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ATTORNEY-GENERAL *v.* WANDURAGOLA.

D. C., Kurunegala, 1,601.

Ordinance No. 12 of 1840, s. 6—Chena lands—Cultivated lands—Forest—Jungle—Presumption as regards forest or chena lands—When rebutted evidence—Survey—Tenement sheet.

Per LAWRIE, A.C.J.—A *chena*, according to Sir John d'Oyly, is high jungle ground, in which the jungle has been cut and burnt for manure at intervals of from five to fourteen years, for the purpose of cultivating dry grain (such as hill paddy, kurakkan, &c.), and roots (such as mannoca, sweet potatoes, &c.), and other vegetables.

The periodical cutting of the jungle and sowing of the land with fine grain, being hurtful to the soil and the villagers, cannot be said to be bringing the land into cultivation, and this seems to be one of the reasons why the Legislature, by section 6 of the Ordinance No. 12 of 1840, declared that *chena* lands should be deemed to be "forest or waste lands."

The better the proof that the land in dispute between the Crown and a private party is *chena*, the stronger is the presumption that it belongs to the Crown.

In the case of lands situate within the Kandyan Provinces, this presumption is rebuttable only by proof of a grant by the Crown or by payment of tax to it.

It is not to be rebutted by proof such as that, more than a hundred years ago, the land was private property, and had been *chenaëd* for sixty years before the institution of the suit by the Crown.

If it had been a *chena* for sixty years since 1840, the Ordinance No. 12 of 1840 applies. If it has ceased to be a *chena* and is now a forest, then too the Ordinance applies.

The presumption is not confined only to cases instituted under section 1 of the Ordinance, but arises generally.

The tenement sheet attached to a survey made by an officer of the Surveyor-General's Department cannot be referred to in explanation of the survey, unless it is properly proved.

ACTION *rei vindicatio* by the Crown instituted on 30th June, 1898. The Attorney-General, on behalf of the Crown, alleged in his plaint that the defendants in February, 1898, trespassed upon five contiguous allotments of land forming the forest called Kekirigoda-mukulana, mined for plumbago in two of the said allotments (F and H), and removed ten tons of plumbago therefrom of the value of Rs. 2,500. He prayed that the forest may be declared the property of the Crown, that defendants be ejected therefrom, and that they be condemned to pay Rs. 2,500 as damages, &c.

The first defendant denied the trespass, but admited that in February, 1898, he took on lease lots G and H from one Mudalihami, who claimed to be the owner of them, dug a pit on lot H, and removed ten tons of plumbago, but that he desisted from working the pit after the Crown asserted title to it.

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The second defendant denied the title of the Crown and averred that, as lessee under certain persons, he held possession of a certain portion of the land described in the plaint and had been working a pit on lot H since April, 1898.

It appeared in evidence that the land in dispute consisted of 51 acres, and was bounded on the north and east by villages, and on the south and west by private properties, that in a portion of the land adjoining the private properties in the west several plumbago pits had been opened by different persons; and that the pit from which the ten tons mentioned in the plaint were removed was one of these pits.

As regards the condition of the land, the District Judge (Mr. S. Haughton) found as follows:—

"Now, what kind of land exactly are we dealing with in the present case? There appears to be no good reason for questioning the evidence either of the Forest Officers or of the Ratemahatmayas, Korala and Arachchi, who have given evidence for the plaintiff, and having inspected the land myself on the 16th ultimo in company with Mr. Hansard and the Chief Clerk, Court Mudaliyar, the headman, the defendants, the plaintiffs, surveyor, and others, the result of my own inspection corroborates their evidence. The land is undoubtedly what would be called forest land in ordinary language; it is not *mukalana* in the sense of heavily timbered forest land, the timber on which might be of forest value, nor does it, indeed, contain even moderately heavy timber, but it contains thick and high timber of a decidedly poor description not worth more, Mr. Hansard thought, than from Rs. 10 to Rs. 15 an acre; these remarks refer to the large 40-acre lot (F), the growth of timber on lot G, H, I, J, being lower, and portions of these latter lots on the north and west of the entire block of fifty-one acres having been evidently cleared within comparatively recent years. These recently cleared portions are undoubtedly those which were cleared by the villagers in 1883, who were sued in District Court case No. 21,631, and for felling timber on which in 1893 other villagers were convicted in the Police Court on their own plea of guilty. As I have said, I accept the evidence of the Forest Officers as to the age and nature generally of the timber on the land; the land shown on lot F and the eastern portions of lots G and J has either never been cleared at all, or else it must have been cleared so long ago as to have become the wilderness which it is, and thus reverted to the Crown. The timber is poor, though thick and tall, and the soil, which is sandy, is so poor that the comparative highness of the timber on it may be quite consistent with very great age."

