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Present. Bertram C.J., Ennis, De Sampayo, Porter, and Schneider JJ.

MUDALIHAMY *v.* KIRIHAMY *et al.*

180—D. C. Kandy, 7,709.

Ordinance No. 12 of 1840, s. 6—Forest, waste, and chenas—Presumption under section 6 refers to the state of the land at the date of the encroachment—Waste Lands Ordinance—Prescription.

The presumption in favour of the Crown under section 6 of Ordinance No. 12 of 1840 has reference to the condition of the land at the time when the encroachment was made, and not to the condition of the land at the date of the passing of the Ordinance, or at the date of an action regarding the title to the land.

BERTRAM C.J.—The words of the section should be construed as though they read: "All lands proved at any material time to be forest, waste, &c., shall be presumed to be the property of the Crown at that time until the contrary thereof be proved;" and, similarly, "all lands proved at any material time to be chena shall, if situated in the Kandyan Provinces, be deemed to belong to the Crown at that time."

Under the Waste Lands Ordinance the material time is the date of the issue of the notice under section 1 (subject to the introspective effect of section 24 (*c*)). The presumption there enacted in section 24 (*a*) is merely for the purpose of the Ordinance, and the object of any legal proceeding under the Ordinance is to determine whether the land in question at the date of the notice came within any of the categories to which the presumption applies . . . . . There is nothing to prevent a plea of prescription being set up to chena lands in proceedings under the Waste Lands Ordinance.

1922.

Mudalihamy v. Kirihamy

H. J. C. Pereira, K.C. (with him *J. S. Jayawardene*), for appellant.—The presumption created by section 6 of the Crown Encroachment Ordinance, No. 12 of 1840, in favour of the Crown, applies to lands which were chenas at the time of the passing of the Ordinance.

The preamble states "Whereas divers persons . . . . . have taken possession of lands in this Colony belonging to Her Majesty, &c.," thus indicating that the Ordinance was intended to meet certain circumstances at that time. Section 1 further gives certain rights to persons who have been in uninterrupted possession of Crown lands for over five years. There is no evidence on record to show that this was chena land in 1840. The deed of gift of 1899, which is the earliest document with reference to this land, describes it as *watta* (garden), and the title of the donors is recited as maternal inheritance. The report of the surveyor shows that there was a plantation on the land twenty years ago. In the plan of 1919 it is again described as a garden, and the Crown had levied a tax on the crops cultivated in this land as from private properties. It was held in *Corea Mudaliyar v. Punchirala* [1] that this Ordinance does not apply to lands which became chenas after the passing of the Ordinance. Paddy and Dry Grain Tax Ordinance, No. 14 of 1840, shows that the Crown had a list of the chenas at that time. The special presumption created in favour of the Crown by section 6 must be strictly construed.

If section 6 is not to be construed as applying to the time when the Ordinance was passed, it should then be proved that the land was chena at the time of the action or shortly prior to it. The *Attorney-General v. Le Mesurier* [2] and *Arunachalam Chetty v. Davies.*[3] Land possessed and cultivated as private land for a considerable time does not come within section 6 (*Kirihami v. Appuhami* [4]). In this case the land has been cultivated as a private garden for at least twenty years.

Garvin, for respondent.—In 1915 the appellant himself had bought the land from the Crown, thus acknowledging the title of the Crown.

Akbar, S.-G. (with him *Obeyesekere, C. C.*), as *amicus curiæ*.—*Corea Mudaliyar v. Punchirala* (*supra*) did not hold that this Ordinance (section 6) did not apply to lands which became chenas after the passing of the Ordinance as pointed out by Wood Renton C.J. in *The Attorney-General v. Punchirala.*[5] Lawrie A.C.J. held in *Attorney-General v. Wanduragala* [6]: "The better the proof that the land is chena, the stronger is the presumption that it belongs to the Crown."

