COREA MUDALIYAR *v.* PUNCHIRALA.

1899.
November 27 and December 29.

P. C., Chilaw, 1,547.

Forest Ordinance, 1885—Land at the disposal of the Crown—Ordinance No. 12 of 1840, s. 6—Chena lands.

In a prosecution for clearing land at the disposal of the Crown not included in a village or reserved of forest, in breach of a rule made under chapter IV. of The Forest Ordinance, 1885 :

Held, per LAWRIE J.—The words "chenas and other lands which can be only cultivated after intervals of several years," occurring in section 6 of the Ordinance No. 12 of 1840, mean lands which were so cultivated at the date of the passing of the Ordinance, and may include lands fit for the cultivation of tea and cocoanut palm.

THE accused in this case was charged under sections 41 and 42 of the Forest Ordinance with having cleared a land at the disposal of the Crown, not included in a reserved or village forest, without obtaining a permit from the Government Agent, as provided by rule 1 of the rules and regulations dated 6th January, 1887, made in terms of chapter IV. of that Ordinance.

It was proved for the prosecution that the land in question was overgrown with low scrub; that the tract appeared to have been previously cultivated; that chena cultivation had been

1899.
November 27 and December 29.

made at intervals of many years; that the accused's house adjoins the land cleared by him; that the villagers laid claim to the whole village where the land was, asserting communal rights on the footing that they were the co-owners of all the low jungle, though they had no sannas or deed of any kind in their favour. It was admitted that the land was well suited for cocoanut cultivation.

The accused, giving evidence in his own favour, deposed that he and other occupants of the village claimed the particular allotment together with the rest of the village; that they were related to each other; that some of the villagers had married and gone to other villages; that neither he nor his co-owners had a sannas or other deed in their favour; that he claimed the land in question as communal property which had come down to him by inheritance; and that he and others cultivated chenas for themselves without permits from the Government Agent.

The Police Magistrate found that some of the lands in the village had been chena before, but that the villagers had no right to the land as against the Crown.

He convicted the accused and sentenced him to a fine of Rs. 20.

Accused appealed.

Rudra, for appellant.—This is not a proper case for criminal prosecution, as the accused claims the land by inheritance. In D. C., Kalutara, 28,686 (*Ram. 1877, p. 166*), payment by a land-owner of one-tenth of its produce to Government was held to be evidence that it was a private land. It is proved in this case that the villagers paid one-tenth tax. In *Queen's Advocate v. Appuhamy* (*1 S. C. C. 26*), PHEAR, C.J., held that in order to bring a land within the meaning of section 6 of Ordinance No. 12 of 1840 it was necessary to show that the land is chena or other land, which, in the same sense as chena, is incapable of being cultivated otherwise than at intervals of several years. So in *Kirihamy v. Fernando* (*2 S. C. C. 88*), it was held that if chena lands were possessed as appurtenances to ancestral paddy lands, such chenas would become private property. And in *Meera Lebbe v. Juan Fernando* (*2 S. C. C. 140*), it was laid down that the mere fact that a land which had been formally occupied or cultivated was, at the time when the dispute as to its ownership arose, unoccupied or uncultivated, would not by itself give rise to the statutory presumption in favour of the Crown. Chena lands are different from ordinary lands. Ordinarily, land though not cultivated every year is cultivable every year, but chena lands being poorer in the soil cannot be so cultivated, they are left fallow for a number of years before they become fit for produce. It has not been proved that the land in respect of which the accused is charged is

1899.
November 27 and December 29.

such chena land. No presumption in favour of the Crown can therefore arise. On the contrary, accused claims it as an appurtenance to his field and says he and his ancestors had cultivated it from time to time.

Rámanathan, S.-G., for respondent.—A great deal of misconception exists as to the nature of chena lands. In olden times the natives were devoted to paddy cultivation, which was annual, being dependent on rain or irrigation, and to the raising of yams, potatoes, dry grain, &c., which required a great deal of manure, in the absence of which it was not possible to carry on such chena cultivation regularly. Villagers therefore resorted to the easy expedient of raising " chena " produce by clearing jungle land, setting fire to the jungle, and allowing the ashes to enrich the soil before planting it with chena shrubs. After the harvest they allowed the land to run into jungle again so as to secure a fresh supply of ash manure before raising another chena crop. Land subject to this kind of treatment, for the purpose of raising such crops as yam, potato, dry grain, &c., fitfully and at intervals of several years, were *henas*, corrupted into " chenas." *Hena* seems to be derived from *hin, i.e.*—weak, irregular—as opposed to regular or annual: hence *hena* cultivation means irregular cultivation of such things as yam, potato, hill paddy, or fine grain, as distinct from the regular rice cultivation, which depends on systematic irrigation or regular monsoon rains.

