Present: Mr. Justice Middleton and Mr. Justice Wood Renton. *July 22, 1910*

BABAPPU *v.* DON ANDRIS *et al.*

D. C., Matara, 4,728.

Possession and cultivation of chena land for twenty years—Possessor acquires no right under s. 8 of Ordinance No. 12 of 1840—Ordinance No. 12 of 1840, ss. 6 and 8—Ordinance No. 9 of 1841, s. 2.

A person who possesses and cultivates chena (jungle) land for a period under thirty years does not acquire any right under section 8 of Ordinance No. 12 of 1840. The effect of section 2 of Ordinance No. 9 of 1841 is to exclude the application of section 8 of Ordinance No. 12 of 1840 to any land referred to in section 6 of that Ordinance.

MIDDLETON J.—The privilege under section 8 of Ordinance No. 12 of 1840 was reserved for those usurping cultivated cinnamon or perhaps paddy lands forming a part of the Crown domain, though not perhaps quite apparently. I think, therefore, that section 8 will not apply to any lands of the description set out in section 6, if there is clear evidence before the Court that they are lands derived by the parties or their predecessors in title from forest, chena, waste, or uncultivated lands of the Crown. If the period of prescription of thirty years against the Crown has elapsed, they will, of course, fall into the category of private lands, and can be dealt with without reference to section 8.

THE facts are fully set out in the judgment of Wood Renton J.

Sampayo, K.C., for the appellant, plaintiff.

H. A. Jayewardene, for the respondents, defendants.

Cur. adv. vult.

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This was an action for declaration of title to a piece of land purchased by the plaintiff from the Crown, and for which the defendants set up a title their fathers derived from Don Bastian, who is said to have purchased on bill of sale in 1830 and to have planted the land with citronella thirty years ago. The District Judge found that the land was jungle or chena and probably Crown property, that the planting of citronella took place about twenty years ago as alleged by the defendants, and that at the date of the sale to the plaintiff in 1907 by the Crown the defendants had acquired a statutory right under section 9 of Ordinance No. 12 of 1840, and dismissed the plaintiff's action. Of the three points raised by Mr. de Sampayo, we only called upon the respondents'

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counsel to meet his last point, and I agree with my brother Wood Renton, whose judgment I have had the advantage of perusing, that there is no obligation to put forward a claim under section 8 at any given time, and that the failure to plead the statutory interest only affects the question of its *bona fides* when actually raised.

The important question raised by Mr. de Sampayo was whether section 2 of Ordinance No. 9 of 1841 did not clearly exempt all forest, chena, and uncultivated lands as described in section 6 from the statutory indulgence conferred by section 6. I have carefully read through the memoranda and documents obtained by my brother from the Colonial Office, and they strongly confirm the opinion I had already formed from a study of the Ordinance, that it was not intended that any benefit should be obtained from the usurpation of lands which could not or ought not to be mistaken for private property. The wording of section 1 of Ordinance No. 12 of 1840 is, in my opinion, singularly infelicitous. The summary delivery up of possession of Crown land is to be ordered when it is proved to the satisfaction of the District Court (1) that the land was taken possession of by a party or parties without any probable claim or pretence of title; (2) and " that such party or parties hath or have not cultivated, planted, or otherwise improved and held uninterrupted possession of such land for a period of five years or upwards." According to this wording the order is to go, whether the alleged usurper has had possession for five years or not. This, I think, was hardly the intention of the English Law Officers of the Crown, whatever might have been the views of the local Government of the day. The section has no doubt been construed as meaning that if five years' uninterrupted possession by the alleged usurper were proved, the summary order of ejectment provided for would not be allowed to issue. The Crown land indicated in the Ordinance, I think, was in those days mostly cinnamon lands, which were subject to encroachments by native squatters. Forest, waste, chena, and unoccupied land was at the same time declared by section 6 to be the property of the Crown; the theory of forest lands being so, having been derived from the Sinhalese and Kandyan dynasties, and such theory being well implanted in the minds of the native population. Section 6, however, embraces a great deal more than forest lands properly so called, and in fact makes all unoccupied and waste lands the property of the Crown. On this basis, *i.e.*, from the popular impression that forest lands were the property of the Crown, it was no doubt considered by the Government of the day that such lands, together with others embraced in section 6, might be particularly exempted from the statutory indulgence under section 8 applicable to lands in or presently susceptible of cultivation. Such lands as forest lands were Crown lands in popular estimation, and the others described in section 6 had been declared to be so by legislative enactment; *ergo*, no one

