Present : Garvin and Jayewardene A.JJ. 1923.

APPUHAMY *v.* THE DOLOSWALA TEA AND RUBBER CO., LTD

90—D. C. Ratnapura, 3,508.

Lease for ninety-nine years—Action for declaration of title against lessee by third party—Rights of lessor and lessee to claim compensation for improvements—Bona fide *possessor*—Mala fide *possessor—Is lessee for ninety-nine years a* bona fide *possessor ?*

A purchased a land from B and leased it for ninety-nine years to C, who planted it with rubber. D, who was an owner of a share, brought an action for declaration of title. A claimed compensation for improvements. The District Judge held that A was not a *bona fide* possessor as he had notice of D's title at the time of planting, and was not the improver, and dismissed his claim for compensation.

The Supreme Court held that A was in the circumstances a *bona fide* possessor and an improver, and that he was entitled to compensation.

[1] *(878) 4 Cal. 692.* [2] *(1894) 32 Cal. 364.*

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"There is no reason why such a lessor should not receive compensation for improvements in cases in which he can fairly be said to be the improver, though the actual work of improvement was done by his lessee."

JAYEWARDENE A.J.—In the case of a lease for a long period a lessee may be treated as a *bona fide* possessor.

THE added defendant, Mr. P. D. G. Clarke, purchased this land and leased it for ninety-nine years to the defendant company, the Doloswala Tea and Rubber Co., 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. The Supreme Court held on the first appeal that plaintiff was entitled to a certain share, and that 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 compensation in respect of improvements effected by the lessee. The added defendant filed pleading formulating his claim. The District Judge held that the added defendant was not entitled to compensation. The added defendant appealed.

The judgment of the Supreme Court on the first appeal is reported in volume 23 (page 129).

E. W. Perera (with him *W. Chas. Silva* and *Choksy*), for added defendant, appellant.

E. J. Samarawickreme (with him *R. L. Pereira* and *H. V. Perera*), for plaintiffs, respondents.

Cur. adv. vult.

October 23, 1923. GARVIN A.J.—

The plaintiffs were upon a previous appeal to this Court declared entitled to two undivided third shares in a land called and known as the Nahalawaturalayepanguwa. This land had been purchased by Mr. P. D. G. Clarke, the added defendant, who leased it, together with several other allotments to which he had acquired title, to the defendants, the Doloswala Tea and Rubber Company. The land was opened and planted with rubber, and at the time this action was instituted the plantation was about eight years old. An award of compensation to the defendant company was also set aside on the ground that a lessee who had improved his leasehold is not entitled to maintain a claim for compensation against a third party who establishes an independent title to the land superior to that of his lessor. This Court indicated, however, that a lessor might possibly be entitled to claim the benefit of the improvements made during the pendency of the lease and successfully maintain a claim for compensation in respect of those improvements. To enable this lessor to file proper pleadings formulating his claim

upon such principles of law or equity as he thought were applicable the case was remitted to the District Court. The Court, while expressing doubt as to whether such a principle applicable to his case could be found, granted to the defendant company leave, if so advised, to formulate a claim if it was thought that the claim could be brought within the application of some special equitable principle which gave them a right to compensation.

The added defendant duly filed pleadings formulating his claim but no claim was made by the defendant company.

All that remained, therefore, for the Court to do was to consider whether the added defendant was entitled to claim compensation, and if so, to determine at what amount the compensation payable should be assessed.

The District Judge has held that the added defendant is not entitled in law to any compensation, and has assessed at Rs. 165 per acre the compensation, which would have been payable had he succeeded in establishing his right to compensation.

Had the District Judge limited himself to the consideration of the two points on which his decision was invited, it would only have been necessary to deal with the appellants' contention that his decision on both these points is wrong.

But he has made his judgment a vehicle for conveying his comment on the decisions of this Court on a point irrelevant to the questions at issue, and in particular on certain observations made by my Lord the Chief Justice in his judgment in this very case. Not only is he guilty of the solecism of making these comments, but he has done so in a manner which is wanting in ordinary courtesy. The District Judge will do well to remember that this Court undoubtedly possesses powers which are more than sufficient to deal adequately with a situation such as this, and that if they are not exercised in this instance it would not be wise to provoke their exercise by a repetition of such conduct.

