1946 *Present :* **Howard C.J. and Soertsz S.P.J.**

PERIACARUPPEN CHETTIAR, Appellant, *and* MESSRS. PROPRIETORS AND AGENTS LTD., *et al.*, Respondents

59–60—D. C. Colombo, 1,513.

Exceptio rei venditae et traditae—*Sale by a person who had no title—Subsequent acquisition of title—Registration of Documents—Land Settlement Ordinance (Cap. 319), s. 8—Improvements made by a person on property when he had good title to it—Subsequent loss of title—Right to compensation in respect of the improvements.*

G, by deed 3 D4 of December 21, 1928, sold to the first defendant company a land the title to which he expected to obtain subsequently by virtue of a settlement under the Ordinance relating to claims to Forest, Chena, Waste and Unoccupied lands.

By an order made on October 27, 1933, under section 8 of the Land Settlement Ordinance (Cap. 319), G was declared entitled to the property.

Plaintiff became the successor in title to G on April 11, 1938, by *bona fide* purchase for value.

Deed 3 D4 was not registered, whereas the settlement order of 1933 and the deeds of the plaintiff were duly registered.

Held, that the plea of *exceptio rei venditae et traditae* was not available to the first defendant as against the plaintiff and that the settlement order made in favour of G did not enure to the benefit of the first defendant.

Held, further, that the defendants were entitled to *jus retentionis* until compensation was paid for improvements made by them during the time when they had good title to, and were owners of, the land.

APPEAL from a judgment of the District Judge of Colombo. The principal facts appear from the head note. The first defendant went into liquidation after this case was instituted. The liquidator was added as the second defendant, and the third defendant was the purchaser of the property from the first defendant. In the District Court and in appeal it was contended on behalf of the defendants that the settlement order made in favour of G enured to the benefit of the first defendant by virtue of deed 3 D4. Alternatively the defendants claimed a *jus retentionis* on the ground of improvements made by them to the land. The District Judge dismissed the plaintiff's action on the ground that the defendants were entitled to retain possession of the land until compensated for improvements. The plaintiff appealed from the judgment, and the third defendant cross-appealed asking that the judgment of the District Judge be varied and that he be declared entitled to the land in question. On the question of compensation it was argued in appeal, on behalf of the plaintiff, that the right to compensation exists only where a person improves someone else's property thinking that it belongs to him and not when he improves what at the time of such improvement was his own property.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for the plaintiff, appellant in No. 59, and the plaintiff, respondent in No. 60.—The plaintiff's appeal is against the finding of the District Judge that the defendants

1——J. N. A 60878-558 (4/46)

had a *jus retentionis* until compensation was paid. That finding was based on the judgment of Nihill J. in *Hethuhamy v. Boteju* [1]. The facts of the present case are different. This is a case of an owner making improvements on his own land and subsequently losing the land. The right to a *jus retentionis* and to compensation exists only where a person improves another's land thinking that it belongs to him, and not where he improves a land which at the time of improvement was his own property—*Wille : Principles of South African Law, p. 353.* At the moment of making the improvement the title must be in someone else. In this case the improvement was admittedly made before the settlement order. Therefore the improver was the actual owner. The actual owner cannot be a *bona fide* improver—*Jayawardene : Partition, p. 129.* The finding of the District Judge is therefore wrong.