was to suppose that if he usurped forest, waste, or unoccupied lands, he was to obtain the privileges under section 8 of the Ordinance. That privilege was reserved for those usurping cultivated cinnamon or perhaps paddy lands forming a part of the Crown domain, though not perhaps quite apparently. I think, therefore, that section 8 will not apply to any lands of the description set out in section 6, if there is clear evidence before the Court that they are lands derived by the parties or their predecessors in title from forest, chena, waste, or uncultivated lands of the Crown. If the period of prescription of thirty years against the Crown has elapsed, they will, of course, fall into the category of private lands, and can be dealt with without reference to section 8. I agree to the order proposed by my brother Wood Renton.

WOOD RENTON J.—

The plaintiff-appellant claims a declaration of title to the land described in the plaint by virtue of the fact that he purchased it from the Crown in 1907; the defendants-respondents deny the appellant's title, and allege that they acquired the land from their father, who derived title from one Don Bastian. Don Bastian purchased on bill of sale 447 of 1830. The respondents allege that he planted the land with citronella thirty years ago, and that they have been in possession ever since. The learned District Judge upheld the latter contention in so far as the facts of planting and possession are concerned. But he says that the planting took place about twenty years ago, and that consequently the respondents' possession must be taken to have been of about twenty years' standing. He goes on to hold that before that date the land was jungle (chena), occasionally cleared, and probably Crown property, although the respondents had a deed for it. On these facts and findings the District Judge adopts the view that, at the date of the sale by the Crown to the appellant in 1907, the respondents had, by virtue of the provisions of section 8 of Ordinance No. 12 of 1840, a statutory right, either to a grant of the land from Government on payment of half the improved value, or, if Government required the land for public purposes, to a right to retain possession of it till they were compensated for it. In the present case, Government has not required the land for public purposes. We are, therefore, concerned only with the former of these alternatives. It appears from the evidence that the first defendant-respondent in fact went to the sale and objected to it; but he states that he was asked at the spot if his name was Dasen, that he said it was not, and that he was then informed that it was not his land that was being dealt with. Dasen was in fact the claimant of the land at the sale. The first defendant-respondent added that the Settlement Officer had not told him that he could take the land for Rs. 10 an acre, and

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said that he was a little deaf. Mr. Fox, the Chief Assistant Settlement Officer, who conducted the sale, stated in his evidence that the "claimant" had refused to buy it at Rs. 10 an acre, and that he had produced nothing in support of his claim. We were asked by Mr. Sampayo to hold that the "claimant" here referred to was the first defendant-respondent himself. I do not think we are entitled to do so, and the learned District Judge finds that the first defendant-respondent is deaf, and that he probably did not hear the offer of the land at a low price, even if it was in fact made to him at the sale. He held that the land was not at the disposal of the Crown in 1907, and accordingly dismissed the plaintiff's action with costs. Three points were urged by Mr. Sampayo in support of the appeal: (1) That a private party must claim the benefit of section 8 of Ordinance No. 12 of 1840 at the time when he has acquired a right to do so, that is to say, at any time between ten and thirty years of his possession; (2) that in any event he should set up his statutory interest in the pleadings, which the respondents in the present case have not done; and (3) that, even if both these points failed, the provisions of section 2 of Ordinance No. 9 of 1841 precluded the respondents from claiming any interest in the land here in dispute under section 8 of Ordinance No. 12 of 1840. In my opinion, the first and second of these points are bad. I do not think that there is anything either in section 8 or in any of the other provisions of Ordinance No. 12 of 1840 to compel the claimant to assert his claim to a grant of the land on payment of half the improved value. Section 8 entitles him to put forward such a claim, but nowhere requires him to do so at any given point of time. We were referred by Mr. Sampayo to a decision of my own (*Perera v. Fernando* [1]), but that case can find no application here. It merely decides that the statutory interest created by section 8 of Ordinance No. 12 of 1840 is not an unfettered interest, and that it is subject to the condition that the claimant should be ready and willing to accept the grant and to pay the prescribed compensation to Government when he is directly challenged to do so. Here, on the evidence and on the findings of the District Judge, the first defendant-respondent was probably unaware that his land was being sold. He did not hear the offer of it said to have been made to him by the Settlement Officer. In my opinion there is nothing in the case of *Perera v. Fernando* [1] which can either bind or greatly assist us here. The failure of the respondents to plead their statutory interest is a point which, I think, can only bear on the *bona fides* of the plea when it is actually raised. Mr. Sampayo's last objection, however, is a more serious one, and indeed, raises an issue of far-reaching importance. Section 2 of Ordinance No. 9 of 1841 is in the following terms:— "None of the provisions contained in the eighth clause, nor the provisions touching prescription contained in the first clause of the