It is well-settled law that in Ceylon a lessee who has improved his leasehold cannot maintain a claim for compensation in respect of these improvements against a third party who establishes a title superior to that of his lessor from a source other than the lessor. The law was declared in this sense in the case of *Soysa v. Mohideen.*[1] Since the decision of that case nothing new has been discovered in the writings of the Jurists. But the attention of this Court has been drawn to two South African cases, *Bellingham v. Bloommetje* [2] and *Rubin v. Botha.* In neither of these cases was compensation granted to the improver in his character of lessee of the property improved. Indeed, it was the circumstance that he was not in law the lessee of the premises which enabled him to contend that he was a possessor who entered upon the premises *bona fide*, and with

[1] *(1914) 17 N. L. R. 279.* [2] *(1874) Buchanan's Rep. 36.*

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the intention of holding and enjoying the premises, if not as owner, at least for a specified period of time, and entitled in equity to a measure of compensation assessed on that footing. A lessee is not in that position ; he is not a possessor in the Juristic sense of the term. Moreover, his rights in respect of improvements to the leasehold property are often prescribed in the terms of the contract under which he holds, and where the contract is silent he had the rights which the law gives him.

Rightly or wrongly, the law has been definitely settled by the decision in *Soysa v. Mohideen* (*supra*). That was a decision of a Full Bench of this Court, consisting of Judges of the eminence of Lascelles C.J., Pereira J., and De Sampayo J., and with their opinion I trust I might be permitted to record my respectful agreement.

In the case of *Lebbe v. Christie*,[1] Wood Renton C.J. and Shaw J. (Ennis J *dissentiente*) held that a similar question which came up for decision was concluded by the ruling in *Soysa v. Mohideen* (*supra*), and Shaw J. in the course of his judgment expressed his agreement with the law as declared in *Soysa v. Mohideen* (*supra*), while Wood Renton C.J. decline to discuss a question which had been settled by the Full Bench.

It is this decision and the judgments of these eminent Judges which the District Judge says were " ignored " at the first trial in favour of the view he has expressed. Whoever may " ignore " a decision of the Full Bench of this Court, a District Judge is bound to follow it, and the only excuse, which I hope I might believe is also the real explanation, for his omission to do so is that he was not aware of the decision.

Is the District Judge right in the judgment from which this appeal is taken ? His reasons for rejecting the added defendant's claim appear to be two-fold. He holds that he is a *mala fide* possessor, and also that he was not the improver.

Now, was the added defendant a *mala fide* possessor ? He gave value for this land, and there is not even a suggestion that he was not a *bona fide* possessor when he entered on the land after his purchase. Certain evidence was called which the District Judge summarizes as follows :— " It appears that Punchina, supported by Hathenna, went before Mr. Clarke and asserted their claims and protested against the clearing." This is the foundation of the finding that Mr. Clarke was a *mala fide* possessor. I shall have some observations to make as to the value of this evidence, and the circumstances under which it was tendered. But assuming it to be true, does a mere informal claim such as this convert *bona fide* into *mala fide* possession ? The added defendant entered under a title. He has participated in the conversion of land which—judging from the prices paid by both Mr. Clarke and the plaintiffs—can hardly have been worth more than Rs. 3,000, into a fully developed rubber

[1] *(1915) 18 N. L. R. 353.*

estate worth probably fifty times as much. These are facts which indicate the utmost confidence in the strength of his title. When this action was filed, he strongly maintained that his title was good. The District Judge thought the plaintiffs had established a better title as to five-twelfths of the land; in appeal it was held that the added defendant's title was defective as to two-thirds. The matter of title depended mainly upon whether two Kandyan women had been married in *binna* or in *diga*, and whether a certain person was a son born to a woman married to two brothers in association or born to her by one of the brothers.

These are questions of the utmost difficulty, and even when the evidence can be relied on and the facts and circumstances ascertained with some degree of certainty, there may well be differences of opinion as to the finding.