[1] *(1899) 4 N. L. R. 135.*
[2] *(1899) 1 Matara Cases 85 at p. 88.*
[3] *(1921) 3 C. L. R. 138.*
[4] *(1879) 2 S. C. C. 88.*
[5] *(1915) 18 N. L. R. 152 at p. 155.*
[6] *(1901) 5 N. L. R. 98 at p. 105.*

Register referred to in the Paddy and Dry Grain Tax Ordinance refers to registration of private chenas.

Ordinance No. 12 of 1840 is the document of title in respect of all lands belonging to the Crown (see Mr. Cumberland's note in *18 N. L. R. 277*). Sections 1-4 deal with the summary method of ejectment, section 5 deals with cinnamon lands, section 8 with lands admittedly Crown property, but improved by a private party, and section 6 with lands over which Crown cannot have effective control. If the Crown can prove that the land was at any time of the particular description, it can claim the benefit of the presumption created by section 6. This presumption could be rebutted only by the production of sannas or grant, or by proof of customary taxes. Kandyan chenas cannot be acquired by prescription (*The Attorney-General v. Punchirala* [1]).

H. J. C. Pereira, K.C., in reply.

Cur. adv. vult.

August 25, 1922. BERTRAM C.J.—

This case was referred to a Court of five Judges for the determination of an important question of law arising under section 6 of Ordinance No. 12 of 1840. Briefly stated, that question is whether the presumptions enacted by the section must be considered as having reference to the state of the land in question at the time when some dispute arises between the Crown and a subject (or between a subject claiming through the Crown and another subject claiming otherwise); or whether they may be considered with reference to the state of the land at any time which may be material to the title.

The facts of the present case are as follows: The land in question consists of 5 acres 1 rood and 18 perches. It is situated in one of the Kandyan Provinces. The plaintiff claims under a Crown grant dated April 12, 1919. The second defendant claims the eastern half on the following chain of title. On August 5, 1899, two brothers, Menikrala and Ukkurala, apparently partners in an associated marriage, purported to gift to their three children, Mudalihamy, Wijeyhamy, and Kirihamy (first defendant), land said to be identical with this eastern half. The land was referred to as a garden (*watta*), and the title recited was maternal inheritance. On April 3, 1910 (D 5), Kirihamy brought in the shares of his brothers, and is said, at about the same time, to have purchased the western half from another party, though the deed purporting to convey this interest was not produced, or, at any rate, was not discussed before us. In 1906 a Crown survey was made of this and several surrounding lands, and, in the following year, a plan was completed as the result of that survey. This plan was replaced by another in 1913, the lots in the original plan having been re-grouped, so as the better

[1] *(1918) 21 N. L. R. 51.*

1922.

BERTRAM C.J.

Mudalihamy v. Kirihamy

to represent the claims of the various claimants. In the year 1915 the whole of this land which had been " fixed for sale or settlement by the Crown " was sold to the first defendant, Kirihamy, for Rs. 91. He paid one-tenth as deposit, but failed to complete the purchase. The land was put up for sale again, and duly sold to the plaintiff, the Crown grant being dated April 12, 1919. In the interval, however, first defendant, Kirihamy, on July 7, 1916, purported to mortgage to second defendant all the lands comprised in the original deed of gift of 1899 according to the boundaries therein set out. The mortgage deed was put in suit, and a sale by auction took place under the direction of the Court, in pursuance of which these lands were conveyed to the second defendant by deed dated February 12, 1920. The second defendant thus claims land said to be identical with the eastern half of the land in question. The first defendant claims the western half under a title not clearly explained.

