regard to the amount of expenses, if found ultimately to be recoverable, I think that this should be the actual amount expended."

Semble, per BERTRAM C.J.—If the owner of property stands by and allows a lessee to execute improvements on the property without any notice of his claim, he will not be allowed to avail himself of his fraud, and the lessee will have the same rights of retention and compensation as a *bona fide* possessor.

Under the Kandyan law, where two brothers have a joint wife, the estate of the brother who dies first passes to the children of the association, and when the survivor who after the dissolution of the association has children by the same wife dies, his estate is divided equally among all the children, whether born during the association or thereafter.

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Property inherited by a person from his father must on his death, childless and intestate, pass to the other children of his father by the same wife.

A and B were the associated husbands of C. D and E were the children of this association. F, another child, was born to C after the death of A.

Held, that on the death of A his property devolved on D and E, and on the death of B his property devolved on D, E, and F.

On the death of E, intestate and issueless, the property inherited by him from A devolved on D exclusively, and not on D and F in equal shares.

THE facts appear from the judgment.

Drieberg, K.C. (with him *E. W. Perera*), for appellant.

Bawa, K.C. (with him *Amerasekera*), for respondents.

Cur. adv. vult.

December 15, 1921. BERTRAM C.J.—

This action concerns the title to 103 acres of land in the Ratnapura District, part of the rubber estate belonging to the Doloswala Tea and Rubber Co., Ltd. It illustrates the pitfalls which beset those who essay to construct estates by purchases from villagers in the Kandyan Provinces.

The various supposed titles to the land comprising this portion of the estate were got in during the years 1911 and 1912 by one Tikiri Banda Doloswala Mahatmaya, who apparently acted as a sort of land broker for the purpose, and on April 5, 1912, this person transferred the lands he purported to have acquired to P. G. D. Clark. One of the transfers to Doloswala Mahatmaya was not executed till some days after that date, but on execution the title it conveyed passed to P. G. D. Clark. On January 18, 1915, P. G. D. Clark leased the lands thus acquired, together with the rest of the lands constituting the new estate (289 acres in all), to the Doloswala Tea and Rubber Co., Ltd., for ninety-nine years, but the lease is made to run from January 1, 1913, and the company apparently actually entered into possession in the course of the year 1912. The whole of the estate, including the lands now in question, was cleared and planted with rubber, the persons whose title the plaintiffs now rely on, meanwhile, knowingly or unknowingly, standing by and saying nothing. The process of clearing and improving the estate went on from 1912 to 1919. Tapping commenced in 1919. It could have been started earlier, but the owner preferred to leave the trees a fuller period to mature.

Shortly after this point the rival interests began to disclose themselves. Belonging to the family whose lands had been acquired by Doloswala Mahatmaya were two daughters of different branches of the family, Punchina and Babinga, who were supposed to have

married out in *diga*. If they had been so married, they would, of course, have forfeited their share in the family inheritance. During all the years in which the estate was being brought into bearing nothing was said to suggest that this supposition was not correct. But early in the year 1920 the plaintiffs (whom the District Judge, with probable truth, describes as speculative purchasers) appeared upon the scene and bought in the interests of Punchina (who was still alive) and of the son of Babina (who was dead), and on August 26, 1920, instituted an action against the company claiming two-thirds of this portion of the valuable rubber estate which the company had constructed.

In this Court they made a further claim. In the District Court the action was fought out on the supposition that the company, who, if the claim in the plaint was upheld, had for many years been engaged in improving the estate, principally for the benefit of the plaintiffs, should at least be allowed the expenses of improvement. But in this Court the successful claimants, for the first time, claimed to be entitled to confiscate these improvements without compensation, on the ground that the defendant company, at the time when they were carried out, were not "possessors" of the property within the meaning of the Roman law, but only lessees. The previous decisions of this Court on the subject had apparently been overlooked by all parties.

