Present : Schneider J. and Jayewardene A.J.

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184—D. C. Kandy, 26.

Waste Lands Ordinance—Claim for half-improved value—Reference to Court—Powers of District Court—Statement of claim—Parties to reference—Ordinance No. 1 of 1897, ss. 6 (b) and 8.

Where a claim made under the Waste Lands Ordinance before the Assistant Government Agent that a land be settled on the claimant upon his paying the half-improved value was referred to the District Court, and where the District Judge declared the claimant absolutely entitled to a portion of the land in claim.

Held, that the Court had no power to grant the claimant a larger right than that claimed by him in the statement of claim.

Obiter—The proceedings in Court should be confined to the persons named in the reference, except in the special case contemplated by section 8 of the Ordinance.

APPEAL from a judgment of the District Judge of Kandy in a reference made to Court under the Waste Lands Ordinance, by the Assistant Government Agent of Kandy, of a claim made by the first respondent that an allotment of land called Welikanda of the extent of 5 acres 3 roods and 8·8 perches be settled upon him, on paying the half-improved value. The statement of claim alleged that one F. B. Bartholomeusz admitted the right of the Crown to the allotment in question, and was prepared to pay the Crown half-improved value, but that he was unable to pay, and was, therfore, permitted by the Crown to possess till he was able to pay. It further disclosed that the first respondent was not the only heir of F. B. Bartholomeusz. In consequence of this disclosure, five other persons were noticed and made parties to the proceedings in Court. They filed their statements of claim and appeared by the same proctor.

The learned District Judge made order declaring the claimants entitled to an extent of 1 acre 1 rood and 27 perches, and the rest to be the property of the Crown.

The Crown appealed.

S. Obeyesekere, C.C., for defendant, appellant.

H. V. Perera, for claimants, respondents.

March 19, 1925. SCHNEIDER J.—

This action originated by a reference made to the District Court of Kandy by the Assistant Government Agent of the District of Kandy acting under the provisions of section 5 of the Ordinance

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No. 1 of 1897 relating to " Claims to Forest, Chena, Waste, and Unoccupied Lands. " The only claimant named in this reference is the first respondent to this appeal. It is alleged in the reference that he made a claim to an allotment of land called Welikanda of the extent of 5 acres 3 roods and 8.8 perches, depicted as lot No. 1 in preliminary plan No. 7,002 (marked Z); and bounded on the north by Welikanda (lot 2 in preliminary plan 7,001), on the east by T. P. 50,120, on the south by Mahaiyawa-ela, a grass field of the Ceylon Government Railway (Crown), and Welikumbura claimed by the Ceylon Government Railway (Crown) and Welikumbura claimed by Mrs. S. A. Carthigaser, on the west by T. P. 325,690, T. P. 325,233, T. P. 325,232, Welikanda claimed by Mrs. S. A. Carthigaser, and Oruwaketuwawatta claimed by Mr. George E. de La Motte.

The first respondent appeared before the Court and duly filed a statement of claim, in which he does not traverse the correctness of the description of the land as given in the reference, but sets out that a " land called Welikanda of 12 acres and 3·2 perches, *save and except an extent of 5 acres 3 roods 8 perches to the south by the side of Mahaiyawa-ela,* belonged to one Mr. Gomis who, on deed No. 9,040 of 1873, sold and transferred the same to F. B. Bartholomeusz. " He does not give the boundaries of this land (paragraph 1). Clearly this paragraph means but one thing, and that is, that neither Mr. Gomis nor Mr. Bartholomeusz, by virtue of the transfer by Mr. Gomis, was entitled to the allotment of 5 acres 3 roods and 8 perches, which for convenience I shall hereafter speak of as the land in claim.

In the very next paragraph of his statement, the first respondent proceeds to allege " that the said F. B. Bartholomeusz planted the *said* land as a village garden ever since his purchase and possessed the said block of land till his death " (paragraph 2). The words " said land " were probably intended to mean the larger allotment of 12 acres, but whether that allotment or the smaller one of 5 acres 3 roods and 8 perches be meant the planting is attributed to Mr. F. B. Bartholomeusz alone. Then follow the allegations in the fifth paragraph that Mr. F. B. Bartholomeusz admitted the right of the Crown to the allotment of 5 acres 3 roods and 8 perches, and was prepared to pay the Crown half the improved value, but that he was unable to pay, and was, therefore, permitted by the Crown to possess till he was able to pay. The first respondent asks that the land be settled on him now upon his paying the half-improved value.