We have now to consider the condition of the land with reference to the times which may be considered material to the question in dispute. The report of the surveyor, Mr. O. P. M. Schokman, which, except in one particular, was accepted by both parties, showed that at the date of his survey, November 15, 1920, on the eastern half of the land, there were forty-nine coconut plants which were only about four years old, and had, consequently, been planted since the abortive sale to the first defendant in 1915 and probably by the first defendant. For the purpose of carrying the story one step further back, we have the evidence of the plaintiff, who is the local Arachchi, and who says that when the land was surveyed by the Crown Surveyor in 1906 there was no plantation on the land at all. He says: " Before the plants on that land were planted, this land was a chena like other chenas." This approximately corresponds with the evidence of Mr. Schokman. It does not, however, account for the presence of the two old coconut trees on the land which, on Mr. Schokman's estimate, must, at that time, have been plants of about four years' growth. The plaintiff explains the jak tree as an accidental growth. This evidence is very strongly supported by the plans of 1904 and 1913 with their accompanying tenement sheets. As I have explained, the lots on the plan of 1907 were re-grouped for the purpose of a later plan. Taking the lots or portions of lots which were comprised in the lot constituted for the purpose of this land in the plan of 1913, and examining the descriptions of these lots or portions of lots as given in the tenements sheet which accompanies the plan, we find that, with one exception, the whole of the land is described as either jungle or chena. That one exception is the southern portion of lot 29 in the plan of 1907 comprising about an acre in extent at the most. This is described as " cleared chena," and may be identified as the portion of the eastern half on which the forty-nine coconut trees have since been planted. It may be taken as clearly proved, therefore, that in or about 1906 the land now in

question consisted either of jungle or chena. The only evidence to the contrary is the reference to the eastern half, in the deed of 1899, as being " watta, " and the fact that there are two coconut trees of twenty years' growth in the eastern half and an old jak tree in the south-eastern corner. This is clearly insufficient to displace the effect of the definite evidence above set out.

We have then these facts. At the date of the institution of the action (November 13, 1919), the land was land more or less sparsely planted with coconut trees of from three to fourteen years' growth and with two trees a few years older. In 1906 its condition was that of chena or jungle with two young coconut plants and a jak tree in the south-east corner. The plaintiff claims on the Crown grant, and the basis of the Crown's title is the presumption created by section 6. The question we have to determine is this : May that presumption be considered with relation to the state of the land at or about 1906, or must it be considered, as Mr. H. J. C. Pereira contends, with reference to the state of the land at the institution of the action ? If Mr. Pereira's contention is correct, there is no basis for the presumption referred to, and the plaintiff must prove the Crown's title in some other way. If the alternative view is the correct one, then the presumption is amply established and has not been rebutted.

I will proceed to consider the question of law. The effect of the section may be presented as follows:—

(1) All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary is proved.

(2) All chenas—

(*a*) *In the Kandyan Provinces* shall 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 by such person (1) of a sannas or (2) of payment of customary taxes.

(*b*) *In other districts* shall be deemed to be forest or waste lands.

Mr. Pereira's first contention is that the section only relates to lands which can be shown to have had the various characteristics specified at the date of the Ordinance, namely, 1840. The object of the section was to protect Crown property. No reason can be assigned for the limitation of that protection to lands bearing a particular character at a particular date. Such a limited form of protection would gradually become more and more inefficacious as time advanced, and, in the absence of a cadastral survey of that date, would be obviously destined to disappear within a very short interval. The contention is not supported by any authority. The passage in

1922.

BERTRAM C.J.

Mudalihamy v. Kirihamy

Lawrie J.'s judgment in *Corea Mudaliyar v. Punchirala*,[1] on which much reliance was placed, has obviously been misunderstood by the compiler of the headnote. This was pointed out by Wood Renton C.J. in *The Attorney-General v. Punchirala* [2] and by my brother De Sampayo and myself in *Hamid et al. v. The Special Officer.* [3] It is inconsistent with the well-known dictum of Sir A. Lawrie himself in *Attorney-General v. Wanduragala* [4] : " The better the proof that the land is chena, the stronger is the presumption that it belongs to the Crown. " It is also inconsistent with the judgment of this Court in *Arunasalam Chetty v. Davies* (*supra*). The word " hitherto " in the passage referred to clearly means not up to the date of the passing of the Ordinance, but up to the date of action brought. I am not affected by the fact that in the case of *Hamid v. The Special Officer*, [5] the Privy Council did not think it necessary to give a decision on this point.

In the alternative Mr. Pereira puts forward the following contention, which presents the principal question to be decided. He contends that when the section declares that land which bears a certain character shall be presumed or be deemed to belong to the Crown, it is speaking with reference to some contemplated action, and that the material time to be considered, in determining whether any particular land bears the character in question, is the date of the institution of the action and not any time prior thereto.