With regard to the facts, I agree with my brother Garvin, who has examined them in detail, and has explained the principles of the Kandyan law of inheritance in their bearing on these facts. In his conclusion that the *diga* marriage of Punchina is not proved, I agree with reluctance. That Punchina, now an old woman and not called as a witness, was never married is, as the District Judge says, very improbable. But I agree that the evidence of this marriage is not full enough to justify us in pronouncing a forfeiture against her.

But as to the legal proposition that the plaintiffs in these circumstances are entitled to confiscate the company's improvements without compensation, the law of the country will, indeed, be in an unfortunate condition if this proposition is ultimately upheld without qualification, and the situation in that event would, in my own opinion, be one calling for the attention of the Legislature.

The defendants complained that had this proposition been advanced in the Court below, they might have been in a position to disclose equitable considerations, which would take the case out of the decisions of this Court on which the plaintiffs rely. They point in particular to certain observations in *Lebbe v. Christie*,[1] which seem to suggest that the previous decisions of this Court in *Mudianse v. Sellandyar* [2] and *Muttiah v. Clements*,[3] never expressly

[1] *(1915) 18 N. L. R. 353.*
[2] *(1907) 10 N. L. R. 209.*
[3] *(1900) 4 N. L. R. 158.*

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over-ruled, where the lessee's right to improvements had been recognized, might be justified upon special equitable grounds. They ask, therefore, that they may be given a further opportunity of developing their position in the Court below before the point is decided. I agree with my brother Garvin that the equities in this case are not likely to be to assist them. The equitable principle at the basis of those decisions may be taken to be that suggested by my brother De Sampayo in *Soysa v. Mohideen*,[1] namely, that a purchaser from a lessor is subject to the same equities as the lessee himself. That principle has no application in this case. But as the case must go back for further consideration on another point, I also agree that the defendants should be given an opportunity to develop their case for equitable relief.

It seems to me, as at present advised, that there is only one equitable principle which might assist the defendants, if the facts of the case justify its application (and at present I am far from saying that they do), and that is the principle enunciated in *The London and South African Exploration Co., Ltd., v. De Beers Consolidated Mines, Ltd.*,[2] quoted by *Nathan, vol. 1, p. 413*. The principle is there laid down with reference to a *malâ fide* possessor, but a lessee, who improves land in the *bona fide* belief in his lessor's title, cannot be in a worse position than a *malâ fide* possessor. "If, however, the rightful owner has stood by and allowed the erection to proceed without any notice of his own claim, he will not be permitted to avail himself of his fraud, and the possessor, although he may not have believed himself to be the owner, will have the same rights to retention and compensation as the *bona fide* possessor" (*Nathan, vol. 1, p. 413*). See also *Walter Pereira's Laws of Ceylon 359 and 360* and the authorities there cited.

In the course of the argument I suggested that the principle enunciated by Lord Cranworth in a well-known passage in *Ramsden v. Dyson*[3] might be found to have some bearing on the case. The passage is as follows: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented" (at pages 140 and 141).

The rule there laid down is based upon the English law of estoppel, with which our own law has more than once been declared to be

[1] *(1914) 17 N. L. R. 279.*
[2] *(1895) A. C. 451.*
[3] *(1865) L. R. 1 H. L. 129.*

identical. But the law of estoppel is very rigid and inelastic. Under that law the defendants could only raise the plea, not as a ground for claiming the benefit of their improvements, but as an objection to the plaintiffs' title altogether. You cannot, under the law of estoppel, claim to estop a person only to the extent to which his implied representations have damnified you. Nor can a person against whom an estoppel is asserted claim to have his responsibility so limited. Estoppel means that a man has so acted that he shall not be allowed to show the truth at all. If authority is needed for this proposition, it may be found in *Ogilvie v. West Australian Mortgage and Agency Corporation.*[1] I do not think, however, that it would be fair to allow the defendants at this stage of the case to raise an objection to the whole title of the plaintiffs, which it had not occurred to them to raise in the Court below. Fortunately, the principle of the Roman-Dutch law is more elastic and more adaptable to the circumstances, and if the defendants can show facts bringing themselves within the principle, I see no reason why they should not be allowed to do so.