As regards the balance of the 12 acres, he claims that on account of the plantations and possession of himself and his predecessors, and asks that, if it should be held to be Crown land, it should be settled on him upon terms. Accordingly, it is clear from his statement that the first respondent does not claim, nor did his deceased father claim, any more than a right to a transfer of the allotment of 5 acres

3 roods and 8 perches upon payment of its half-improved value. If the balance extent of 6 acres and 35·2 perches does not come within the land under reference, no question arises in this action as to any rights in it which the first respondent may claim.

Although the first respondent asked that both allotments be settled on him alone, he disclosed in his statement that he was not the only heir of his father through whom he claimed. In consequence of this disclosure, upon the initiation of the defendants' proctors five persons were noticed, namely, the second, third, and fourth respondents to this appeal and two others. These latter, who are a brother, and the wife of a deceased brother of the first respondent, failed to appear upon notice and made no claim in Court. The second, third, and fourth respondents filed a statement of claim which is identical in all respects with the statement of the first respondent, except that they too claimed a declaration of right in themselves alone without including the first respondent. All the respondents filed their statements and appeared by the same proctor. The apparent conflict of claims is obviously due to a little want of care in the drafting of the pleadings. I will, therefore, regard all the respondents as making a claim jointly.

From what I have said so far, if the land in claim, that is, the allotment of 5 acres 3 roods and 8 perches referred to in the statements, can be identified with the land under reference, it would be apparent that none of the claimants claim any larger right in the land under reference than to a grant under the provisions of section 8 of the Ordinance No. 12 of 1840. There is no difficulty in identifying the land under reference. Both parties call the land Welikanda. The extent they give is identically the same, viz., 5 acres 3 roods and 8 perches, the difference of ·8 of a perch being negligible. In the reference the land is said to be bounded on the south by the Mahaiyawa-ela, a grass field belonging to the Crown, a portion of Welikanda also belonging to the Crown, and a portion of Welikanda, now of Mrs. Carthigesar, but which, according to the first respondent himself, formerly belonged to the Crown. In the statements the land in claim is described as being the southern portion of the 12-acre allotment and lying by the side of the Mahaiyawa-ela. This side must be the north side of the ela. From the plan Z it is apparent that the land under reference lies wholly to the north of the ela, and that there is no other portion of Welikanda which touches the ela. If the land in claim be to the south of the ela, there was no necessity to refer to it at all in connection with the land under reference, as it lies entirely to the north of the ela. These facts lead to the conclusion that the claimants intended to say, although they do not say so expressly, that the land under reference is the allotment of 5 acres 3 roods and 8 perches mentioned in their statements. The land in claim being identical with the land under reference, there is but one issue between the parties,

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namely, whether the conditions laid down in section 8 of the Ordinance No. 12 of 1840 had been fulfilled so as to entitle the respondents to a grant of the land upon payment of the half-improved value. Eight issues were framed and tried, raising questions of law and ownership, but there was no issue specifically raising the question which is the only matter in dispute according to the pleadings. Issue 8—which is: "Assuming the issues framed to be answered in favour of the claimants, are they entitled to a declaration of their title"—might possibly be regarded to have been intended to raise that question, but it is worded vaguely if that was the intention.

After the trial of the issues framed, the learned District Judge declared the claimants entitled to an extent of 1 acre 1 rood and 27 perches, described as lot No. 11068 in preliminary plan No. 4,124 (A 3) being the southern portion of the land under reference, and the rest to be the property of the Crown. He made no order as to costs.

It is from this decree the defendant has preferred this appeal.