It is undoubtedly the case that, as a rule, when an enactment declares that a certain state of fact shall be presumed (or shall be deemed) to exist, the meaning is that this shall be so presumed or deemed by a Court in some legal proceeding before it, and that the material time to consider for the purpose of the application of the presumption, if no time is otherwise indicated, is the date of the institution of the proceeding, that being the time with reference to which the respective rights of the parties are to be determined. The interpretation contended for by Mr. Pereira thus seems the simplest and most natural interpretation.

Such an interpretation, however, in the case of the present section, would render it largely inoperative. Forest, waste, or unoccupied land in this country is not taken possession of in order that it may be preserved as a hunting ground or as a deer park. It is taken possession of in order that it may be cleared, cultivated, planted, or otherwise improved. These are the operations which brings to the attention of the agents of the Crown the fact that the land has been appropriated. To say that the presumption does not apply, where these operations have already to any extent changed the face of the land appropriated, is to say that it can only apply when the trespasser is caught *flagrante delicto* and before he has done anything in

[1] *(1899) 4 N. L. R. 138.*
[2] *(1915) 18 N. L. R. 155.*
[3] *(1920) 21 N. L. R. 353.*
[4] *(1901) 5 N. L. R. 105.*
[5] *(1921) 23 N. L. R. 150.*

pursuance of his entry upon the land. But this does not happen. In all countries it is the essence of the position of the squatter that he should for some time have escaped notice.

Mr. Pereira felt this difficulty, and was prepared to concede that the Court need not confine its reference to the state of affairs existing at the actual date of the action, but might extend its consideration to some short interval before action. Pressed and to state the nature of the interval he had in his mind, he suggested that such an interval as a month might ordinarily be appropriate. This admission of the necessity of a concession and the obvious impracticability of defining the limits of the concession emphasize the difficulty of the suggested interpretation.

But this is not its only difficulty. The section must be read in its context, and its context is the whole Ordinance. It is impossible to contend (though the attempt has been made) that the presumptions of section 6 were intended to apply only to the summary procedure of the first section. The Ordinance was a general enactment dealing with the whole question of encroachments of Crown property, and the section was intended not only to declare or define the general law, but also to provide an instrument for enforcing certain particular provisions of the Ordinance.

With regard to the state of the general law at the time, this is most conveniently stated by Lawrie J. in what is generally known as *The Ivies Estate Case* (*Appurala v. Dawson* [1]) :—

> " It is different where the land, granted by the Crown, is not in the present possession of any one, when it is forest, waste, unoccupied, or uncultivated. Independent of the Ordinance No. 12 of 1840, such lands are, in this Colony as in all countries where there is a Crown or Government, presumed to belong to the Crown of State. When the Ordinance No. 12 of 1840 enacted that all forest, waste, unoccupied, or uncultivated land shall be presumed to be the property of the Crown, it did no more than enact the law then existing. The effect of the enactment was rather to restrict presumption than to create it. "
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> " The British Crown, soon after the British accession to the Kandyan country, recognized the rights of its Kandyan subjects to own land, but it did not relinquish the right recognized by all the authorities on Kandyan law to forest, wilderness, unreclaimed, and untenanted by men, to mines of precious stones, metals, pearl banks, &c. To these the Crown has now, and always has had, right. "

Lawrie J., however, expresses the opinion, that as regards chenas periodically cultivated there is no presumption of Crown ownership independent of the Statute.

[1] *(1892) 3 S. C. R. 1.*

1922.

BERTRAM C.J.

Mudalihamy v. Kirihamy

Middleton J. in *Babappu v. Don Andris* [1] states the law somewhat differently. He says that forest lands were universally recognized as Crown, and that the Government of the day extended the principle to all those comprised in section 6. I do not know the source of this opinion. Davy is cited in Mr. C. R. Cumberland's memorandum referred to in the case as saying (p. 85) : " All forests and chenas were considered royal domains, and could not be cut or cultivated without express permission. "

I should prefer to take Lawrie J.'s account as the most reliable statement of the law at the date of the enactment of the Ordinance. The history of the Ordinance itself and of its subsequent amendment I need not recount, as it is fully stated in the well-known judgment of Wood Renton J. in *Babappu v. Don Andris* (*supra*). Viewed then in the light of this state of the law and of the history of the Ordinance, it is plain that, if Mr. Pereira is right, in so far as the section affected to state the law, it fell far short of the law as it existed, and in so far as it affected to enlarge the scope of the law, it failed effectively to do so.