The added defendant's title is one in which he might quite justifiably have placed the confidence he appears to have done, and I am not prepared to hold that he acted *mala fide* in developing this land merely because he repelled two persons who are said to have claimed an interest in it. Neither of these persons pursued the matter any further. They are not even shown to have addressed Mr. Clarke through a proctor, a method of proceeding with which everybody is quite familiar. Eight long years elapse, during which nothing more is heard of these claims, until the plaintiffs, whom the District Judge describes as land speculators, happens upon them, and are now seeking to evade their liability to compensate the added defendant by raising this plea of *mala fide*.

I see no reason to doubt that Mr. Clarke's possession has been *bona fide* throughout. He does not, in my opinion, appear ever to have had reasonable ground for doubting that his title was a good one.

For my own part I am reluctant to place any reliance on the evidence led to establish the facts upon which this plea is founded. Neither at the first trial nor at the hearing of the appeal, which was very fully argued, was there the slightest suggestion that the possession of the defendant or of his lessee was *mala fide*. The evidence has obviously been procured in the interval in a final attempt to obtain this valuable property for nothing. So much for the finding that the added defendant was a *mala fide* possessor.

The second reason given by the District Judge for rejecting the added defendant's claim is that he was not the improver. The evidence indicates that this land was cleared, and its development as a rubber estate commenced for the defendant company by Mr. Clarke, and continued and completed by other servants of the company in succession to Mr. Clarke. Nor, indeed, is it denied that the actual clearing, planting, and development was made by the defendant company through its agents and servants. This is regarded by the Judge as conclusive of the question whether or not

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the added defendant was the improver. His opinion would seem to be, that unless a person can prove that the plantation, building, or fixture which constitutes the improvement was made or erected by him or by his agent for the purpose he is not an improver in the eye of the law.

But this is surely too narrow and superficial a view. Suppose a father built a house at his expense on land purchased by his son in the way of a gift to this son. Upon completion of the house the son enters into occupation, but is later evicted by a third person. Always supposing the son to have been a *bona fide* possessor, is this third party to retain, free of all cost to himself, that which was intended to be a gift to the son ? I can conceive of no principle of law or justice which permits a person to appropriate to himself the full benefit of money expended by a father for the purpose and with the intention of advancing the interests of his son. Why should the son's position be any different to what it would have been if he had received the money from his father and expended it in building the house ?

To take another case. A purchases land and enters into possession in the *bona fide* belief that he is the owner. In A's absence from the Island B purchases the land, and in ignorance of A's title enters into possession and builds on it. On A's return he sues B and evicts him, but is ordered to pay compensation to B for the improvement made by him. A pays B and enters into possession again. X succeeds in establishing a title superior to that of A. Surely A, who has paid for the improvements made by B, is himself an improver and entitled to be compensated by X though he did not build the house. Otherwise X will be left the owner of a house for which A has had to pay B, while A gets nothing.

These hypothetical cases are I think sufficient to show that a person who did not make or erect the plantation or building which is claimed to be an improvement himself or by an agent for the purpose may nevertheless be the improver in respect of that plantation or building. There are no decisions of this Court on the point, nor does there appear to be anything in the text writers which throw any light on the matter. This important and difficult question must, therefore, be decided on first impressions. Whether or not a *bona fide* possessor can be considered to be an improver must depend upon a consideration of the circumstances of each case ; he cannot be denied the rights of an improver merely because it was not his hand or the hand of his agent that made or erected that which constitutes the improvement.

The case under consideration is that of a *bona fide* possessor who claims to be an improver in respect of a plantation made by his lessee. An owner may occupy and develop his property himself. To do so by leasing the property is another method of possessing and enjoying one's property. A *bona fide* possessor who leases his