But I come to the general question of the right of a *bona fide* lessee to compensation. This case differs from those which have previously come before this Court. In this case, as the action has developed, the lessor and the lessee are sued together, and it is sought to evict them from a share of the property by virtue of a title paramount. There is yet a further distinction. In the two leading cases which have come before this Court (*Soysa v. Mohideen* (*supra*)), the lessee was ejected, not because his lessor had no title, but because of the effluxion of the lessor's title. The cases are, no doubt, to a certain extent analogous, but are not identical. When the lessee made the improvements the land was not *res aliena*. It had since become so. His grievance was that he expected to enjoy the result of the improvements longer. This is not the case discussed in Voet's chapters dealing with the rights of *bonæ fidei* possessor (*V., 3, 21,* and *VI., 1, 36*). It is discussed elsewhere (*XIX., 2, 16*). The only question there considered is the lessee's right to damages against the landlord or his heir. Indeed, this precise case figures in the *Digest* (*XIX., 2, 9*). A usufructuary let a farm on a five years' lease and died before the lease expired. The inquiry is made: "Can the lessee recover from the heir the cost of improvements? *Si sumptus fecit in fundum, an recipiat?*" The answer is: No, if the lessor let as *fructuarius*, because the lessee might have foreseen the possibility. *Quid tamen si non quasi fructuarius ei locavit, sed si quasi fundi dominus? Videlicet tenebitur; decepit enim conductorem.* If he let as *dominus*, the heir must pay. The law may well be that in such a case the disappointed lessee must look to the lessor or his heir for compensation. But the result would not necessarily be the same where the lessor had no title at all.

[1] (*1896*) *A. C. at p. 270.*

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Both these Full Court cases, therefore, could have been decided in such a way as to leave the present question unaffected. It must be admitted, however, that the *ratio decidendi* adopted by the Full Court in *Soysa v. Mohideen* (*supra*) is so wide and is expressed in such unqualified terms that it must be taken to cover the present case. It would hardly be possible to seek to re-open a question on which the opinion of the Full Court has been so authoritatively expressed. The further distinction, however, that in this case the lessor and lessee are sued together remains to be dealt with.

Before I pass to this, however, I may perhaps be permitted to say a few words on the general question of the rights of the lessee to the expenses of improvements as against a person claiming adversely to his lessor. I have not been able to find any discussion of or even allusion to this question, either in the original Roman texts or in the Dutch commentators upon them. The conclusion reached by our Court in *Soysa v. Mohideen* (*supra*) was apparently reached by a process of commenting on the commentators. The two chapters in which Voet discusses the respective rights of a *bonæ fidei* possessor and a *malæ fidei* possessor are those "*de hereditatis petitione*" (*V., 3*) and "*de rei vindicatione*" (*VI., 1*). The question naturally arose: What were the rights of persons ejected by these actions who had spent money on the lands from which they were ejected? The answer was, that if he was a *bonæ fidei* possessor he was entitled to compensation. That a lessee has not the *civilis possessio* is undoubted, but it may be suggested that the rights of the *bonæ fidei* possessor were emphasized in those chapters, not because of the importance attached to his *civilis possessio*, but, on the one hand, because of the importance attached to his *bona fides*, and, on the other, because of the maxim, cited in this connection, "*Iure naturæ aequum est neminem cum alterius inuria fieri locupleti-orem.*" (For instances of the generality of this maxim see *Voet VI., 3, 52.*) There is nothing in that maxim which requires that it should be limited to persons holding the *civilis possessio*. It may further be suggested that if either the Roman prætors or the Dutch jurists had had specific occasion to consider the application of that maxim to a lessee, more particularly a lessee under a long lease like the present, they would have hesitated to declare that it applied only to persons holding the *civilis possessio*. If necessary, I cannot help thinking that just as for certain purposes they recognized the existence of an *utile dominium*, they would for this purpose have treated him as having an *utilis possessio*. The South African Courts appear to have found it possible to treat the question from the broader point of view. See *Rubin v. Botha*[1] and *Bellingham v. Bloom-metje*.[2] The pronouncements of our own Court make it impossible for us to do so, and the result is that the principle, so limited, is in the present case in danger of proving a defective instrument of justice.