[1] *(1906) 2 A. C. R. 112.*

said Ordinance No. 12 of 1840, shall extend to any land referred to in the sixth clause thereof, nor to any public road, street, or highway, nor to any land known or held as toonhawul land."

This section is a substantial reproduction of section 9 of Ordinance No. 12 of 1840, which it repeals. That section is as follows:—

"Provided always that nothing in the preceding or in the first clause of the Ordinance contained shall extend to any land referred to in the sixth clause of this Ordinance, nor to any public road, street, or highway, nor to any land known or held as toonhawul land; and provided also that all judgments, orders, and decrees heretofore given or pronounced in any action, suit, or proceeding shall be conclusive, and bind the parties in such and the same way as if this Ordinance had not been passed."

We are dealing here with enactments which may fairly be described as ancient statutes; and while I think we are bound by a series of decisions applicable alike to Imperial (*Julius v. Bishop of Oxford* [1]), Indian (*Administrator-General of Bengal v. Prem Lal Mullick* [2]), and Colonial (*Craies, Stat. Law, p. 123*) Acts, to exclude from consideration the proceedings of the Legislative Council itself in regard to them, we are entitled by the rules in *Heydon's case* [3] and by many later authorities (*Craies, ad. loc. cit., pp. 120, 122*) to look "not merely to the words of an Act of Parliament, but to the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign, meaning extraneous, circumstances so far as they can justly be considered to throw light upon the subject" (*Wear River Commrs. v. Adamson* [4]). Among such "foreign" or "extraneous" circumstances the public history of the time when the Act (*Craies 120*) was passed is included, and we are not required to be oblivious of the history of the legislation itself (*Holme v. Guy* [5]), always excluding its history as disclosed by debates in Parliament (*Millar v. Taylor*,[6] *A.-G. v. Sillem*,[7] *R. v. West Riding C. C.*[8]). Acting on these rules, I propose now to refer to certain official documents which, in my opinion, come within them, and to which I have obtained access through the Colonial Secretary's Office. It would seem (see a valuable note dated November 8, 1907, by Mr. Cumberland, on Ordinance No. 12 of 1840) that while, in strict law, waste and uncultivated land, whether forest or chena, was always regarded as the property of the Crown, the theory of the law, though never abandoned, was not strictly pressed to its logical conclusions. Thus, claims to "appurtenances" were recognized both in Kandyan and in British times. Again, both under Kandyan

[1] (*1880*) *5 A. C. 214*
[2] (*1895*) *L. R. 22 Indian App. 118*
[3] (*1584*) *3 Co. Rep. 8*
[4] (*1877*) *2 A. C. 743, 763*
[5] (*1877*) *5 Ch. D. 901*
[6] (*1769*) *4 Burr 3302*
[7] (*1863*) *2 H. & C. 621*
[8] (*1906*) *22 Times L. R. 83*

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and under British rule, certain indefinite rights of grazing and getting firewood were from time to time allowed, and though chenas were permitted to be made with license on the land not appurtenant to a field and, therefore, doubtless Crown land, rough land which was not appurtenant was chenaed without permission. The "Kandyan Government," says Mr. Cumberland, "though strong at headquarters, was not strong enough to check its subordinate officers in districts remote from Kandy, except perhaps spasmodically, and the rights of the Crown doubtless were not enforced by indolent or corrupt chiefs, while a similar laxity occurred in early British times, partly from the same causes and partly from the fact that waste land was then practically of no value. When (however) the price of land was raised from 5 per cent. to 20 per cent. an acre in the thirties, and a considerable demand for land grew up, the authorities awoke at last to the necessity for enforcing the rights of the Crown more strictly."