But it was not merely with reference to the existing state of the law that the section was enacted, but also, as it seems to me, for the purpose of assisting the enforcement of two special provisions of the Ordinance, namely, sections 1 and 8.

Section 1 as originally enacted contemplated the ejectment of squatters on Crown land even after the lapse of thirty years. Even this limit was not intended to apply to land of the descriptions mentioned in section 6 (though by an inexactitude of drafting, rectified in the following year, effect was not given to this intention). In its final form the section provided for the summary ejectment of trespassers from lands of this description, however prolonged the occupation. Section 6 would have been useless for the purpose of enforcing such a section, if its presumptions related only to the state of affairs existing at the institution of proceedings.

So also as to section 8. This conceded to occupiers of Crown lands without title certain rights, when the occupation had lasted more than ten years. But the proviso in the following section excluded from the benefit of the concession all cases where the Crown lands occupied were of the categories enumerated in section 6. To ascertain whether the lands occupied were of any of these categories at the date of the occupation, it would be necessary to go back ten years, and to prove that they were Crown lands at all, it would be necessary to apply the presumption with reference to that date. How then could the presumption be applied, unless it was capable of an antecedent operation ?

The consequences of adopting the interpretation suggested are thus so fundamentally fatal to the object of the Ordinance that we

[1] *(1919) 13 N. L. R. 273.*

are forced to the inquiry whether there is not an alternative interpretation, which, even though less apparently simple and natural, should preferably be adopted—*ut res magis valeat quam pereat.*

There is such an alternative interpretation. It is that the words should be construed as though they read: " All lands proved at any material time to be forest, waste, &c., shall be presumed to be the property of the Crown *at that time* until the contrary thereof be proved, " and, similarly, " all lands proved at any material time to be chena shall, if situated in the Kandyan Provinces, be deemed to belong to the Crown *at that time.* " In view of the history and the object of the Legislature, I do not think it can be said that this interpretation is a forced one, and am of opinion it should be adopted.

Any other interpretation would make it unsafe for any Crown grantee of forest, waste, or chena land to improve the land granted, for by so doing he would be destroying the only available evidence of the grantor's title.

Previous authorities cannot help us very much, as the question has never been specifically considered. The dictum of Lawrie J. that " what has to be ascertained in the state of the law shortly before the institution of the action " indicates, I think, that he has not done what we have had to set ourselves to do, that is to say, that he had not thought out the subject. What he was really concerned to say was that it was not necessary to show that the land had always been waste and unoccupied.

The same observation may be made with regard to the dictum of Phear C.J. in *Kirihami v. Appuhamy* [1] : " The land . . . . was not at the time when the question at issue between the parties first arose, or at any time not remote therefrom, such land as designated chena in clause 6 of Ordinance No. 6 of 1840. " It is difficult to deduce any tenable principle from the words " at any time not remote therefrom. " They are at any rate not consistent with Mr. Pereira's contention. It is here also, perhaps, best to say that the subject had not been thought out.

There is, however, another group of authorities which is in favour of the view above suggested, namely, those on the subject of the supposed presumption of the validity of Crown grants. They have decided that no such presumption exists, but in more than one of them attention is drawn to the presumption enacted by section 6 of the Ordinance now under consideration, and it is intimated or implied that the material time for the purpose of considering whether the latter presumption applies is the date of the Crown grant. See per Clarence and Dias JJ. in *De Silva v. Mendarissa* [2] and *Wemelasekera v. Silva.* [3] See also per Wood Renton in *Silva v. Bastian.* [4]

[1] *(1879) 2 S. C. C. 58.*
[2] *(1886) 8 S. C. C. 58.*
[3] *(1897) 3 N. L. R. 61.*
[4] *(1912) 15 N. L. R. 132.*

1922.