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As regards the chena clearings attempted to be proved by the defendants, the District Judge was of opinion that the land had not been cleared in recent times except in the plot H, where the plumbago pits had been opened.

As regards the title deeds of the lessors produced by the defendants, the District Judge found that the indefinite metes and bounds mentioned in them did not sufficiently locate the lands as falling within the land in dispute, and that therefore the deeds in question " cannot be taken as to any extent proving title against the presumption in favour of the Crown."

He entered judgment for plaintiff for the land and gave Rs. 1,250 as damages.

Defendants appealed, as also the Attorney-General on the question of damages only.

Rudra, for second defendant, appellant.—The *onus* is on plaintiff to prove that the land is forest, but he has failed to do so. The land was surveyed at the instance of the Crown in 1898, and the tenement sheet referring to the survey, though not produced in the Court below, is now before the Court in appeal, and it shows that F had " jungle growth over 40 years old; " G " jungle growth about 15 years old; " H " contains plumbago," and no mention is made of jungle growth at all; I and J " jungle growth about 15 years old." Jungle is not " forest " under section 6 of Ordinance No. 12 of 1840. The oral evidence led for the Crown as to there being forest in the land in dispute must be rejected in view of the statements in the tenement sheet. The 6th section of the Ordinance must not be taken as the general law of the Island. The presumption therein enacted in favour of the Crown does not arise in all cases, but only in cases instituted under the 1st section. In *Appurala v. Dawson*, known as " the Ivies' Estate Case " (*3 S. C. R. 1*), this point does not appear to have been considered, but in *Attorney-General v. Samarasinghe, 1 Browne 220*, it was raised and decided that the presumption was not limited to suits under the Ordinance of 1840. [LAWRIE, A.C.J.—It is now too late to raise this point. There are many decisions against you.] Yes, but the point should be re-considered. [Counsel argued on the merits also.]

Seneviratna, for first defendant, appellant, argued on the facts of the case.

Rámanáthan, S.-G. for plaintiff, respondent.—The tenement sheet is inadmissible in evidence. It was not proved in the Court below. The only evidence in the case as regards the condition of the land is that given by the witnesses call ' on either side. The District Judge has found in favour of the ıtiff's witnesses

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that all the allotments except H contained forest. Forest is jungle, which is a Sanskrit term adopted in the Hindustani language. The *Century Dictionary*, recently published by the *Times*, gives the meaning of *jungle* as a dense growth of rank and tangled vegetation, large and small, often nearly impenetrable, such as is characteristic of some parts of India. This is the meaning of *forest* also.

As regards the applicability of the presumption that forest land is Crown land—[LAWRIE, A.C.J.—We shall not trouble you on that point.] Counsel argued at length on the facts of the case, and left the question of damages in the hands of their lordships.

Cur. adv. vult.

15th July, 1901. LOWRIE, A.C.J.—

The Attorney-General, on behalf of the Crown claimed 51 acres of land called Kekirigoda-mukalana, described on the survey plan A.

In appeal, counsel for the defendants objected to this survey being received in evidence. As the case was unintelligible without it, it is necessary to dispose of that objection at once.