The first measure dealing with the subject was introduced in the Session of 1839-40, and ultimately became Ordinance No. 5 of 1840. Reciting that "divers persons, without any probable claim or pretence of title, have taken possession of lands in this Colony belonging to" the Crown, it proceeded to make provision for the prevention of such encroachments. The District Court was empowered on information supported by affidavits, and after summary inquiry, to make orders for the delivery up of possession of lands entered upon by private persons "without probable claim or pretence of title" (section 2). Any person, however, against whom such an order might be made was empowered to proceed by the ordinary course of law for the recovery of possession of the lands; and in case he should be able to establish his title, might obtain reasonable compensation for any damage that he might have sustained (section 2). On dismissal of an information under section 1, the Government might be ordered to pay costs (section 3). "All forest, waste, unoccupied, or uncultivated lands" were to be presumed to be the property of the Crown until the contrary should be proved; all chenas and "other lands which can be only cultivated after intervals of several years" were to be deemed to be the property of the Crown generally and in the Kandyan Province, except upon proof of a sannas or grant, "together with satisfactory evidence as to the limits and boundaries thereof, 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" (section 5). Provision was made for the grant of certificates of non-claim (section 6). Section 7 was in these terms:—"Whenever any person shall have, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and shall have held uninterrupted possession thereof

for ten years, such person shall be entitled to a grant from Government of such land, on payment by him or her of half the improved value of the said land, unless Government shall require the same for public purposes, or for the use of Her Majesty, her heirs and successors, when such person shall be liable only to be ejected from such land on being paid by Government the value of the half of the improved value thereof. Provided always that nothing herein contained shall extend to any land referred to in the fifth clause of this Ordinance."

Ordinance No. 5 of 1840 was forwarded to the Secretary of State with despatch No. 31 of February 10, 1840. In that despatch the Governor explains the object of the reference in section 7 to the acquisition of lands to the use of Her Majesty, and the payment of compensation for lands so acquired. "There were in many parts of the Government cinnamon plantations small spots of land occupied and cultivated by persons who had no title, but who had by sufferance been more than ten years in unmolested possession. The sale of the cinnamon plantations ordered by Her Majesty's Government must in consequence be greatly injured, if the parties in question were not removed in the first instance; and further, the absence of such a power would hold out to parties an actual inducement to take possession of the most central parts of the Crown lands hereafter, as being of course the most valuable."

Section 7 was amended accordingly. The Law Officers of the Crown in England, however—Sir John, afterwards Lord, Campbell, A.-G., and Sir Thomas Wilde, S.-G., afterwards Lord Truro—to whom Ordinance No. 5 of 1840 was referred, in a letter to the Secretary of State, dated June 8, 1840, stated their opinion that while in the case of a recent encroachment upon the property of the Crown the summary proceedings authorized by section 1 might be very necessary and proper, where there had been a quiet enjoyment for any considerable period the title to the land ought to be tried by the ordinary process and rules of law.

"We think," said the Law Officers, "that the first clause is wholly inconsistent with the principle which ought to regulate the law of real property under every form of Government. If there had been a limitation as to the period within which the party complained of had entered illegally on land belonging to the Crown, the proceedings to eject him in a summary manner might be justified and might be salutary; but as the clause is framed, when there has been an undisputed possession for a century, a party may be turned out of possession on the allegation that the original entry was without probable claim or pretence of title, thus giving no effect whatever to prescription."

Ordinance No. 5 of 1840 was accordingly disallowed. But the Secretary of State (despatch No. 98 of June 15, 1840), in intimating this disallowance to the Government of Ceylon, said that should the

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Legislative Council re-enact the law with the amendment suggested by the Law Officers of the Crown, there would be no objection to its confirmation. Ordinance No. 12 of 1840 was then passed. In its original form it fixed at thirty years the period of uninterrupted possession that would oust the summary procedure sanctioned by section 1, and at " not less than ten nor more than thirty years " the period of such possession as would give rise to the statutory interest created by section 7 of Ordinance No. 5 of 1840 (Ordinance No. 12 of 1840, sections 1 and 8). It re-enacted in substance in the form of a separate section (section 9) the proviso to section 7 of Ordinance No. 5 of 1840; and it provided (section 5) that all cinnamon lands which should have been uninterruptedly possessed by Government for a period of thirty years and upwards should be deemed to be the property of the Crown.