BERTRAM C.J.

Mudalihamy v. Kirihamy

I should like to add, however, that as at present advised I doubt whether the above reasoning would apply to proceedings under the Waste Lands Ordinance. There the material time is the date of the issue of the notice under section 1 (subject to the retrospective effect of section 24 (*c*)). The presumption there enacted in section 24 (*a*) is merely for the purposes of the Ordinance, and the object of any legal proceeding under the Ordinance is to determine whether the land in question at the date of the notice came within any of the categories to which the presumption applies.

It may also be noted that the formula of the presumption in the Waste Lands Ordinance is not the same as that in section 6 of Ordinance No. 12 of 1840, and, consequently, if the reasoning of my brother De Sampayo (in which Loos J. concurred) in *Attorney-General v. Punchirala* [1] is to be taken as expressing the law—a point on which I should like to reserve my own opinion—there is nothing to prevent a plea of prescription being set up to chena lands in proceedings under that Ordinance.

I would dismiss the appeal, with costs.

ENNIS J.—

The point of law reserved in this appeal for the consideration of five Judges is, I understand, from what date does the presumption raised under section 6 of the Ordinance No. 12 of 1840 operate for the purpose of the Ordinance in the case of chena land in the Kandyan Province ? It is the same question, but under another Ordinance, as that referred to by the Privy Council as not arising in the case of *Hamid v. The Special Officer appointed under the Waste Lands Ordinance.* [2]

The presumption arises on proof of a fact, and it was contended for the appellants that, before the benefit of the presumption under section 6 of the Ordinance No. 12 of 1840 with respect to chena land could be claimed, it must be affirmatively proved that the land was chena land at the date when the Crown claimed, or shortly before; and, in the alternative, it was contended that it must be shown to be chena land at the date of the Ordinance.

The Ordinance No. 12 of 1840 was enacted " to prevent encroachments upon Crown lands. " It proceeded in section 1 to provide a summary procedure for the ejectment of persons encroaching on Crown lands without probable claim or pretence of title, upon proof that the person had so encroached ; and proof that they had " not cultivated, planted, or otherwise improved and held uninterrupted possession of such land for the period of five years and upwards. "

[1] *(1918) 21 N. L. R. 51*

[2] *(1921) 23 N. L. R. 150.*

Section 6 of the Ordinance declares that:—

> " All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas . . . . shall, if the same be situate within the districts formerly comprised in the Kandyan Provinces . . . . be deemed to belong to the Crown and not to be the property of any person claiming the same against the Crown, except upon proof only by such person of a sannas or grant for the same . . . . or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts. "

The Ordinance No. 9 of 1841 enacted that " the provision touching prescription contained in the first clause of the Ordinance No. 12 of 1840 " should not extend to land referred to in the sixth clause of the Ordinance of 1840.

The result was that a person encroaching on a chena land in the Kandyan Province could be summarily ejected upon proof, only that he had entered upon or taken possession of such land without probable claim or pretence of title.

It would seem, therefore, that the only proof required in such summary proceedings would be—

(1) That the land was chena (*i.e.*, Crown land) at the time of the entry ; and

(2) That there was an entry without probable claim or pretence of title.

Section 2 of the Ordinance allowed any person ejected by this summary procedure to recover possession by ordinary procedure " in case he shall be able to establish title."

The Ordinance then clearly contemplated that this provision should operate in the case of chena land from the time of the encroachment no matter how far back the encroachment was.

Section 6 of the Ordinance does not, in my opinion, confer a benefit, as argued for the appellant, it is declaratory of the rights of the Crown, which are to be presumed upon proof of a certain fact, *e.g.*, that the land was chena, and, by an inference from section I and the subject of the Ordinance, that it was so at the date of the encroachment.

It must be remembered that " chena " is but a method of cultivation, and it has been defined in the case already referred to, as, briefly, felling of forest, burning the timber, and planting again for a season followed by abandonment until the process can profitably be done again. It was contended that to make a permanent plantation on the site immediately altered the character of the cultivation

1922.