The survey is a tracing of a preliminary plan of six allotments of land surveyed by "C. C. Wijetunga, Itinerating Surveyor," in May, 1898. On it is written "True Extract. Surveyor-General's Office, Colombo, 10th August, 1898. Alfred E. Wackrill, Acting Assistant Surveyor-General. P. D. Warren, Acting Surveyor-General. 8th October, 1898." As it was signed by the Acting Assistant Surveyor-General and also by the Acting Surveyor-General, it is presumed to have been made by his authority and to be accurate and is admissible in evidence. (See Ordinance No. 6 of 1864 and the Evidence Ordinance of 1895.)

Counsel for the defendants contended that the survey was incomplete without the tenement sheet or "description" of the lots by the surveyor, a copy of which was furnished by the Surveyor-General to the defendants' proctor and is filed at page 409.

I am not sure whether that be a "public document," as defined in section 74 of the Evidence Ordinance; it is not signed by the Public Officer who had the custody of it, as is required by section 76. I cannot hold it as properly in evidence, though both parties referred to it in appeal as explanatory of the survey. The surveyor ought to have been called to testify to the accuracy of the facts stated in that description.

I understand that the plaintiff and the second defendant are agreed that though the survey divides the land into several lots, it was originally, and still is, one land. In the course of the argument in appeal I expressed my doubt whether the lot H was

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not a separate land. I was assured that it had been taken for granted by both parties at the trial that all the land in the survey was one land, and that H, G, F, &c., must be taken together.

The defendants' case is that they were digging plumbago from a pit under a license granted by an Arachchi when they were called on by the Crown to desist, and were afterwards sued for damages in this action. They maintain that the Crown is bound to prove its title to the land, that they are not obliged to say what kind of land it is, and that the whole burden rests on the Crown. The Crown has undertaken the burden; it has undertaken to prove that this is a forest belonging to the Crown.

That proof is not that it has been declared a forest under the Forests Ordinance, No. 10 of 1885, nor that it has been proved to be a land at the disposal of the Crown under the Waste Lands Ordinance (No. 1 of 1897), nor is there evidence that this forest has ever been under the supervision of the Forest Officer of the Province. Nor is there evidence that the Crown ever gave permits for the felling and removal of timber. One or two headmen say it is Crown land, because they have always believed it to be so, but there is no proof of possession or of acts of ownership by the Officers of the Crown, except the prosecution of trespassers in 1883 and 1893.

The Crown rests its case on proof that the land in 1898 was a forest, a land covered with trees, and the Solicitor-General contended that, if that be proved, there is presumption in favour of the Crown's ownership, a presumption created (or perhaps stated to be the law) in the 6th section of Ordinance No. 12 of 1840.

Counsel for the second defendant raised a question, which has often been argued, that the 6th section of the Ordinance No. 12 of 1840 was not a statement of general law, that the presumption in favour of the Crown applied only in proceedings commenced under the 1st section of the Ordinance. In many ordinary actions of ejectment by the Crown the presumption has been pleaded and applied. In my opinion the rules for special procedure of the Ordinance No. 12 of 1840 end with section 4. The remaining sections are of general application, they are not preceded by the words " for the purposes of this Ordinance " which precede section 24 of Ordinance No. 1 of 1897.

On the evidence of Mr. Hansard and of Mr. Fyers, Forest Officers, I hold that the land in question is a forest. I will quote only a bit of Mr. Hansard's evidence: " I started inspecting the " land on the N.W. point, and went along the north boundary " of lots G and F, taking the measurements of certain large trees " on the boundary and estimating the growth of forest.

"N. and S. of the north boundary the land is chena from 15 "to 20 years old for about two chains in length, that is, lot G. I "then went along the rest of the northern boundary and then "down the eastern boundary. The forest on the northern portion "of lot F is from 50 to 60 years old, and that on the rest of it between "80 and 100 years, in my opinion.....The forest on the "eastern portion of J is about 50 years old, and on the western "portion 25 to 30 and 15 to 20 years old.