[1] (*1911*) *S. Afr. L. R.* (*App. Div.*) *568.*

[2] (*1874*) *Buch. 36.*

It remains to consider whether, in the present case and similar cases, its defects can be remedied by allowing the lessor to claim in respect of his lessee's improvements. It could hardly be considered satisfactory that when both lessor and lessee were before the Court, the claim of the lessor, who had the *civilis possessio*, should be rejected because he did not make the improvements, and that of the lessee, who had made the improvements, should be rejected because he had not the *civilis possessio*, more particularly as in most cases, if not in every case, the lessor would be himself responsible to the lessee in damages. I agree that the case should go back so that this question may be carefully considered, and I agree that if it is to be considered, this should be done in the formal and regular manner that my brother Garvin suggests.

It may be noted that the lessor retains the *possessio* even when he has delivered the property to the lessee. There is a passage in *Voet* in which the expression is used in this precise connection. (See *XIX., ii., 17.*) "*Si tamen bonæ fidei possessor, qui prædium elocaverat, ejus evictionem patiatur ante finem locationis, et evincens colono vel inquilino usum neget,*" see also *Institutes IV., 15, 5.* "*Possidere autem videtur quisque non solum, si ipse possideat, sed et si eius nomine aliquis in possessione sit . . . . qualis est colonus et inquilinus.*" See also *Dig. XLI., 2, 25, 1.* "*Et per colonos et inquilinos aut servos nostros possidemus.*" If, therefore, an owner may be considered as possessing through his tenant, why may he not be considered as improving through his tenant, and why should a *bonæ fidei* possessor, who turns out not to be the owner, claim compensation on his tenant's behalf ?

With regard to the amount of expenses, if found ultimately to be recoverable, I think that this should be the actual amount expended. The supposition of the benefit derived being less than the expenditure need not here be contemplated. In the present case the expenses can only be calculated on the basis of an average per acre. I think that the learned Judge was wrong in giving what he considered to be a reasonable amount. Mr. Berwick's rule (2) given on page 369 of *Walter Pereira's Laws of Ceylon* seems to me to be too condensed a summary of the passage of the *Digest* on which it is based. (See *Dig. VI., 1, 38.*) The exception mentioned by Voet in his own comments on this passage, namely, "*Nisi hæ nimis graves, nec eas ipse dominus fuisset facturus*" (*VI., 1, 36*), seems to me, read in connection with the passage in the *Digest*, to refer to the special case of a sumptuous building on the land of a poor man. The Judge on these authorities certainly has a discretion in the matter, but in the present instance in all probability the expenses are comparatively high, simply because the work was particularly well done. The benefit to the owners will be correspondingly great. I do not see why compensation, if due, should not be paid at the full rate of the expenditure per acre. With regard to the cost of the cooly lines, the question is somewhat

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different. A company like the defendants might be expected to provide better accommodation for its coolies than persons in the position of the plaintiffs, and here the case of buildings cited by Voet and in the *Digest* more closely applies. I would, therefore, adopt the District Judge's method of assessment in this matter. The actual partition of the buildings among the shareholders must await the anticipated partition action, and in this it will, no doubt, be found possible to give effect to the defendant company's equitable claims.

I agree with the order proposed by my brother Garvin.

GARVIN A.J.—

This is an action for a declaration of title to an undivided two-thirds of a portion of land described in the plaint as Nahalweturalage panguwa. The land was some years ago incorporated in and now forms part of a rubber estate, of which the defendant company, the Doloswala Tea and Rubber Co., Ltd., claims to be the owner. The particular portion of land now in dispute, approximately 103 acres in extent, was leased to the company by Mr. P. G. D. Clark, who is the added defendant.