N. Nadarajah, K.C. (with him *Ivor Misso*), for the third defendant, respondent in No. 59, and the third defendant, appellant in No. 60.—It is submitted that the third defendant has a valid title to the land in dispute. The settlement order made in favour of Gunasekera enured to the benefit of the first defendant. Firstly, it is submitted that 3 D4 conveyed the property to the first defendant. The title acquired by the settlement order passed by 3 D4 to the first defendant through whom third defendant claims as purchaser. A person not the owner of property can sell the property to another and the title subsequently acquired by the vendor accrues to the vendee—*Manchenayake v. Perera* [2]; *In re Lind* [3]. Secondly, it is submitted that Gunasekera was an agent to transfer the settlement order to his vendee. He was under a fiduciary relationship to the vendee—see sections 90, 92, 94 and 96 of the Trusts Ordinance (Cap. 72), and *Tillakaratne v. Dassanaike* [4]. Therefore Gunasekera must be deemed to have held the property in trust for the first defendant. Finally, it is submitted that the principle *exceptio rei venditae et traditae* applies—*Voet 21 3* (*Berwick's Translation, p. 531*); *Gunatileke v. Fernando* [5]; *Rajapakse v. Fernando* [6]. As regards compensation the District Judge was right in following the decision of Nihill J. in *Hethuhamy v. Boteju* (*supra*). That decision was considered in *Dias v. Wickremesinghe* [7]. The question of right to compensation arises only when title is defeated. Defendants are in the position of *bona fide* possessors—*Walter Pereira : Laws of Ceylon, 1913 ed., pp. 353, 354, Maasdorp : S. African Law, 1938 ed., p. 52; Wille : Principles of S. African Law, p. 353; Carimjee v. Abeywickreme* [8]; *Marthelis v. Jayewardene* [9]. It is submitted that the claim of the defendants for compensation and *jus retentionis* has been established.

C. E. S. Perera (with him *T. B. Dissanayake*), for the first and second defendants, respondents in No. 60.—Only *bona fide* possession is required to entitle a person to claim compensation. Either first defendant had title or had no title. In either event he was a *bona fide* possessor and is entitled to compensation—*Tikiri Banda v. Gamagedera Banda* [10].

[1] *(1941) 43 N. L. R. 83.*
[2] *(1945) 46 N. L. R. 457.*
[3] *(1915) 2 Ch. 345.*
[4] *(1939) 14 C. L. W. 7.*
[5] *(1921) 22 N. L. R. 385.*
[6] *(1920) 21 N. L. R. 495.*
[7] *(1945) 46 N. L. R. 346.*
[8] *(1920) 22 N. L. R. 286.*
[9] *(1908) 11 N. L. R. 272.*
[10] *3 S. C. C. 31.*

H. V. Perera, K.C., in reply.—A *bona fide* possessor is a possessor who is not an owner. In the present case first defendant was the actual owner when he made the improvement. *Tikiri Banda v. Gamagedera Banda* dealt with a revocable deed, the revocation being by the owner. That decision is not applicable to a case where the improver had a good title. In that case there was a defect in the existing title; in the present case an independent paramount title destroys the existing good title. The decision in *Tillakaratne v. Dassanaike* (*supra*) is not applicable to the facts of the present case. That was a case under the Forests Ordinance. In the present case no facts have been shown to establish a trust. No trust has been raised on the pleadings. Further, this is not a case where a person sells with a defective title or no title. Here a good title existed and a statutory title took its place destroying the earlier title. Therefore the *exceptio rei venditae et traditae* does not apply—*Mudalihamy v. Dingirimenika* [1].

Cur. adv. vult.

March 11, 1946. HOWARD C.J.—

This case involves an appeal by the plaintiff from a judgment of the District Court of Colombo dismissing his action with costs on the ground that the defendants are entitled to retain possession of the land in question until compensated for improvements, whilst there is a cross appeal by the third defendant asking that the judgment of the District Judge be varied and the third defendant be declared entitled to the land in question. The facts of the case are as follows. By deed No. 486 dated December 21, 1928 (3 D4), the land in question was sold by one H. A. Gunasekera to the first defendant. 3 D4 recited that Gunasekera, on a claim before the Commissioner appointed under the Waste Lands Ordinance, was declared the purchaser of the land in question and that Gunasekera had been granted permission to sell the premises by the Government Agent, Province of Sabaragamuwa. In the operative part of 3 D4 Gunasekera (1) sold, assigned and transferred the premises to the first defendant, (2) warranted title to the same, (3) covenanted to execute all such further deeds and assurances required for more effectually conveying and assuring the property to the first defendant, (4) covenanted, soon after the publication of the final orders of settlement under the Waste Lands Ordinance by the Special Officer, to execute a confirmation and ratification of the sale by a duly constituted notarial deed and also to hand over to the first defendant all title deeds, grants and settlements relating to the title to the said premises. By an order made under the Land Settlement Ordinance (Cap. 319) dated October 27, 1933, duly registered in Folio 42/120, Ratnapura, Gunasekera was declared entitled to the property. On a decree entered against Gunasekera in Case No. 18,808, D. C., Kalutara, the premises were sold on January 13, 1935, and purchased by the judgment-creditor, Don Andiris. Don Andiris by deed No. 935 dated May 14, 1935 (P 9), sold the premises to Hendy Singho, who by deed 1900 dated April 11, 1938 (P 8) transferred to John Singho. On the same day John Singho by deeds (P 1, P 3, P 23) executed in favour of the plaintiff a lease, an usufructuary mortgage and an agreement. All these deeds apart from 3 D4 are registered in the same