ENNIS J.

Mudalihamy v. Kirihamy

and that the land then ceased to be chena land, that it was then cultivated land to which the presumption in favour of the Crown declared in section 6 would not arise. But section 1 of the Ordinance read with the Ordinance of 1841 does not, in the case of chena land, require any proof that the land has not been " planted, cultivated, or otherwise improved " within five years (which is the only provision touching prescription found in that section). It would seem, therefore, that no cultivation could alter the character of chena land once it fell within that designation.

This conclusion is in accord with history in the Kandyan Province. Davy, writing in 1821, in his " Account of the Interior of the Island and its Inhabitants, " says (page 185): " All forests and chenas were considered royal domains, and could not be cut down or cultivated without express permission. " Moreover, it would seem that in the days of the Kandyan kings all land whether cultivated or not was considered as belonging to the King until grant was made by sannas or registration, for we frequently find in sannas produced in evidence before the Courts that grants were made of whole villages and tracts of land, including cultivated as well as uncultivated land.

Section 6 of the Ordinance of 1840 by omitting mention of " cultivated " land would seem to have limited the rights of the Crown rather than to have conferred a benefit on the Crown ; and, in accord with Kandyan custom, we find in section 6 that the presumption in favour of the Crown in the case of chenas can be rebutted only by the production of the grant or proof of payment of customary taxes. The cultivation of chena was illegal without express permission.

It has already been held by a Court of three Judges in the case of *Attorney-General v. Punchirala* [1] that prescription does not run in the Kandyan Provinces in the case of chena land.

There is a finding of fact in the present case by the learned District Judge that the land was chena land ; and, from a survey plan of 1906 and the tenement sheet which has been produced on this appeal, it appears that the land was mostly jungle land in that year, and only a portion was " chena " and another portion " cleared chena. "

I would accordingly, in answer to the question reserved, say that the Ordinance operates from the date of the encroachment.

DE SAMPAYO J.—

The Chief Justice and my brother Ennis have dealt so fully with the point referred to the Full Bench for decision that I need only record my opinion very briefly. Counsel on behalf of the appellant maintained that the presumption in favour of the Crown under section 6 of the Ordinance No. 12 of 1840 was applicable only to lands which were of the character and description mentioned: (1) At the date of the enactment of the Ordinance ; and (2) alternatively at

[1] *(1921) 21 N. L. R. 57.*

the date of any action in which the question of title might be raised. I am unable to agree with either branch of this proposition. In my opinion the Ordinance is a general enactment laying down once for all what kind of lands shall be considered the property of the Crown, and incidentally providing a summary remedy against trespassers on Crown property. The preamble to the Ordinance shows that it had two purposes in view, namely, (1) to deal with encroachments already made by persons who "without any probable claim or pretence of title have taken possession of lands" belonging to the Crown; and (2) to make provision "for the prevention of such encroachments" in the future. With regard to this second class of encroachments, it appears to me obvious that the character and description of the land must be considered as at the time when the act which constitutes the encroachment is done. Inasmuch as section 1, which provides a summary remedy, expressly exempts persons who have cultivated, planted, or otherwise improved and held possession of the land for the period of thirty years or upwards, it follows that although the land may have completely changed its character and have become a cultivated land, with a plantation of thirty years of age or with other ancient improvements, at the time of the application for the summary remedy, the presumptive title of the Crown to the land still subsists, the question for determination being what was the character of the land when the encroachment was made thirty years before. This period of thirty years was considered to be too long, and was cut down to five years by Order in Council of August 11, 1841, but the principle involved remains the same. There is no reason to think that a different test must be applied if, instead of the summary proceeding, an ordinary civil action is brought. On the contrary, I think the object of the Ordinance will be defeated unless the Crown or a claimant from the Crown is allowed to prove that the land was of the character mentioned in section 6 of the Ordinance when the Crown's right was first invaded by the act of the trespasser. I accordingly think that the presumption in favour of the Crown under section 6 of the Ordinance has reference to the condition of the land, neither at the date of the Ordinance nor at the date of any action regarding the title, but at the time when the encroachment was made.