Ordinance No. 12 of 1840 was forwarded to the Secretary of State under cover of despatch No. 183 of December 9, 1840. In that despatch the Governor pointed out that it had been necessary to amend section 7 of Ordinance No. 5 of 1840 in consequence of the modification of section 1. He also explained as follows the provisions of section 5 of Ordinance No. 12 of 1840 as regards the cinnamon lands:—" In the course of the survey of the Government cinnamon plantations, which has been for some time in progress, in order to their sale as directed by Her Majesty's Government, various claims have been from time to time set up to portions of the plantations, in some instances to portions lying in the very centre of them. In most cases the claimants found their claims upon extracts from the Dutch thombos or land registers, showing that at some distant period the lands in question belonged to their ancestors. It is, however, well known that the Dutch Government, at the time of forming the cinnamon plantations, took these lands from the then owners, and gave them either other lands in exchange or other adequate compensation. The parties claiming have not, during the present century, in any manner possessed or derived any benefit from the lands, which have been uninterruptedly held by Government, whose possession has consisted in the undisputed right of peeling the cinnamon growing on them. While the cinnamon monopoly lasted, and the privilege of peeling cinnamon was rigidly confined to the Government, a title founded on possession of such a nature might naturally be viewed with some suspicion, but Your Lordship will observe that the monopoly has now ceased to exist for several years, and notwithstanding the Government has continued to peel the cinnamon up to the present moment without any interruption or objection from those claimants having been started."

Ordinance No. 12 of 1840 was in turn referred to the Law Officers in England (see despatch No. 93 of August 25, 1841), who reported that the period of thirty years or upwards of uninterrupted possession, limited by section 1 as that after which a summary order for

the delivery up of the possession of land might not be made, was "unreasonably long." It was reduced by Order in Council of August 11, 1841, to five years.

I have been unable to find any official information as to why Ordinance No. 9 of 1841 was passed. But section 2 of that Ordinance clearly re-enacts the substance of section 9 of Ordinance No. 12 of 1840. I will consider in a little while the question whether any *raison d'etre* for it can be found. It results from the foregoing survey of the history of the legislation with which we are concerned in the present case, (1) that the exclusion of forest, waste, unoccupied, or uncultivated and chena lands from the scope of the statutory interest conferred by Ordinances Nos. 5 and 12 of 1840 on the occupiers and improvers of "land belonging to Government" formed part of the section (section 7 of Ordinance No. 5 of 1840) by which that interest was originally created, was re-enacted in substance by section 9 of Ordinance No. 12 of 1840, and has been reproduce—also without material alteration—by section 2 of Ordinance No. 9 of 1841; and (2) that the substitution of Ordinance No. 12 of 1840 for Ordinance No. 5 of 1840, and the amendment of Ordinance No. 12 of 1840 by the Order in Council of August 11, 1841, were due to objections, on the part of the Imperial Government, first to the absence of any period of uninterrupted possession which would protect the occupier from summary ejectment, and afterwards to that period being fixed at thirty years.

I would hold that the effect of section 2 of Ordinance No. 9 of 1841 is to exclude the application of section 8 of Ordinance No. 12 of 1840 to any land referred to in section 6 of that Ordinance. There can be no doubt but that this is the strict and literal interpretation of the enactment in question, and I am not sure that its object in so providing cannot be surmised. Section 1 of Ordinance No. 12 of 1840 confered on the Crown wide powers of resuming possession by a summary procedure, of lands of which private parties had taken possession "without probable caim or pretence of title." Section 8 embodies the common law principle of the right of retention of lands by a *bona fide* possessor in a special form applicable to lands belonging to Government. Section 2 of Ordinance No. 9 of 1841 excludes from the scope of that remedy, as well as of the provision as to five years' uninterrupted possession in section 1, the lands referred to in section 6, which are of such a nature that a person entering upon them without grant or title from the Crown cannot be said to be a *bona fide* possessor.