The defendants plead Mr. Clark's title, aver that they planted the land with rubber, and, in respect of the improvements so effected by them, that in the event of the plaintiffs being declared entitled to any share of the land, they, the defendants, be declared entitled to retain possession of the land till compensated.

The added defendant claims the whole "pangu," and prays for the dismissal of the plaintiffs' action.

The District Judge declared plaintiffs entitled to five-twelfths of the land, and allowed the defendant company, in respect of that share, the sum of Rs. 16,939·69 as compensation for improvements.

From this judgment the added defendant appealed. The plaintiffs, as respondents to the appeal, have, under the provisions of section 772 of the Code, taken certain objections to the appeal, and the defendant company similarly has filed a statement of certain other objections.

Mr. Bawa, counsel for plaintiffs, respondents, objected to the defendants' objections being entertained, but after discussion it was agreed by counsel that the objections of each respondent should be dealt with as an appeal to which the other parties are respondents. It is not, therefore, necessary to consider the merits of Mr. Bawa's preliminary objection.

The land in dispute originally belonged to one Alensuwa, who had four children, to wit, Kirilamaya, Kiribaba, Thomisa, and Kalonchiya. Kirilamaya died intestate and unmarried, so that the remaining three brothers became entitled to the whole land in the proportion of one-third to each. Kiribaba and Thomisa were associated as husbands of one Elenda. Punchina and Kirionchiya

were admittedly children of this association. Elenda had a third child, Babonchiya *alias* Abanchiya. The plaintiffs say that this child was born to Thomisa after the death of Kiribaba, and is, therefore, in the position of a half-brother; that on Kiribaba's death the two children of the association, Punchina and Kirionchiya, took his one-third in the proportion of one-sixth each; and that on the death of Kirionchiya, intestate and unmarried, Punchina took her brother's share and thus became entitled to one-third, the whole of Kiribaba's share; they also claim that on Thomisa's death Punchina got half his share, the other half devolving on Babonchiya *alias* Abanchiya. The one-third share which belonged to the other brother, Babonchiya, the plaintiffs say devolved upon two of his children, to wit, Babinga and Kiriendera, as the other two were daughters who married in *diga* and thus lost their rights of inheritance. Babinga's share was claimed by her son Hatenuwa, and the plaintiffs now claim two-thirds as purchasers of the shares of Punchina and Hatenuwa.

The added defendant, on the other hand, asserts that Babonchiya *alias* Abanchiya was also a child of the association. It is his case that Punchina married in *diga* and lost her rights to inherit both from her parents and from her brother Kirionchiya. So that in the result the two-thirds shares belonging to Kiribaba and Thomisa devolved exclusively on Babonchiya *alias* Abanchiya. The added defendant agrees with plaintiffs that two of Babonchiya's daughters married in *diga*, but they assert that Babinga, like her sisters, also married in *diga*, so that the whole of Babonchiya's one-third share devolved on his son Kiriendera. The shares thus assigned to Babonchiya *alias* Abanchiya and to Kiriendera—two-thirds plus one-third—is the whole estate which was transferred by them to one T. B. Doloswala, from whom it was purchased by the added defendant.

On this statement of the respective cases of the parties three issues of fact arise: First, whether Babonchiya *alias* Abanchiya was the son of the association, or whether he was born after the dissolution of the association on the death of Kiribaba; second, whether Punchina was married in *diga* as alleged by the added defendant; third, whether Babinga was married in *diga*.

The District Judge has held that Babonchiya *alias* Abanchiya was not the child of the association, and that he was born to Elenda and Thomisa after Kiribaba's death. He has also found that the evidence proved that Babinga was married in *binna* and not in *diga* as alleged by the added defendant. There is ample evidence to support the District Judge's findings on these two issues of fact, and I see no reason to doubt that those findings are correct.