[1] (*1927*) *28 N. L. R. 412.*

folio as the settlement order. It was by virtue of these deeds that the plaintiff claimed to be entitled to the property in dispute. The first defendant went into liquidation after this case was instituted. The liquidator was added as the second defendant and the third defendant is the purchaser of the property from the first defendant.

In the District Court and in this Court it has been contended on behalf of the defendants that the settlement order made in favour of Gunasekera enured to the benefit of the first defendant by virtue of 3 D4 and that the third defendant has now a good and valid title to the land in dispute. Alternatively the defendants claim a *jus retentionis* on the ground of improvements to the land. The District Judge dismissed the plaintiff's action on the ground that the defendants are entitled to retain possession until compensation is paid for improvements.

It will be convenient first of all to consider the contention put forward by Counsel for the defendants that the settlement order made in favour of Gunasekera enured for the benefit of the first defendant. Mr. Nadarajah maintains—

(*a*) 3 D4 conveys the property to the first defendant;

(*b*) 3 D4 creates a trust in favour of the first defendant. Gunasekera must be deemed when he obtained the settlement order to have held the property on trust for the first defendant;

(*c*) the principle *exceptio rei venditae et traditae* applies.

With regard to (*a*) the first point that requires consideration is the precise effect of an order under the Land Settlement Ordinance. Section 8 is worded as follows :—

> "Subject to the provisions of section 5 (6), every settlement order shall be published in the *Gazette*, and every settlement order so published shall be judicially noticed and shall be conclusive proof, so far as the Crown or any person is thereby declared to be entitled to any land or to any share of or interest in any land, that the Crown or such person is entitled to such land or to such share of or interest in the land free of all encumbrances whatsoever other than those specified in such order and that subject to the encumbrances specified in such order such land or share or interest vests absolutely in the Crown or in such person to the exclusion of all unspecified interests of whatsoever nature and, so far as it is thereby declared that any land is not claimed by the Crown or that some person unascertained is entitled to a particular share of or interest in any land, that the Crown has no title to such land or that some person unascertained is entitled to such share of the land or that such interest in the land exists and that some person unascertained is entitled thereto, as the case may be :
>
> Provided that nothing in this section contained shall affect the right of any person prejudiced by fraud or the wilful suppression of facts of any claimant under the notice from proceeding against such claimant either for the recovery of damages or for the recovery of the land awarded to such claimant by the order :
>
> Provided further that nothing in this section shall affect the rights of *fidei commisarii* whose interests have been prejudiced by an order published under this section."

In my opinion the order of October 27, 1933, is conclusive proof of the title of Gunasekera. The order vests the title in Gunasekera subject to any encumbrances specified in the order. All unspecified interests are excluded. The two provisos to the section are not material to the questions which arise for decision in this case. The rights of *fidei commisarii* do not arise. The first proviso in my opinion refers to some fraud or wilful suppression of facts by a claimant anterior to the making of the settlement order. There is no such suggestion in the present case. The settlement order, therefore, wiped out and destroyed all previous titles to the property and vested it in Gunasekera. Mr. Nadarajah, however, maintains that the exclusive title of Gunasekera acquired by the settlement order passed by virtue of 3 D4 to the first defendant. In support of this argument he cited the case of *Manchanayake v. Perera* [1] In this case it was held that a conveyance executed after the institution of a partition action and before the entering of the final decree, purporting to sell, assign, transfer and set over " to the vendee " the interest to which the said vendor may be declared entitled to in the final decree to be entered into in the said case from and out of all that land (*i.e.*, the subject of the partition suit) is valid and not obnoxious to section 17 of the Partition Ordinance. It passes an immediate interest in the property and is not merely an agreement to convey in the future. At p. 460 the following passage occurs in the judgment of Soertsz J. :—