property still remains the possessor, though the right to occupy and enjoy it is conceded to the lessee. There is, therefore, no reason why such a lessor should not receive compensation for improvemets in cases in which he can fairly be said to be the improver, though the actual work of improvement was done by his lessee. In the case of improvements made by a lessee under circumstances in which either under the terms of the lease or by operation of law the lessee becomes entitled to receive compensation from the lessor, and such compensation is paid at the termination of the lease, I can see no obstacle to the claim of the lessor that he in turn is entitled to be compensated as a *bona fide* improver in the event of eviction by a third party ; nor can I see that there is any material difference in the position of the lessor when no compensation is paid or payable so long as a corresponding benefit has been secured to the lessee by mutual covenants or by a substantial reduction in the rent. A *bona fide* possessor is entitled to appropriate to himself all the fruits and profits derivable from the proper use of the land. If in consideration of improvements to be made by his lessee he makes a substantial reduction in the rent or remits it altogether, is he to lose both the rents as well as the right to compensation for the improvements so brought into being by him ? Nor do I think it makes any difference that the eviction takes place during the pendency of the lease so long as the improvements were made by the lessee under circumstances in which the lessor is placed under a liability to his lessee in respect of such improvements. It might I think be assumed that as a general rule a lessee will not improve the leasehold unless he is assured of or receives directly or indirectly some compensating advantage or benefit from his lessor either under the contract of lease or under the general law. Is the lessee to have this benefit or advantage, the owner who successfully vindicates his title to retain the improvements, and the *bona fide* possessor who leased the property and thus caused the improvements to come into being to bear the loss ? In cases such as these a lessor who has thus caused the improvements to come into being, and has directly or indirectly compensated the lessee or has assumed a liability to do so, is in my view entitled to claim to be compensated as an improver in the event of eviction by a person with a superior title.

There is a class of cases, however, which must not be lost sight of. They are rare, but that is not a sufficient reason for ignoring them. A lessee may conceivably make improvements under circumstances which give him no right to compensation, and even where he has received no corresponding benefit or advantage from his lessor, and even without his lessor's knowledge. In such cases it will in all probability be held that inasmuch as the improvements have cost the lessor nothing, and were not made with the deliberate intention of benefiting him personally, and as he has incurred no legal liability

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to the lessee, he should not be permitted to make a profit at the expense of his lessee, and that the benefit of the improvements should go to the true owner.

But this is not such a case. The added defendant purchased this land in April, 1912. He appears to have entered into negotiations with the defendant company almost immediately, and it is admitted that he acted as manager of the defendant company from January 1, 1913, till October, 1915, the period during which the clearing and planting was done. The formal lease to the defendant company was not made till January, 1915, but it provides that the lease is to be deemed to have commenced to run on January 1, 1913. This lease relates, not only to the land which is the subject of this case, but to numerous others as well. It would seem, however, that Mr. Clarke was the actual planter of this land, though he did so as agent of the company, and that at the date when the company was formally vested with the leasehold the land had been opened and planted.

The lease clearly contemplates the development of the land. The circumstance that it does not compel the lessees to develop the land is of little importance. This land is situated in a rubber-growing district, and it is difficult to imagine that a company would buy it and not open it. But there is the fact that they did clear and plant it even before the deed was actually signed. The low rental is another factor of importance. It is only Re. 1 per acre per year for the undeveloped land, to be increased as the land is developed, the maximum rental is the low rate of Rs. 3 per acre for the developed land. The lessees, in consideration of the covenants, and presumably mainly in consideration of the low rental, have actually developed this land. The lessor, in contemplation of the development of the land, which had in point of fact been commenced by him on behalf of the company, leases this land, for a long term at a low rental. He has covenanted to secure the lessees in the enjoyment of premises, and by reason of all the circumstances to which I have adverted, now lies under a heavy liability to the defendant company, particularly in respect of the improvements which were contemplated by both parties to the lease, and had in fact been commenced and were far advanced at the date of the lease.

It was the relationship between the added defendant and the defendant company which resulted in these improvements, and, indeed, the purpose of that relationship would seem to have been to develop this land.

In my opinion the added defendant is an improver, and entitled to be compensated as such.

It only remains for me to assess the compensation to which the added defendant is entitled. Learned counsel contends that in no case should the added defendant receive a large sum by way of compensation that is recoverable by his lessee. He contends that