It is only necessary to consider the second, whether or no Punchina was married in *diga*. The District Judge has held that she was. The oral evidence called by the added defendant is of no real value. The only witnesses called for the defence, whose evidence lends

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any support to the contention, are Pinkolahamy, Lindekumbure Kiribaba, and Agonis Appu. The first named says: "I knew Nahalwaturuge Kirionchiya and his sister Punchina. She is at Doloswala. I do not know whether she was married." Kiribaba who starts by saying of Punchina: "She is in Doloswalakanda," almost immediately after says: "She is said to be at Doloswala." He does not know whether Punchina had gone out in *diga* or not. He does not even know in whose house she stays.

In cross-examination he says: "I met Punchina on the road at Doloswalakanda." This is apparently the foundation on which his evidence is based.

This evidence proves nothing. It does not prove a marriage in *diga*; indeed, it does not prove that Punchina at any time in her life lived at Doloswala for any appreciable period.

Agonis alone speaks to a husband, but all he says is that he saw Punchina at her husband's house at Doloswala. He, apparently, does not know when the marriage took place, and does not say at what period of her life or for how long Punchina lived at Doloswala. His evidence, as recorded, would seem to show that for very many years past Punchina has lived in her native village. There is the further fact that Dingiriya, the alleged husband, had left his "mulgedara," and it was not there the witness saw Punchina.

This is all the oral evidence. It falls far short of proof of a *diga* marriage, if indeed it proves a marriage at all.

The District Judge appears to have based his finding on certain documents read in evidence. He relies mainly on the documents D 6 and D 7. The first of these consist of the proceedings of case No. 9,561 of the District Court of Ratnapura. That was an action filed by Elenda on April 20, 1870, to vindicate for herself a life interest in a one-third share of a field called Ruhaltenakumbura. Elenda claimed as the widow of Kiribaba, alleging in her plaint that her husband's one-third share on his death devolve upon his son Kirionchiya, subject to a life interest in her favour. This the District Judge regards as a clear indication that Punchina was at that date married in *diga*. This, undoubtedly, is a possible explanation. It is suggested, however, that Elenda was concerned in that action to vindicate her title to a life interest, and that it was sufficient for her purposes to allege that Kiribaba had issue. I have perused the proceedings, and, except for this averment in the plaint, I can find in the evidence recorded in that case no reference whatever to the children born to Elenda and Kiribaba. Thomisa states that Kiribaba left "issues." This is the only passage in the evidence which refers to Kiribaba's family. It seems clear that, at all events, at the trial all that it was thought necessary to establish was that Kiribaba did leave some issue.

But whatever support the averment in this plaint may have leant to, the added defendant's case is weakened by the document P 2.

This is an extract from the Service Tenures Register made under the provisions of Ordinance No. 4 of 1870. It refers to the Mahalwaturage pangu, and among the paraveni nilakarayas is entered the name Nahalwaturage Elenda. The evidence is that Punchina was also known as Elenda, and Nahalwaturage Elenda clearly refers to her.

This is a record which establishes beyond doubt that Punchina was one of the co-owners of this land in 1870. It is contended that if this record was made at the earliest possible date, it might have been made in February, 1870, and that the proceedings D 6 which were taken in April of that year indicate that Punchina must in the interval have been married in *diga*.

The contention at its best is not very convincing. It is based entirely on the supposition that this was one of the very first lands dealt with by the Commissioners appointed under the Service Tenures Ordinance; of this there is no proof.

Documents P 2 and D 6 are records made about the same time. The one is an entry made by a third party; it is the record of an officer specially appointed to inquire into the matters to which this record refers. D 6 so far as it helps the added defendant is merely a statement in a plaint.

It is impossible, in view of the existence of the record P 2, to draw from a statement in this plaint, which may or may not be based on information from Elenda, an inference which will have the effect of disinheriting her daughter Punchina.