> " But, it is well established both in the Roman-Dutch law and in the English law that a vendor can sell property which, at the date of the sale, did not belong to him. Wessels, basing himself on Voet and other well-known authorities, sums up the law thus : ' If the object of the obligation does not exist at the moment the agreement is concluded but is capable of coming into existence, then the law regards such an obligation to be *in rerum natura*, and the contract is enforceable at law.' As he goes on to point out, an obligation in respect of a thing not in existence but capable of coming into existence may result from a *conventio spei*—the mere chance of something coming into existence, or from a *conventio rei speratae*. In the former case, the parties stand bound from the moment the transaction is entered into, whatever the result ; in the latter case, there is a tacit understanding that if there is no result the obligation will be without an object and therefore there will be no contract, but if there is a result the contract operates *jam tunc*. As stated in the Digest 18.1.8—*nec emptio nec venditio sine re, quae veneat, potest intelligi et tamea fructus et partus futuri recte ementur, ut cum editus esset partus, jam tunc, cum contractum esset negotium, venditio facta intellegitur*."

We were also referred to the English case of *In re Lind (1915) 2 Ch. 345.* The headnote in this case is as follows :—

> " In 1905 L., who, as one of the next-of-kin of his mother, was presumptively entitled to a share of her personal estate, assigned his expectant share to the N. Society by way of mortgage. In May, 1908, he assigned the same share to A. by way of mortgage subject to the mortgage of 1905. In August, 1908, he was adjudicated a bankrupt and in 1910 he received his discharge. Neither the N. Society nor A.

(*1945*) *46 N. L. R. 457.*

proved in the bankruptcy. In 1911 L. assigned his expectant share to the I. Syndicate. In 1914 L's mother died, and the share thereupon fell into possession :—

Held—by the Court of Appeal, affirming the decision of Warrington J., that, notwithstanding L's bankruptcy, the assignments of 1905 and 1908 remained in force and operated so as to transfer his share on the death of his mother and did not merely impose upon him a personal liability which could be affected by his bankruptcy.

Held, therefore, that the N. Society and A. were entitled in priority to the I. Syndicate."

The question as to whether 3 D4 is an out and out conveyance of the interest Gunasekera was to obtain under the settlement order or merely an agreement to sell is not a matter of real relevance for reasons which I shall give later. But in my opinion on the strict wording of 3 D4 it was a transfer of the interest Gunasekera was to receive. Such a transfer was not in my opinion in any way obnoxious to the provisions of the Land Settlement Ordinance. But although a suggestion was made in the District Court by the defendants that the deeds P 8, P 9, P 1, P 3 and P 23 were tainted with fraud, no evidence was forthcoming in support of such a suggestion. The plaintiff, therefore, appears before the Court as a *bona fide* purchaser for value. His deeds are registered whereas 3 D4 is not. It may be that the first defendant has a good case against Gunasekera on the ground that the latter was holding the property for the first defendant as a trustee. But this fact is not sufficient to displace the title of the plaintiff.

In regard to (*b*) I am of opinion that for similar reasons the defendant cannot succeed by calling in aid the provisions of the Trusts Ordinance (Cap. 72). Chapter IX. of this Ordinance deals with constructive trusts and Mr. Nadarajah contends that Gunasekera must be deemed to have held the property in trust for the first defendant. But in this connection section 98 which saves the rights of *bona fide* purchasers for value must be considered. In spite of a constructive trust in favour of the first defendant the rights of the plaintiff, a *bona fide* purchaser for value, are in my opinion preserved.

With regard to (*c*) it is necessary to consider somewhat closely the application of the principle of the Roman-Dutch law, *exceptio rei venditae et traditae*. It is formulated by Voet in Book XXI. title 3. The following extracts are from Berwick's translation, pp. 531, *et seq.* :—

" *Section 1.*—Since on the confirmation of the right of an alienator (which was defective at the time of the alienation) the originally defective right of the alienee becomes confirmed from the very moment that the vendor acquired the dominium ; and therefore the dominium, from that time annexed to the original purchaser, could not be taken away from him without his own act or consent ; hence he has the right of suing his vendor or a third party possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership."