the compensation payable as between the added defendant and the defendant should be assessed in accordance with the provisions of the Placaat of September 26, 1658, which only allows to the lessee the mere cost of the trees at the time of planting. If this contention is to prevail in such a case as this, the so-called right to compensation is worthless, and these proceedings a mere farce. Now, an examination of the Placaat shows that it did not contemplate agricultural enterprises of the nature of tea or rubber plantations which are of a permanent character. In the next place, counsel has not been able to give me either authority or reason for supposing that this Placaat was ever in application in Ceylon. On the contrary, the indication in the local cases is that in cases in which the lessee's right to compensation is established, the amount of such compensation should be assessed upon the same basis of assessment as is applicable to the case of a *bona fide* possessor. These improvements have been made with the consent and acquiescence of the lessor, and under a lease which certainly contemplated the making of these improvements if that was not also the principal purpose of the lease. Whatever the exact amount recoverable by a lessee as compensation or damages may be, there is no reason in this case to suppose that it will be less than the amount ascertained by assessing it on the basis of the compensation payable to a *bona fide* possessor. That is the basis upon which compensation should be assessed in this case. The Chief Justice has expressed the opinion that in this case the compensation should be assessed at the amount actually expended in making the improvements. I do not think that the expenditure after the sixth year should be allowed. The trees in this plantation were tapped in the year 1919. Any expenditure incurred thereafter was presumably in the nature of maintenance, and should in any event be set off against the gross profits. Evidence has been led to establish that the expenditure on this property up to the time tapping was commenced was Rs. 534·26 per acre. It is contended that the evidence falls short of proof that that amount was actually expended on development during that period. The figures as excerpted from the company's books are set out in document D 1. Their accuracy was apparently assumed at the first trial, but at the second trial they were impeached on the ground that the clerk who compiled the document D 1 had not been called. They are also impeached on the ground that Mr. Ruston admitted there was a discrepancy in the figures for one year as compared with certain figures taken out by him. It is not said what the discrepancy amounted to, but one is struck with the fact that the totals for each year do not differ very largely from the figures given by Garnier in his book, which the Judge and the parties regard as reliable. Garnier's figures for six years is Rs. 380. The cost to the company from January 1, 1912, to the end of 1917 is Rs. 491·54. The company's figure for the year 1918 is Rs. 42·72

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Unfortunately Garnier's figure for the seventh year of cultivation is not given. But the fact that his figures for the preceding two years is Rs. 40, the company's figure seems reasonable. This will give a total of Rs. 420 against the company's figure of Rs. 534·26. Allowing for any inaccuracies in the company's figures, I think the cost to them could hardly be short of Rs. 450 per acre. It may be that the company has actually spent more. If the award is less than what they had actually expended, they have themselves to blame for not placing strict proof before the court. To the damages assessed on this basis of Rs. 450 per acre must be added the cost of a cooly line, which is assessed by the District Judge at Rs. 750. The total amount payable is, therefore, approximately Rs. 32,000, but the exact amount will be computed and ascertained by the District Judge on the basis of Rs. 450 per acre, together with Rs. 750 for the cooly line.

I would, therefore, allow this appeal, and direct that judgment be entered for the added defendant for the amount so ascertained. Until compensation is paid to him in full, the added defendant will be entitled to retain possession. He will also be entitled to the costs of this appeal and of the second trial in the Court below.

JAYEWARDENE A.J.—

I agree. I do not think it is satisfactory that I should merely give a silent assent to the judgment just delivered, which I have had the advantage of reading, and I desire to state my own views shortly. I need not repeat the facts of the case. In the judgment delivered on the first appeal, it was decided by this Court that a lessee not having the *civilis possessio* was not entitled to claim compensation for improvements effected by him during the pendency of the lease, even as against a third party, unless he can establish some equitable considerations which would induce the Court to grant him such compensation. In doing so this Court felt itself bound by the decisions of two Full Court cases, *Soysa v. Mohideen* (*supra*) and *Lebbe v. Christie* (*supra*). The case was, therefore, sent back for the defendants, the lessees, and the added defendant, the lessor, to formulate their claims for compensation. The lessees took no steps to establish any equitable ground on which they would be entitled to compensation, but the added defendant amended his original answer and claimed compensation for improvements effected by him and by his lessees. In my opinion, and for the reasons given by my brother Garvin in his present judgment, the lessor is in any case entitled to claim compensation for improvements. A consideration of the terms and objects of the lease leads one to this conclusion. The lessor is in possession of the land through his lessee, and the lessee makes the improvements as the

agent of the lessor. For instance, in *Soysa v. Mohideen* (*supra*) De Sampayo A.J. said :—