As regards other lands, the summary remedy by way of information is applicable where there has been less than five years' uninterrupted possession. Where there has been five years' but less than ten years', uninterrupted possession, ejectment can be obtained only by ordinary process of law. Between ten years and

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thirty the occupier has the statutory interest created by section 8. More than thirty years' uninterrupted possession of an adverse character will establish title by prescription against the Crown.

It will be observed that the repealed section 9 of Ordinance No. 12 of 1840 provided that " nothing . . . . . in the first clause of this Ordinance contained shall extend to any land referred to in the sixth. " The result, if that provision had stood unamended, would have been to prevent the Crown from summarily recovering under section 1 land which is declared by section 6 to be presumptively its property, and on which there could not well be an unauthorized entry by a private individual otherwise than " without probable claim or pretence of title. " Section 2 of Ordinance No. 9 of 1841 prevents this result by limiting the exclusion of section 1 from the lands referred to in section 6 to " the provision touching prescription contained " in the former of these sections. The Crown, that is to say, is to be at liberty to exercise its summary powers under section 1 against unauthorized possessors, " without probable claim or pretence of title, " of any land deemed to be its property under section 6, and in such a case the possessor cannot defend himself by setting up a plea of uninterrupted possession for five years or upwards. If this view is correct, it not only supplies us with a possible *raison d'etre* for the enactment of Ordinance No. 9 of 1841, but points to the conclusion that section 2 of that Ordinance means what it says. That conclusion is still further strengthened by the reference in section 2 to public roads, streets, or highways which are vested in the Government on behalf of the public, and in regard to which there could not readily be any *bona fide* possession by private individuals. I think that the interpretation of section 2 of Ordinance No. 9 of 1841, pressed upon us by Mr. Hector Jayewardene, the respondents' counsel, viz., that it contemplates, in such a case as the present, the condition of the land not at the date of the original occupancy, but at the date of sale, is excluded not only by the history of the enactment, but by its terms and by the language of section 8.

In my opinion the respondents cannot claim any interest in the land here in suit, if it was in fact land at the disposal of the Crown at the time when their occupancy of it began. The learned District Judge has held that it was then jungle land (chena). It was therefore one of the classes of land which is presumptively Crown property. It appears to me, however, that the learned District Judge has considered the case almost solely from the point of view of section 8 of Ordinance No. 12 of 1840, which, in my opinion, confers no rights on the respondents, if the land here in question falls under any of the categories indicated in section 6. I think that the respondents are fairly entitled, therefore, to a reconsideration of, and to a further inquiry into, and adjudication upon, the question as to whether or not Don Bastian under his deed of 1830, and his successors in title, have established title against the Crown by over thirty years'

prescriptive possession. I would, therefore, propose to set aside the decree of the District Court, declare that if the land here in suit falls under any of the categories indicated in section 6 of Ordinance No. 12 of 1840, the respondents have no statutory interest therein under section 8 of that Ordinance, and send the case back to the District Court for further inquiry into, and adjudication upon, the question of prescription. The appellant is entitled to the costs of the appeal, but all costs of the original and also of the further inquiry should be, I think, left to the discretion of the District Judge. If the respondents fail to establish title by prescription, the case must be disposed of on the footing that the respondents have no statutory interest under section 8 of Ordinance No. 12 of 1840.

We have been invited by the respondents' counsel to reserve their right to raise, at the further inquiry in the District Court, the question whether in respect of the long cultivation of the land in suit by their predecessors in title they have any claim to compensation at common law. Mr. Sampayo does not object and we allow this point to be raised accordingly, of course without expressing any opinion as to whether it is maintainable.

The construction that we are placing in this case on section 2 of Ordinance No. 9 of 1841 will, I fear, revolutionize for the future the practice that has grown up under Ordinance No. 12 of 1840, of acknowledging in cases like the present a statutory interest under section 8 of that Ordinance as a matter of strict legal right. That, however, cannot be helped. The issue has now been definitely raised, apparently for the first time, so far as the Courts of Law are concerned, and we have no option to do otherwise than determine it judicially, whether our view of the enactments involved comes into conflict with the hitherto received interpretation of them or not.

Sent back.