Section 2.—But, if the purchaser still possesses the thing, and the same persons that are liable to be sued (by him) in respect of (its) eviction bring an action to evict the property from him, it is in his discretion, whether he will suffer eviction and afterwards, when it has been taken from him, sue the successful party by the action *ex stipulatio in duplum*, or by the action *ex empto* for the *id quod interest* (damages), or whether he will prefer to keep the property and repel his vendor and other like persons seeking to evict him either by the *exceptio rei venditae et traditae* or by the *exceptio doli*."

Section 3.—This plea may be opposed, not only to the original vendor, but to all those who claiming under him endeavour to evict a thing from the first purchaser; such as those to whom the vendor has again alienated the same thing, whether by an onerous or lucrative title after he became owner (*i.e.*, after he acquired the dominium which he did not have when he first sold it)."

This principle was considered and explained by Lord Phillimore in *Gunatilleke v. Fernando* [1] in the following terms :—

"This law admitted what was called the *exceptio rei venditae et traditae* (Dig., lib. XXI., tit. 3). Under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor; and though delivery (*traditio*) was, as the title shows, a part of the defence, if the purchaser had acquired possession without force or fraud, he could use the exception, though he had never received actual delivery from the vendor. Also, if he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. (See Voet, Commentary on the Pandects, LXXI., tit. 3). The principal passages are given in translation in a note to *Rajapakse v. Fernando*.[2] The principle does not rest upon estoppel by recital, and is broader in its effect than the English rule. Still the *exceptio* given by the Roman law required the double condition, not only that the property should be sold, but that it should be delivered, though the delivery might in the case mentioned be presumed by a fiction; and here there was no delivery of the property, and the plaintiff is not and never has been in possession. This objection is that which impressed itself upon the mind of the District Judge. The Supreme Court, however, have thought that in this particular the Roman-Dutch law as administered in Ceylon has made a further stride.

The early Roman law, with its simpler methods of business, might be expected to receive modification under a system according to which conveyance of land is no longer effected by mere delivery, *traditio*, the place of which is supplied or which is itself supplemented by writings such as deeds or notarial instruments, particularly if in addition to these there is a public registration of such documents.

[1] *22 N. L. R. pp. 390–391.*

[2] *(1920) A.C. p. 192.*

Accordingly the Supreme Court in Ceylon has held and apparently in conformity with earlier authority that what took place in this case is equivalent to *traditio*. The Chief Justice in his judgment thus expresses himself: . . . . . *Traditio*, whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed. See *Appuhamy v. Appuhamy* [1], where the whole subject is lucidly explained. The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own law will give to a person who has completed his title by securing the delivery of a deed.'

Perhaps the matter may be put in this way. A sale made by a vendor without title cannot be relied upon as against a purchaser from that vendor after he has acquired title, if and so long as the earlier sale remains in contract only; but if the earlier sale is accompanied, followed, or evidenced by certain acts which may be deemed equivalent to the Roman *traditio*, that sale will prevail.

The deed of 1893 was attested by witnesses and a notary so as to satisfy the conditions required by the Ceylon Ordinance for effectual transfer of land, and it was registered as another Ceylon Ordinance directs. In *Rajapakse v. Fernando* [2] their Lordships laid stress upon the fact that the conveyance on which reliance was placed had been duly registered, though it should be added that in that case the successful party was in possession."

The principle of *exceptio rei venditae et traditae* was successfully pleaded not only in *Gunatilleke v. Fernando* (*supra*), but also in another Privy Council case of *Rajapakse v. Fernando* [3]. Mr. Perera has, however, contended that these cases do not apply so far as the present case is concerned inasmuch as the settlement order extinguished all former titles. He relies on the case of *Mudalihamy v. Dingiri Menika* [4]. The learned District Judge in holding that *exceptio rei venditae et traditae* did not apply also relied on *Mudalihamy v. Dingiri Menika* (*supra*). In the latter case a person sold his undivided interests in a land and was subsequently allotted, in lieu of such undivided interests, a share in a partition action to which the purchaser was no party. It was held that the decree in the partition action barred any claim by the purchaser to the land and that the plea of *exceptio rei venditae et traditae* was not available to him. It was sought by the unsuccessful plaintiff to bring the case within the principle of *Gunatilleke v. Fernando* (*supra*). He admitted there was a valid and subsisting decree under the Partition Ordinance, but he claimed that the decree in so far as it declared his vendor entitled to the western half share of the land had enured for his benefit and that he was, therefore, entitled to rely upon the partition decree as part of his title. With regard to this plea Garvin J. said that he was aware of no case in which it has been held that the *exceptio rei venditae et traditae* is available to a purchaser who is seeking to resist his vendor or a person