> " It is good law that a fiduciary when he hands over the property to the *fidei commissary* is entitled to claim compensation for any useful improvements he may have made during his possession (*Voet 36, 1, 61*), and probably Herbert Edwin's (*i.e.*, the lessor's) legal representative might make such a claim in respect of the improvements made through the lessee, the defendant " ;

and Pereira J. remarked :—

> " It may be that the lessor or his legal representative may claim the benefit of the lessee's improvements and be entitled to compensation " ;

although neither Judge gave a definite ruling on the point. I am, however, not prepared to hold that in no case is the lessee entitled to claim compensation for improvements from a third party. Such a case, in my opinion, is the case of leases for long periods, such as a lease for ninety-nine years, where a lessee may be treated as a *bona fide* possessor. Wille in his *Landlord and Tenant in South Africa, page 207*, says :—

> " In the Supreme Court of the late South African Republic, Kotzé C.J., in the case of *Rex v. Stamp*,[1] followed Grotius and Morula, and held that ' as the lessee has a right of his own, it follows that he must have a remedy for the protection of that right, for *ubi ius ibi remedium*.' In the case of *Collins, N. O. v. Hugo and the Standark Bank*,[2] the same Judge held that under a duly registered long lease the tenant received ' a sort of beneficiary ownership, *utile dominium*,' and that under a duly registered lease for so long a period as ninety-nine years the tenant obtained a ' real ' right over the property leased, and that the lease ought therefore to be regarded as immovable property. In three subsequent cases (*Johannesburg Waterworks Estate and Exploration Co., Ltd., v. Registrar of Deeds*,[3] *Ex parte Montorio*,[4] *Brooke v. Directors of the Corner Estate Co.*[5]) leases of immovable property for periods of ninety-nine years were held to be immovable property.
>
> " The Supreme Court of the Transvaal has held (*Rolfes, Nebel & Co. v. Zweeigenhaft* [6]) that to the extent to which, by the Roman-Dutch law under the maximum *huur gaat veer keep*, a purchaser was obliged to recognize a lease not in

[1] (*1879*) *1877-1887 Kotze 65.*
[2] (*1893*) *Hertzog Z. A. R. 176.*
[3] (*1897*) *4 Off. Rep. 75.*
[4] (*1897*) *4 Off. Rep. 279.*
[5] (*1897*) *4 Off. Rep. 306.*
[6] (*1903*) *T. S. 193.*

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longum tempus, the tenant received a qualified *ius in re*. If a tenant enters into a long lease, which was not duly registered, he obtains only a personal right against the landlord (*Smith v. Farrelly's Trustee*[1]); if duly registered, 'the lease is of the nature of an alienation, and partakes of the nature of immovable property' (*Fawcus' Executrix v. Bezuidenhout*[2]); if duly registered for so long a period as ninety-nine years, a lease is immovable property, *i.e.*, it confers a real right on the tenant (*Ex parte Master of the Supreme Court*[3]).

. . . . . .

"As a result of the above authorities, the juridical nature of a tenant's right under a lease may be stated to be as follows :—

(1) Under a short lease :

. . . .

(2) Under a long lease :

(*a*) If duly registered.—The tenant obtains a real right to the property as against all persons other than a creditor under a mortgage bond which has been duly registered against the same property before the lease was registered (*cf. Henderson Consolidated Corporation, Ltd., v. Registrar of Deeds*[4])."

The element of registration may be disregarded in applying this principle locally. This seems to be in accordance with what Domat lays down in his *Civil Law, bk. 1, tit. 4, sec. 10* (*Strahan's Translation*). He says :—

"Emphyteutical leases or leases for perpetuity or a long term of years have been a consequence of the leases of farms. For since the owner of barren lands could not easily find tenants for them, a way was invented to give in perpetuity such kind of lands on condition that the grantee should cultivate, plant, and otherwise improve them, as the word 'emphyteusis' signifies. By this agreement the proprietor finds, on his part, his account by assuring to himself a certain and perpetual rent; and the perpetual tenant finds likewise his advantage in laying out his labour and industry to change the face of the ground and to make it fruitful";

[1] (*1904*) *T. S. 958.*
[2] (*1903*) *T. S. 41.*
[3] (*1906*) *T. S. 563.*
[4] (*1903*) *T. S. 661.*

and in paragraph III. of the same section he says :—

> " Perpetual leases are distinguished from the common leases of farms by two essential characters which are the foundation of the rules that are peculiar to perpetual leases. The first is the perpetuity of the lease, and the second is the translation of a kind of perpetuity " ;

and in a note he observes :—

> " There are some emphyteutical leases which are not perpetual, but only for a long term of years, such as a hundred or ninety-nine."