It appears from D 7 that Abanchiya, in an action to vindicate a share which he could not possibly claim if Punchina's rights were disclosed, decided to make no reference to her at all. This is certainly not a reason for holding that Punchina had lost her rights by a marriage in *diga*.

There is this further comment to be made in regard to these cases, that whether married in *diga* or not Punchina was entitled to a share in her brother Kirionchiya's estate.

Facts from which a forfeiture of rights of inheritance follow should not be lightly presumed. They must be proved. The evidence in this case does not amount to proof of the averment, the onus of which lies on the defendants. I, therefore, hold that Punchina did not forfeit her rights of inheritance by a marriage in *diga*.

Now, it is common ground that on the termination of the association by the death of Kiribaba, his one-third immediately vested in his children, subject to a life interest in his widow Elenda. Abanchiya was not a child of the association. It follows, therefore, that Kiribaba's interests vested in his two children, Punchina and Kirionchiya, who each took a one-sixth share of the land. Thomisa continued as Elenda's husband, and to them was born a son Abanchiya. Kirionchiya was the next member of the family to die.

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It is contended for the plaintiffs that his share devolved on his sister Punchina, who thus became entitled to one-third of the land. I think the contention is sound. It is not disputed that a sister takes the estate of her brother to the exclusion of her half-brother. It was suggested, however, that Abanchiya should be regarded as a full-brother and not as a half-brother. Abanchiya, Kirionchiya, and Punchina were the children of the same mother, and it is suggested that Thomisa, as the father of Abanchiya, as member with Kiribaba of the association to which Kirionchiya and Punchina were born, might physically have been their father. This must be admitted. But it must also be admitted that they might well have been the children of Kiribaba and not of Thomisa.

It is a rule of inheritance of the Kandyan law that where two brothers have a joint wife, the estate of the brother who dies first passes to the children of the association, and that when the survivor who after the dissolution of the association has children by the same wife dies, his estate is divided equally among all the children, whether born during the association or thereafter (*vide Modder 388, Armour 74*). This proposition, as I have said earlier, is not disputed. It is an equally well-established rule of the Kandyan law that property inherited from his father by a person dying childless and intestate will devolve on his brothers and sisters of the full blood equally (*vide Modder 588*). The principle of the rule clearly is this: Property inherited by a person from his father must on his death, childless and intestate, pass to the other children of his father by the same wife.

It is the property inherited by Kirionchiya from his father Kiribaba with which we are here concerned. For the purpose of determining the devolution of this property, it is necessary to ascertain whether, besides Kirionchiya, there are any other children of Elenda who are legally her children by Kiribaba. Punchina clearly is such a child, and Abanchiya equally clearly is not. It follows that it is Punchina who succeeds to the property of her brother Kirionchiya and not Abanchiya. Punchina, therefore, inherited one-sixth from her father Kiribaba, one-sixth from her brother Kirionchiya, and from Thomisa one-sixth, the remaining one-sixth passing to Abanchiya. These three-sixths or half were admittedly purchased by the plaintiffs, who also purchased from Hatenuwa the one-sixth which he inherited from his mother Babinga. The plaintiffs had, in my opinion, established a clear title to half plus one-sixth or two-thirds of the land, and the title to that share is accordingly declared. The District Judge has held that the defendants have not established a title by prescription, and there is no reason for saying that he was wrong.

There remains the question of compensation for improvements. The Roman-Dutch law gives to the improver of lands a right to compensation for improvements effected by him, and with this right

goes the further right to retain possession until compensation is paid. But this right is given only to a person who, at the time when he made the improvements in respect of which the right is claimed, had the *possessio civilis*, which is defined as "*detentio animo domini*." A lessee has no such possession. With a view to ameliorating his position, a limited right to a measure of relief has been accorded him as against his lessor, but there is no authority for the proposition that an action for compensation was available to a lessee against a person who vindicates his right to the land by a title adverse and independent of his lessor. The Roman-Dutch law is, therefore, clearly against the defendants. This view of the law has been expressly affirmed by two rulings of the Full Bench of this Court. I refer to the cases of *Soysa v. Mohideen* [1] and *Lebbe v. Christie*.[2]

