1929

Present: Fisher C.J. and Drieberg J.

HEENMAHATMAYA *v.* L. R. P. ESTATE & Co., LTD.

75—D. C. Ratnapura, 4,814.

Service tenure—Chena land—Obligation to give share of produce—Commutation—Ordinance No. 3 of 1870.

The obligation to give a share of produce from chena land is a service that may be commuted under the Service Tenures Ordinance.

APPEAL from a judgment of the District Judge of Ratnapura.

H. V. Perera (with *Weerasooria*), for plaintiff, appellant.

H. H. Bartholomeusz, for defendants, respondents.

August 30, 1929. FISHER C.J.—

In my opinion it is clear that the obligation " to give 1/20 share out of chenas as otu " is a service to which the Service Tenures Ordinance, 1870, applies, and the extracts from a register made under that Ordinance have rightly so treated it. That being so, it is not necessary to deal with the question discussed by the learned Judge, namely, whether " when the chena lands are changed into tea and rubber estates are the owners still liable to give 1/20 of the produce to the temple." The question was raised in argument before us as to whether the order for commutation had been in fact made by the Commissioners or whether they had merely made an assessment for the purpose of commutation. In my view it must

be taken that an order for commutation was actually made, and that being so it is clear that no dues were paid for a period of more than ten years prior to the bringing of the action. That being so the claim is barred by section 24 of the Service Tenures Ordinance, 1870. But even assuming that the Commissioners did not proceed beyond assessment, in my opinion the same result follows. In giving judgment the learned Judge says: " But even granting that the payment by other *nilakarayas* would operate to prevent defendant company from pleading prescription, is the evidence sufficient to prove beyond doubt that services were performed or commuted dues and otu paid during the period of ten years prior to the institution of this action? I do not think so. The priest says that a book was kept at the temple in which the services performed and the payments made by the *nilakarayas* were entered. Why is that book not produced? It would be the ' best ' evidence on the point, and if the best evidence is not produced, other evidence must be regarded with suspicion." That view taken by the learned Judge appears to be amply justified by the evidence, and I do not think that a subsequent remark in the judgment can be taken as a contradiction of that finding which, as I have said, seems to be the proper finding on the evidence. The result therefore is that the plaintiff's action is barred, and the appeal must be dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.