The owner's right in the property in such leases is called " direct property," and the tenant's right is called " useful property." He adds in paragraph 8 :—

> " It follows from the nature of these perpetual leases that all the accidents which destroy only the revenues or the improvements made by planting, building, and others of what kind soever they be, that are made by the perpetual tenant, are his loss. For he was obliged to make improvements, and it was for his behalf that the estate was improved. And the accidents which destroy the land fall both upon the owner who suffers the loss of his estate and likewise on the perpetual tenant who loses the improvements which he had made upon it."

But there is nothing in my opinion to prevent a lessee refraining from asserting his claim to compensation and permitting the lessor to do so. The lease in the present case is one for ninety-nine years, but the claim of the lessees was not pressed on that ground. On the same ground, I think, may be justified the allowance of compensation to a transferee of a lessee for fifty years in *Hewawitarane v. Dangan Rubber Co., Ltd.*[1]

In the present case there is no conflict of claims between the lessor and lessee, and the lessee is satisfied to let the lessor obtain compensation for his improvements.

There remains the question whether the lessor was a *bona fide* possessor. In addition to the reasons given by my brother Garvin for holding that the lessor was a *bona fide* possessor, I may refer to the observations of this Court in the *Dangan Rubber Company's Case* (*supra*), where the company's right to compensation was sought to be defeated on grounds similar to those alleged here. There Wood Renton A.C.J. said (at page 51) :—

> " He (the District Judge) holds it to be a *mala fide* possessor, however, and, therefore, disentitled to compensation, because the work of developing the estate was continued without inquiry after the plaintiffs had, by their letter

[1] (*1913*) *17 N. L. R. 49.*

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dated January 28, 1907 (A D 1), warned Mr. Martin, one of the syndicate, from whom the company purchased, of their claim. But mere notice of an adverse claim is not sufficient to establish bad faith against a purchaser. 'A *bona fide* possessor need not necessarily be the owner of the property possessed, nor need he have a legal right to possess it. It is sufficient if his possession is the result of an honest conviction in his mind of the right to possess.' (*Pereira : Right to Compensation for Improvements, pp. 21, 22.*)"

And Pereira J., at page 55, said :—

"I do not think that there is anything in the evidence to show that the appellants did not act in the honest belief that they were entitled to the lands in dispute. The mere fact that a claim was made to them by the respondents is insufficient to show that the appellants acted *mala fide*, especially in view of the fact that the respondents took no action to have their rights declared by the Court for nearly three years. I see no reason to doubt that the appellants were *bona fide* possessors in the strict sense of the term, and I hold that they are entitled to compensation . . . . ."

In my opinion, therefore, the added defendant was a *bona fide* possessor, and, in view of the previous judgment of this Court, he is entitled to maintain his claim for compensation for improvements. I also agree to the *quantum* of compensation allowed.

Lastly, I wish to say a word with regard to the attitude taken up by the learned District Judge towards the judgment of my Lord the Chief Justice. I do not think he has approached it in the proper spirit. This Court, I am sure, does not claim to be infallible ; like all human institutions it is liable to err. It would always welcome comments on its judgments where such comments are based on sound reason or authority, especially when such comments proceed from Courts of inferior jurisdiction. But to question the correctness of a considered ruling of this Court by saying, as the learned District Judge says in his judgment, that it does not agree with what he has "read of the old Jurists" is of little value, particularly in view of the Chief Justice's remark that he has "not been able to find any discussion or even allusion to this question either in the original Roman texts or in the Dutch Commentaries upon them." After reading his judgment, one cannot help feeling that the learned District Judge would have been better advised if he had adopted a more respectful tone and language in his comments.

Set aside.