Thus, the words " chenas and other lands which can be only cultivated after intervals of several years," occurring in the Ordinance No. 12 of 1840, section 6, must be taken to mean lands which had been used, at the time of the passing of the Ordinance, by the natives of the country for the raising of chena produce by the expedient of felling jungle and setting fire to it for the purpose of getting a supply of ash manure. If there is a plentiful supply of ash manure to be had every year, there is no reason why these very lands should not give a crop every year. Indeed, cocoanut plants grow well enough on what are called " chena " lands. With a little hoeing round the trees and some ash manure, the cocoanut plants thrive there. In these circumstances, there is no point in the argument that, because lands dealt with by sqattters are fit for cocoanut cultivation, therefore they are not chena lands under the Ordinance. The authorities cited by counsel for the appellant must be read by the light of the past agricultural history of the Island and the fact of the existence of improved methods of cultivation at the present day, as also the opportunities which cultivators have of transporting manure of different kinds from one part of the country to the other

1899.
November 27 and December 29.

by means of roads and railways, which did not exist in 1840, when the Ordinance to prevent encroachment upon Crown lands was passed. As to the payment of one-tenth tax, there is no evidence of it save the bare statement of the accused. His claim to the land as property belonging to the villagers as a body is unmeaning, because accused does not show that he and his fellow-villagers are descended from a common ancestor and what his particular share is by such inheritance. Nor does he produce any other evidence of co-ownership, such as a deed or sannas, showing what interest his fellow-villagers and he in particular have in the land claimed.

Cur. adv. vult.

29th December, 1899. LAWRIE, J.—

As this case was presented to me and argued as a test case on which many others depended, I delayed to give judgment until I had time carefully to consult the authorities cited to consider the case in all its respects.

It is (I think) a simple case. The appellant cleared for chena cultivation half an acre, covered with low scrub of about four or five years' growth. He did so claiming right: he did not ask nor get a permit from the Government Agent. The land had been chenaëd before —indeed so far as the memory of any living witness goes it has been chenaëd. It was argued that this was not, properly speaking, a *chena*, because chenas are defined in the Ordinance No. 12 of 1840 to be land which can be only cultivated after intervals of several years, and that there was evidence here that in Milagahahena the soil is fertile, and that cocoanuts and other permanent food-producing trees might be planted. The words "can be only cultivated after intervals of several years" mean (I think) I have *hitherto* been so cultivated.

Science and experience discover permanent plants suited to chena land, notably tea, which has been planted and flourishes on hundreds of acres which were formerly chena. I cannot but hold that this half acre, and indeed the whole of the land spoken to by the witnesses, is *chena* land within the meaning of the Ordinance No. 12 of 1840.

The 6th section of the Ordinance No. 12 of 1840 seems to contemplate that the best proof that chenas (in other parts of Ceylon than the Kandyan Province) are private property are the Thombo Register heretofore established. I am ignorant whether there be a Thombo Register in the village or district in which the land lies. None has been produced. It was open to the appellant to prove written title to the land; it is admitted that he had none. It was open to him to prove title to it as an appurtenant of his paddy

fields, but he has not done so. It was open to him to prove title to it by prescriptive possession for a third of a century on a title adverse to the Crown, but he has not done so. He has not said that he individually, or his father or any ancestor or any one from whom he derives title, possessed or cultivated this part of Milagahahena. He claims as communal property, as the property of the inhabitnats of the village Midellawatawenna. In many parts of Ceylon there are traces of the old communal system: these are interesting to a historian or antiquarian, but communal property is not (I think) recognized by our Common Law.

The claim made by the appellant (and I presume by those who are defendants in other cases which depend on this) has not been stated with precision, and the question whether there be common or communal property in Ceylon, and if there be what the rights of individual villagers in the common property are, and how they are to be regulated, cannot be decided in a criminal case.

I am bound to hold, on the evidence before me, that the appellant cleared a chena land deemed to be a forest or waste land within the meaning of No. 12 of 1840, and hence presumed to be the property of the Crown; that he did so without a permit, as is required by the Forest Ordinance rules, and that the appellant has failed tc make a *primâ facie* case that the land is his private property.

It was urged with force and ability that, in cultivating, the appellant acted in good faith, that he had a colourable title. I do not doubt that he believed that he and all the men of his village have right to possess and cultivate the chena. That belief rests on the tradition that the villagers have done so from time immemorial, but it is proved that Government has of late years asserted adverse title. It is said that customary taxes have been imposed, but as no permits or receipts were produced I do not know whether the tax implied that the land was Crown or private land. Latterly, the Crown has sold parts of the high and chena land in the village. While the belief that their claim was good prevents the villagers of Midellawatawana being regarded as criminal when they chenaëd the chena, I am not able to say that good faith was founded on such reasonable grounds as to furnish a complete defence to a charge under the Forest Ordinance.