[1] *3 S. C. C. 61.*
[2] *(1920) A.C. 192.*
[3] *21 N. L. R. 495.*
[4] *28 N. L. R. 412.*

claiming through him upon a title declared by the final decree in a partition action. At pp. 414–415 the learned Judge stated as follows :—

" In a sense, it is correct to say that the parties who by a final decree in a partition action are allotted shares in severalty have acquired a new title, but that is only the indirect effect of the decree and proceeds from the fact that it is good and conclusive against all persons whomsoever. So far as the plaintiff is concerned the title derived by the first defendant under this decree necessarily involves the extinguishment of any claim of title which he may have had prior to the passing of that decree.

He is effectively barred by the decree from asserting a claim to any interest in the land, and is not therefore in a position to establish that interest which he must show before he can estop his vendor or those claiming under them by the *exceptio rei venditae et traditae*.

In any other view of the law it will be competent even for a person through whose negligent omission to assert his title to an interest in the land a final decree for partition has been entered allotting that interest in severalty to his vendor, to maintain successfully against his vendor and those claiming through him upon a title based on that decree that he is still the owner. It is a view which, in my opinion, is unsound.

The exception must, I think, be limited to cases in which the new title which the purchaser asserts has enured to his benefit is obtained by his vendor by the usual means by which title is derived, such as purchase, gift, or inheritance.

A decree which bars a title cannot be relied on by a person who is estopped by that decree to support and confirm the very title which it bars."

If the *exceptio* is limited to the cases mentioned by Garvin J. and the same principle applies to land subject to a settlement order as to land subject to a partition decree, the argument of Mr. Perera must prevail and the *exceptio* is of no avail in the present case. In *Rajapakse v. Fernando* (*supra*) the facts were as follows : C, when he had no title in 1909, sold a piece of land to M and S through whom the defendant acquired title in 1915 and went into possession. The deed of 1909 was registered in Folio 68/253. C obtained a Crown grant in 1912 and the property was sold in execution against him and purchased in 1916 by plaintiff's predecessor in title. The Crown grant was registered in a different folio without reference to the previous title. It was held by the Supreme Court and the Privy Council that the defendant's title was superior. *Rajapakse v. Fernando* (*supra*) differs from the present case as the defendant's original deed was registered and the subsequent title acquired by his vendor was by Crown grant. Again in *Gunatilleke v. Fernando* (*supra*) Lord Phillimore in his judgment at pp. 391–392 stated as follows :—

" Their Lordships think that the view of the Chief Justice, in which the other learned Judges concurred, was right, at any rate, as applied to the circumstances of the present case. The learned Chief Justice reserved his opinion as to what might be the case if the other party was, as he expressed it, ' a *bona fide* purchaser for value without notice '. As he truly said, the defendant was a donee and not a purchaser, and

he unquestionably had notice in 1913 of the transaction in 1895. Whether the idea expressed in the words 'a *bona fide* purchaser for value without notice' is one which is exactly appropriate to the system of Roman-Dutch law may be a question. Whether the point can ever arise as regards land where the previous transfer has been duly registered may also be a question Their Lordships make no pronouncement on these points. They are content to say that in the circumstances of this case and as against this defendant there was a sufficiency of material to satisfy the requirements of *traditio* under the Roman law."

As compared with the present case the defendant was a donee and not a purchaser and he also had notice in 1913 of the transaction in 1895 on which the plaintiff based his claim. For the reasons I have given I do not think the principles laid down in *Gunatilleke v. Fernando* and *Rajapakse v. Fernando* (*supra*) apply. The *exceptio* cannot, therefore, be called in aid by the defendant.