It was contended, however, by Mr. Drieberg that the language in which the earlier cases of *Mudiyanse v. Sellandyar* [3] and *Muttiah v. Clements* [4] were referred to by the judgments indicate that the Judges who delivered them thought that when special equities were established the Courts would recognize a right in a lessee to be compensated for improvements effected by him to the leasehold property. After a careful examination of these cases, I have formed the opinion that there is nothing in their judgments to show that the Judges intended to approve the decisions in the earlier cases, or to recognize any right in a lessee to compensation for improvements, except to a very limited extent, and that only as against his lessor, and possibly against a person claiming under his lessor.

No passage from any recognized authority on the Roman-Dutch law, nor any decision of this Court, was cited to show that an action for compensation for improvements, apart from contract, was allowed to a lessee as against a person who established a title to the premises under lease by a title adverse to and independent of the lessor.

An appeal was, however, made to us to allow the defendants a further opportunity to develop their case for equitable relief. For the reasons which I have given, I should myself have been disposed to reject the appeal, on the ground that the defendants have failed to show that such a remedy, except within the limitations outlined by me, was available in law. In view, however, of the fact that the objection taken in this Court to the defendants' claim for compensation does not appear to have been taken in the Court below, and that for reasons which will appear later, I think the case must, in any event, be remitted to the District Court for another purpose, the defendants may have this opportunity, but on the distinct understanding that, as at present advised, I am unable to see that any such remedy is available under the law in force in this country.

[1] *(1914) 17 N. L. R. 279.*
[2] *(1915) 18 N. L. R. 353.*
[3] *(1907) 10 N. L. R. 209.*
[4] *(1900) 4 N. L. R. 258.*

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It was contended that if the defendants as lessees were not entitled in law to maintain an action for compensation, it was open to the added defendant to claim the benefit of his lessee's improvements and maintain an action for compensation in respect thereof. No clear authority for this proposition was cited, but the brief reference made to the point in *Soysa v. Mohideen* [1] and *Lebbe v. Christie* [2] are, I think, sufficient to show that the contention on first impression is a possible one, and certainly one that should be carefully considered. It is not possible to do so at present, because no such claim has as yet been made by the added defendant, and no evidence has been given in support of such a claim. Having regard to all the circumstances of this case, I think the added defendant should be given an opportunity to prefer and develop a claim to compensation, if so advised, and for this purpose the case must go back. As I have said before, it will be open to the defendants to avail themselves of this opportunity to formulate such claims to compensation for improvements as they may be advised to make. But the claims, if made, must be embodied in appropriate pleadings, whether by way of further answers or otherwise, and the plaintiffs must have an opportunity to file pleadings by way of reply to the claims presented by the defendants and added defendant, or either of them.

I would, therefore, upon this appeal, adjudicate and direct as follows :—

The judgment of the District Judge is set aside. The plaintiffs are declared entitled to an undivided two-thirds share of the land in dispute and their costs of action, which will be paid by the added defendant.

The case is remitted to the District Court to enable the defendant company and the added defendant to file further pleadings formulating their claims, if any, to compensation for improvements, such further pleadings to be filed within two months from the date on which this record reaches the District Court. If no such claim is entered within the time above prescribed, judgment will be entered dismissing all claims for compensation for improvements, and the plaintiffs will, further, be declared entitled to be placed and quieted in possession of the two-thirds share to which they have been declared entitled.

If within the time prescribed a claim or claims has or had been entered in terms of the above order, and the plaintiffs have been given an opportunity to reply thereto, the District Judge will try and determine the matter of such claims as in a regular action, each party being at liberty to adduce further evidence.

The plaintiffs have substantially succeeded, and are entitled to the costs of this appeal, which will be paid by the added defendant.

Sent back.

[1] *(1914) 17 N. L. R. 279.*

[2] *(1915) 18 N. L. R. 353.*