The learned District Judge has taken much pains in endeavouring to arrive at a correct decision in this action. It was his insistence after the trial was closed, which resulted in the production of several material documents from the Kachcheri. He visited and inspected the land. He has considered and discussed at some length in his judgment the documentary and oral evidence. Therefore, it is with much reluctance I find myself constrained to dissent from him. His order is obviously wrong in two respects. He should not have declared the claimants to be the *owners* of any portion of the land under reference since the claim they made was much less. It was only under section 8 of the Ordinance No. 12 of 1840. No doubt section 16 of the Ordinance No. 1 of 1897 empowers him after inquiry to pass such order as he may consider just and proper. But his order cannot be regarded as just and proper even upon his own findings of fact. He has found that the claimants and their predecessors had cultivated and improved and had possessed only the portion he has awarded to them, although they claimed the whole of the land under reference. According to that finding they had no claim to the rest of the land as against the Crown. There is, therefore, no room to regard his order as an adjustment by which he gave the claimants larger rights in a smaller portion of land in lieu of smaller rights which they had in a larger portion. Next, I am doubtful that he was justified in including the two persons, whose names are given as the first and second claimants in his decree, among the claimants in whose favour he has given a declaration of title, inasmuch as those persons neither appeared nor preferred any claim, directly or indirectly, either before the Assistant Government Agent or himself.

Upon the evidence which I shall presently proceed to consider, I am of opinion that the learned District Judge's order is not sustainable, not only in those two respects, but at all. But before proceeding to consider the evidence, I wish to refer to a matter which is not of any importance in this action or directly concerned with its decision, but which it might be necessary to consider in the future. I am doubtful that it was the correct procedure to add the second, third, and fourth respondents as claimants. They did not appear before the Assistant Government Agent, nor did any other person make a claim before that officer on their behalf. The reference gave only the name of the first respondent as a claimant. If the other respondents had been disclosed to him as persons interested, their names should have appeared in the reference as required by section 6 (*b*) of the Ordinance. The provisions of the Ordinance require certain preliminary proceedings to be held before a reference is made. Those provisions also appear to suggest that the proceedings are confined to the persons named in the reference, except in the special case contemplated in section 8 which has no application to this action. The Civil Procedure Code does provide for the addition of parties after the initiation of an action in Court, and section 13 of the Ordinance No. 1 of 1897 enacts that the proceedings, under the Ordinance shall be regulated by the Civil Procedure Code, but except in so far as they are applicable and except where the Ordinance contains special provision. Having regard to the provisions of the Ordinance, it seems to me that it was not contemplated that parties should be added after a reference had been made to Court. It is possible to conceive cases where such an addition would be desirable, but on the other hand, there is the possibility that if those parties had appeared before the Government Agent, there might have been no need for a reference at all. Section 18 which gives the right of appeal in the exercise of which this appeal has been preferred gives that right only to "any party to the reference." I find some difficulty in regarding any party added to the action after the reference has come into Court as a party to the reference. But as the question does not arise upon this appeal, I shall now proceed to consider the evidence. The burden of proving their claim lay upon the claimants as plaintiffs (sections 7 and 12).

According to the admissions contained and the claim made in the statements, as I have already pointed out, the issue which the claimants had to prove was that the conditions laid down in section 8 of the Ordinance No. 12 of 1840 had been complied with. That is, they had to prove that they or their predecessors had taken possession of, and cultivated, planted, and otherwise improved the land under reference, and had held uninterrupted possession thereof for not less than ten nor more than thirty years. Although this issue was not specifically raised, yet it is not possible to ignore the

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fact that it is the essential issue in the action. Section 146 of the Civil Procedure Code makes the allegations in the plaint part of the material to be taken into consideration in the framing of issues. According to the provisions of the Ordinance No. 1 of 1897, the claimants are in the possession of plaintiffs, and their statements are, therefore, in the position of a plaint in any ordinary action. That being so, the claimants must be held bound by their admissions, and their claim limited as having been set out to that granted by section 8 of the Ordinance No. 12 of 1840. But as the issue of title has been raised and tried, and as the evidence regarding the issue arising upon the admissions must be a part of the evidence on the larger issue of title which has been tried, I shall consider the evidence bearing upon the issues which have been tried and upon which the District Judge has based his judgment.