It is said that a Police Court is not the right tribunal to try questions of disputed title to land. Of course it is not, but a Police Court prosecution is less burdensome to a villager than a civil action. It does not last for long, and there are no costs. If the accused has a good title—if he even has a colourable title—he can produce his deeds or prove his possession and he will be

1899.
November 27 and December 29.

by means of roads and railways, which did not exist in 1840, when the Ordinance to prevent encroachment upon Crown lands was passed. As to the payment of one-tenth tax, there is no evidence of it save the bare statement of the accused. His claim to the land as property belonging to the villagers as a body is unmeaning, because accused does not show that he and his fellow-villagers are descended from a common ancestor and what his particular share is by such inheritance. Nor does he produce any other evidence of co-ownership, such as a deed or sannas, showing what interest his fellow-villagers and he in particular have in the land claimed.

Cur. adv. vult.

29th December, 1899. LAWRIE, J.—

As this case was presented to me and argued as a test case on which many others depended, I delayed to give judgment until I had time carefully to consult the authorities cited to consider the case in all its respects.

It is (I think) a simple case. The appellant cleared for chena cultivation half an acre, covered with low scrub of about four or five years' growth. He did so claiming right: he did not ask nor get a permit from the Government Agent. The land had been chenaëd before —indeed so far as the memory of any living witness goes it has been chenaëd. It was argued that this was not, properly speaking, a *chena*, because chenas are defined in the Ordinance No. 12 of 1840 to be land which can be only cultivated after intervals of several years, and that there was evidence here that in Milagahahena the soil is fertile, and that cocoanuts and other permanent food-producing trees might be planted. The words " can be only cultivated after intervals of several years" mean (I think) I have *hitherto* been so cultivated.

Science and experience discover permanent plants suited to chena land, notably tea, which has been planted and flourishes on hundreds of acres which were formerly chena. I cannot but hold that this half acre, and indeed the whole of the land spoken to by the witnesses, is *chena* land within the meaning of the Ordinance No. 12 of 1840.

The 6th section of the Ordinance No. 12 of 1840 seems to contemplate that the best proof that chenas (in other parts of Ceylon than the Kandyan Province) are private property are the Thombo Register heretofore established. I am ignorant whether there be a Thombo Register in the village or district in which the land lies. None has been produced. It was open to the appellant to prove written title to the land; it is admitted that he had none. It was open to him to prove title to it as an appurtenant of his paddy

fields, but he has not done so. It was open to him to prove title to it by prescriptive possession for a third of a century on a title adverse to the Crown, but he has not done so. He has not said that he individually, or his father or any ancestor or any one from whom he derives title, possessed or cultivated this part of Milagahahena. He claims as communal property, as the property of the inhabitnats of the village Midellawatawenna. In many parts of Ceylon there are traces of the old communal system: these are interesting to a historian or antiquarian, but communal property is not (I think) recognized by our Common Law.

The claim made by the appellant (and I presume by those who are defendants in other cases which depend on this) has not been stated with precision, and the question whether there be common or communal property in Ceylon, and if there be what the rights of individual villagers in the common property are, and how they are to be regulated, cannot be decided in a criminal case.

I am bound to hold, on the evidence before me, that the appellant cleared a chena land deemed to be a forest or waste land within the meaning of No. 12 of 1840, and hence presumed to be the property of the Crown; that he did so without a permit, as is required by the Forest Ordinance rules, and that the appellant has failed tc make a *primâ facie* case that the land is his private property.

It was urged with force and ability that, in cultivating, the appellant acted in good faith, that he had a colourable title. I do not doubt that he believed that he and all the men of his village have right to possess and cultivate the chena. That belief rests on the tradition that the villagers have done so from time immemorial, but it is proved that Government has of late years asserted adverse title. It is said that customary taxes have been imposed, but as no permits or receipts were produced I do not know whether the tax implied that the land was Crown or private land. Latterly, the Crown has sold parts of the high and chena land in the village. While the belief that their claim was good prevents the villagers of Midellawatawana being regarded as criminal when they chenaëd the chena, I am not able to say that good faith was founded on such reasonable grounds as to furnish a complete defence to a charge under the Forest Ordinance.

It is said that a Police Court is not the right tribunal to try questions of disputed title to land. Of course it is not, but a Police Court prosecution is less burdensome to a villager than a civil action. It does not last for long, and there are no costs. If the accused has a good title—if he even has a colourable title—he can produce his deeds or prove his possession and he will be

1899.
November 27 and December 29
LAWRIE, J.

acquitted; if he has no title, and if his possession be unjustifiable, a fine is less burdensome than the decree for possession and costs in a civil suit. In my opinion the fines imposed in such cases should be moderate, so that the alternative of imprisonment may not be necessary. In the present case, which I affirm, I reduce the fine to Rs. 10. This will doubtless be paid: I need not add the alternative of imprisonment.