PORTER J.—

This action was brought by the plaintiff to vindicate his title to a piece of land called Gonagahawelahena, about 5 acres in extent.

The plaintiff's claim is based on a Crown grant P 1, dated April 12, 1919. The point of law raised is shortly as follows: By clause 6 of Ordinance No. 12 of 1840 all forest, waste, and chena lands are presumed to be Crown lands, unless the person claiming the land can prove a title. The question here is whether the land in dispute is

1922.

PORTER J.

Mudalihamy v. Kirihamy

chena land within the meaning of section 6 of the Ordinance No. 12 of 1840, and should, therefore, be presumed to belong to the Crown. The learned Judge in the Court below has decided the question in the affirmative, and entered a decree in favour of the plaintiff; from this judgment the defendants appeal. The oral evidence called for the plaintiff, who is the Arachchi, is the plaintiff himself, who says he has known the land for many years, and that "when this land was surveyed by the Crown surveyor there was no plantation on the land," and that the land was a chena like other chenas."

There is a jak tree in the corner of the land—"there are jak trees everywhere in the village"—"jak trees grow in every jungle."

The plaintiff calls Mr. Hampton, the Assistant Land Settlement Officer, who states that this land was sold by the Crown originally to Kirihamy (defendant himself), but that, having paid one-tenth of the purchase price on account, he failed to pay the balance, and the land was again put up for sale and purchased by the plaintiff. From this, counsel for respondent argues that defendant Kirihamy is estopped from denying the Crown title. Mr. Hampton further states that when he first inspected the land there were coconut plants three years old and two coconut trees thirteen years old. This is the whole of the oral evidence called on either side, but the report of Mr. Schokman, licensed surveyor, is put in evidence, and admitted by Mr. Pereira for the defence. On this the learned Judge finds, as a fact, that the land in dispute is a chena within the meaning of section 6 of Ordinance No. 12 of 1840. The point of law reserved for the Court of five Judges is: From what date does the presumption raised under section 6 of Ordinance No. 12 of 1840 operate for the purpose of the Ordinance in the case of chena land ? For the appellant it has been argued by Mr. Pereira that that the words "chena" land can only apply to lands which were "chena" at the date of the Ordinance No. 12 of 1840. In the alternative Mr. Pereira contends that the time at which the Ordinance would operate would be the date of the institution of the action or at some short interval before action. The point was raised in the case of *Hamid v. The Special Officer appointed under the Waste Lands Ordinance* decided by the Privy Council and reported in *23 N. L. R. at page 150.* Unfortunately the point was not decided. It would appear, however, that the Privy Council considered that if at any time in its history land had been proved to be chena land, it was deemed to be Crown land, unless the person claiming showed a title by grant or sannas.

Lord Buckmaster says: "Land that is chena land cannot be taken out of the category merely by evidence to show that by another method of cultivation, by the application of other processes in other hands, it might be cultivated in another way." There is a finding of fact by the learned Judge in the present case that the land is chena.

This is supported by a survey plan of 1906, the tenement sheet shows that the land was at that time all jungle or chena land, except a very small portion marked cleared chena.

In my opinion the Ordinance operates from the time of the encoachment. Prescription does not run in the Kandyan Provinces in the case of chena land (*Attorney-General v. Punchirala* (*supra*)).

I think the learned Judge has decided this case rightly, and would dismiss this appeal, with costs.

SCHNEIDER J.—

I have had the opportunity of reading the judgments of my Lord the Chief Justice and of my brother Ennis in this appeal. I do not think I can add anything to what they have stated. If I may venture to say so, I agree with their reasoning and conclusions. But I would add that the Solicitor-General was present upon the invitation of the Chief Justice as *amicus curiæ*, and argued the respondent's appeal on the law at request of counsel for the respondent and with the acquiescence of counsel for the appellant and of the Appeal Judges.

It was definitely understood that the result of this appeal was not to be regarded as in any manner affecting the Crown.

Appeal dismissed.