"Lot I contains jungle from 15 to 20 years old. The northern "portion of G contains forest about 40 years old, a small portion "just on the boundary, as stated above, being about 15 years old, "and the rest of the forest on the south of G is between 25 and "30, as well as a small bit 15 to 20 years.....There is a "bund on the western boundary of lot K, there are three timber "trees, large ones, growing on it, on lot K; adjoining the bund "there are rushes, showing the site of a tank, and on the north-"east and south of K is forest 40 years old and 80 to 100 years "old respectively," and so on.

Mr. Fyers said: "When I inspected the land it contained jungle "from 20 to 60 years old and upwards; on the western portion of "it the forest was more or less thin.....Lot F contains "dense forest over 60 years old."

This evidence satisfies me that the land surveyed is a forest. In it are trees of various ages, and though the trees in some places are thinner than in others, the whole land in the early part of 1898 was an unoccupied forest.

This land must be presumed to be the property of the Crown. That presumption may be rebutted, but it holds until the contrary be proved. Mr. Rudra was unwilling to admit that he called the land a *chena*, but in my opinion the second defendant and his witnesses alleged and led evidence to prove that it was a *chena* land appurtenant to a field which of old belonged to Mudianse Mohottala, and which they alleged had been possessed as an appurtenant *chena* from time immemorial by the descendants of Mohottala and those deriving title from them.

But would proof that it was a *chena* advantage the defendant and rebut the presumption? The Ordinance enacts that "all "*chenas* and other lands which can be only cultivated after "intervals of several years shall, if the same be situate within the "districts formerly comprised in the Kandyan Provinces (where "no *thombu* registers have been heretofore established), be "deemed to belong to the Crown, and not to be the property of "any private person claiming the same against the Crown except "upon proof only by such person of a sannas or grant for the

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" same, together, with satisfactory evidence as to the limits or " boundaries thereof, or of such customary taxes, dues, or services " having been rendered within 20 years for the same as have been " rendered within such period for similar lands being the property " of a private proprietor in the same district." This enactment with regard to *chenas* has, I think, now made a change in the law. In Kandyan times high lands were acknowledged as appurtenant of fields. Sir John d'Oyly said: " Every field, with a few exceptions, had attached to it a garden and a jungle ground called *hena*, which, as a matter of course, was inherited and transferred with it."

And in another place Sir J. d'Oyly said: " A *chena* land was high jungle ground, in which the jungle was cut and burnt for manure, after intervals of from 5 to 14 years, for the purpose of cultivating the paddy called *el-vi* and other fine grains as cotton, or sometimes roots and other vegetables. After two or at the most three crops it was abandoned till the jungle grew again."

Many men of experience in this land have considered this periodical cutting of the jungle and sowing with fine grain hurtful to the soil and injurious to the interests of the villagers, who became less dependant than they should have been on the steady labour of working their paddy fields.

Cayley, C.J., in a judgment in D. C., Kalutara, 20,650 (December 6, 1873), reported in *Grenier's Reports, 1873, p. 142*, held that *chena* cultivation was an injury to land and could not be called bringing land into cultivation.

From these and other considerations the Legislature in 1840 thought it right to bring *chenas* under the immediate control of Government by declaring them to be the property of the Crown, and I am not sure that the 20 years spoken of as the time within which services or taxes had been rendered did not refer to the 20 years before the Ordinance came into operation, and the enactment may have been absolute that for the future all *chenas* should be decreed forest or waste land within the meaning of the 6th clause.

The meaning of this part of the 6th clause was considered by the Full Court in D. C., Kurunegala, 10,277. The District Judge says that is unreported, but it has been reported both in *Morgan's Digest, p. 419*, and in *Rámanáthan's Reports, 1843-1855, p. 25.*

In the D. C., Ratnapura, case reported in *1 S. C. C. 28*, Phear, C.J., held that to bring the land within the enactment it was necessary to show that it was chena or other land which in the same sense as *chena* is incapable of being cultivated otherwise than after intervals of several years.