The only matter now remaining for consideration is the plaintiff's appeal against the finding of the District Judge that the defendants had a *jus retentionis* until compensation was paid. The law with regard to this matter is stated in Wille's Principles of South African Law at pp. 353–354 as follows :—

"A person who expends money or labour in improving property, intending to do so for his own benefit, thinking either that the property belongs to himself, or that he has a right to occupy it for some substantial period, whereas in fact he has no such right or title to the property and in consequence the improvements are acquired by the owner of the property, is entitled to claim from the latter the amount by which the property has been enhanced in value. Even a person who has made improvements on another person's property *mala fide*, that is, knowing that he had no title to the property, is entitled to claim the same measure of compensation if the owner stood by and allowed him to make the improvements without objection.

The owner of the improved property is not bound to accept the improvements and so become liable to pay compensation; if he refuses acceptance, the person who made the improvements may remove them if this can be done without injury to the property. But if the owner does accept the improvements he becomes liable for compensation, and consequently the claim for compensation arises only upon the acceptance, which takes place as a rule when the owner claims possession of the property together with the improvements or benefits."

The same principle is formulated in Book II. of the 1938 edition of Maasdorp's Institutes of South African Law at pp. 52 and 53. Mr. Perera has contended that the right to a *jus retentionis* and to compensation only exists where a person improves some one else's property thinking that it belongs to him and not when he improves what at the time of such improvement was his own property. By the deed of December 21, 1928 (3 D4) the Gamikande Estates, Limited, became entitled to the property and entered into possession. It was during this

occupation that the improvements compensation for which is now claimed were made. The improvements were, therefore, effected on land of which at the time they were the owners and not on land which they thought belonged to them. In these circumstances Mr. Perera contends compensation is not payable. He was unable to cite any authority in support of the limitation he puts on the principle I have cited. In fact the authorities to which our attention has been invited point the other way. No such limitation is to be found from a perusal of the judgment of Nihill J. in *Hethuhamy v. Boteju*[1]. Moreover the case of *Tikiri Banda v. Gamagedera Banda* (*supra*) is an authority which, in my opinion, favours the contention of the defendants on this particular point. The headnote in this case is as follows :—

> " Where the plaintiffs were put into possession of a portion of land, in the Kandyan Provinces, by the owner under a deed of gift, and whilst in possession they brought it into cultivation and permanently improved it and increased its value ; and subsequently the original owner revoked the deed of gift and ejected the plaintiffs from the said land.
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> *Held*, by Cayley C.J. and Dias J. that (1) the plaintiffs, the donees under the revoked deed, were entitled to compensation for the permanent improvements made by them ; and that as no objection was taken to the form of action, either in the answer or in the Court below, they were entitled to recover this compensation by the present proceedings, which were in the form of an *actio in personam*.
>
> *Held*, also by the Collective Court that they were entitled to this compensation without any deduction for profits received by them during their occupation.
>
> *Held*, by Berwick J., that they were entitled to this compensation, and to recover it by a personal action both under the Roman-Dutch Common Law and also by the Kandyan Law.
>
> *Held, further*, by Berwick J., that under the Roman-Dutch law every possessor without title is entitled, when ejected by the true owner, to compensation for useful improvements made by him, and may recover this not only by retention of the land till he has recouped himself for this from the rents and profits, but also by a personal action. And further, that if the possession has been parted with or lawfully lost, his only means of recovering compensation for improvements is by action. "

Mr. Perera has sought to distinguish this case on the ground that the plaintiffs had only a defeasible title, whereas in the present case their title was absolute. I do not think that such a distinction can be drawn. Both Cayley C.J. and Berwick J., in their judgments pointed out that the plaintiffs, so long as their deed of gift remained unrevoked, must be treated as owners of the land with a good though a defeasible title. So in this case the improvers had a good title. In my opinion Mr. Perera's contention fails.

[1] *43 N. L. R. 83.*

For the reasons I have given both appeals fail. The judgment of the learned District Judge is affirmed. There will be no order with regard to the costs of appeal.

SOERTSZ S.P.J.—I agree.

Appeals dismissed.