As held the proofs fall short of that, but Sir John Phear does not seem to have doubted that if it had been *chena* land, the 6th section would have applied. In the case reported in *2 S. C. C. 88*, Phear, C.J.. held that land was not a chena within the meaning of section 6.

Counsel for the second defendant relied on Sir John Phear's judgment in D. C., Kalutara, 32,054, *2 S. C. C. 139*. I fail to see how that case applies. He there interpreted the meaning of the words "unoccupied and uncultivated," not "*chena*," and the land was in the low-country, not in the Kandyan Provinces.

In D. C., Ratnapura, 1,238, Cayley, C.J., recognized the right of the Crown to *chena* land, but drew a distinction between the right to the land and to the crops growing on it. In the Tangalla case reported in *5 S. C. C. 195*, Burnside, C.J., held that the presumption that *chena* land belonged to the Crown was a rebuttable presumption, and that it had been rebutted by 60 years' possession and by proof that for upwards of 20 years the land had paid the usual tax to Government.

In the Ivies' Estate Case, *3 S. C. Rep. 1* Burnside, C.J., and Withers, J., held that there was proof that the plaintiff's predecessor in title paid 1/14 by way of tax for the *chenas*, which was *primâ facie* evidence that the *chenas* belonged to private parties.

So far as any of these decisions hold that proof that private parties cultivated a land as *chena* is proof of private ownership, they seem to me to be contrary to the words of the Ordinance.

The better the proof that the land is *chena*, the stronger is the presumption that it belongs to the Crown, and that presumption can be rebutted only by proof of a grant or by payment of tax.

Here there is no sannas or grant, no taxes for kurakkan on high lands as exacted in the North-Western Province.

I think it is probable that more than 100 years ago, Mudianse Mohottala lived on the land F, at a place where some stone-pillars still stand, but long ago he left that house and moved to a house in Wetanga, where his descendant, the Registrar of Births, now lives.

The part of the land marked K was formerly a tank, the bund of which is still visible. K is no longer a tank, the bund is breached: at the south the surveyor shows, by two little arrow heads, how the water flows.

Mr. Hansard estimated the oldest trees to be about 100 years. From that I think it probable that when Mudianse Mohottala moved to Wetanga the indigenous trees began to grow undisturbed.

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Now continuing to rely on Mr. Hansard's evidence, I gather that on parts of the land there is a newer growth, on the north of G 40 years old, on the south of G 30 or 25 years old, and on a part of the land a growth of about 15 or 20 years old.

The villagers of Wetanga, either the descendants of Mudianse Mohottala or others, in 1883, and again in 1893, it is well proved, cut down the trees on a part of the land.

In 1883 the land was not cultivated in kurakkan, partly because the rain prevented the trees and branches being burnt, and also because the cultivators were prosecuted and punished.

There was a later cultivation about five years ago, on a small scale, and the cultivators were prosecuted and fined.

Has the presumption in favour of the Crown been rebutted by proof that more than 100 years ago this land was private property, and by proof of *chena* cultivation for the succeeding 60 years? I think not.

When the Ordinance No. 12 of 1840 was passed, this was *chena* land. I see no reason why the Ordinance did not apply to it, for it has not been shown that there was a grant, or that there had been a payment of tax within 20 years of the passing of the Ordinance. If it was a chena 60 years ago in 1840, if it remains till now a chena, the Ordinance applies; if it has ceased to be a *chena* and is now a forest, the Ordinance applies.

The result to which I come is that the land in the survey is forest, the property of the Crown; that if it be a chena land it is equally the property of the Crown; and that the defendants must yield possession and must pay for the plumbago they have taken.

As to the question of damages, both the plaintiff and the defendants have appealed. I think the District Judge has made a reasonable estimate, perhaps rather too favourable to the defendants. I would not disturb the judgment.

MONCREIFF, J.—

I also am of opinion that the Crown has proved that the land in dispute is forest. The attempt of the defendants to show that it was private land has failed. Attempts were made to assert private rights in 1883 and 1893, but they were promptly suppressed.

I therefore agree to the order made by the Chief Justice.