The decision of the District Judge largely rests upon his finding—(1) that the land under reference formed part of the Rakawal *panguwa* and was appurtenant to the adjoining Welikumbura; and (2) that at the time of the coming into operation of the Ordinance No. 12 of 1840 the southern half of the land was already a *watta* planted with coffee, jak, and fruit trees like any village garden. I propose to examine these two findings first. I shall first consider whether the land under reference came within the operation of the Ordinance No. 12 of 1840 as being a chena at the time of the coming into operation of that Ordinance. If the land at the date was chena land, it would be presumed to be the property of the Crown as it is within the Kandyan Provinces unless the claimants established a title through a sannas or grant. (See section 6, No. 12 of 1840, and *the Attorney-General v. Punchirala*,[1] *Hamine Etena v. the Assistant Government Agent, Puttalam*,[2] and *the Attorney-General v. Appuhamy*.[3]) It would make no difference to that presumption that the land formed part of the Rakawal *panguwa*. No one pretends that anyone had a sannas or grant. The Ordinance No. 12 of 1840 came into operation in October, 1840. As to what was the nature of the land at that date, the only proof adduced is the documents marked P 8 and P 9 which contain the evidence produced at an inquiry by the Government Agent upon an application by the first respondent's father and two brothers of the father for a certificate that the Crown had no claim to an allotment of land of nearly 18 acres in extent. This application was made by the document D 1 in 1856. The southern boundary of the land was given as Welikumbura in this application. The land under reference was, therefore, probably included in that land. They claimed to have purchased it from one Mr. C. C. Gomis upon a "Sinhalese Bill of Sale" which was said to be annexed to their application. They stated that Mr. Gomis had purchased from three

[1] *(1919) 21 N. L. R. 51.* [2] *(1922) 23 N. L R. 289.*

[3] *(1922) 24 N. L. R. 112.*

members of the family of Tollekumbure Duraya, who and whose ancestors had possessed it from time immemorial, and that Mr. Gomis himself had posssessed for fifteen years. One of the applicants—Mr. J. G. Bartholomeusz—two Durayas, and one Tamby Lebbe gave evidence at the inquiry. This Mr. Bartholomeusz and all his witnesses called the land Welikumbura *hena*. Mr. Bartholomeusz stated that at the date of his purchase the land was covered with jungle eight or nine years old, and that while he was clearing the land he found some coffee and jak trees, about twelve or fifteen years old, over an extent of about 2 acres. He said he knew nothing of the previous history of the land. There is much conflict in the descriptions, both as to the extent and the boundaries of the land given by the other witnesses of the hena or chena they spoke of. Two of them make out that it is bounded on all four sides by other henas, while one of the Durayas would have it that it is bounded on one side by a high road, on another by an ela, and on the third by a kumbura (field). But they are all agreed that the land had been cultivated only with kurakkan and paddy (I take it hill paddy) before the sale to Mr. Gomis. Those are two cereals ordinarily planted on chenas. They are agreed, too, that at the time of the sale to Mr. Gomis the land was covered with forest of the same age as the forest on the surrounding portions of land, that is, about ten to fifteen years old. That is the age of forest growth to be usually found on chenas cultivated at long intervals. This is all the evidence there is as to the nature of the land at the time it passed into the hands of Mr. Gomis. As to the date of that event, it can be fixed with some degree of accuracy. There is the assertion in the application of 1856 by the Bartholomeusz brothers that Mr. Gomis possessed the land for fifteen years, which would appear to fix the date of his purchase as 1841. One of the Durayas stated that the transfer to Mr. Gomis was about thirteen years, the other about twenty years, before 1856. These statements are unreliable. Tamby Lebbe said that it was in 1841 or 1842. The first respondent's evidence at this trial is that the deed in favour of Mr. Gomis was dated 1859, and that in favour of his father 1873. His document P 6 lends some support to the latter part of this statement. Neither deed is now forthcoming, and it would appear that copies cannot be now procured. It is obvious from the application D 1 that the date 1859 given by the first respondent is wrong, and that it should be 1856 or earlier. The District Judge thought that the oldest trees he found on the land were about seventy-five years. That would fix the date of the planting as 1850. I think, therefore, that a fair inference to be drawn from the evidence is that Mr. Gomis had purchased in 1841 or 1842. As the land at the date of his purchase was a chena, the provisions of the Ordinance No. 12 of 1840 would apply to it, and it would be presumed to be the property of the Crown, unless that presumption is rebutted by the production of a sannas or grant. That

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presumption has not been rebutted. Accordingly, it must be held that the land in claim is Crown land. The admission of the claimants in their statements that it was Crown land, is, therefore, in accordance with the evidence which they produced. I would accordingly hold that the land under reference is Crown land. In May, 1857, after the inquiry, the Government Agent informed the applicants that the Deputy Queen's Advocate was of opinion that they had not adduced any evidence to entitle them to "a certificate against the right of the Crown in regard to any portion of the land." But he added "I am, however, prepared, although you cannot claim it as a right, to *secure* your application to purchase, on payment of half its improved value, the portion cultivated by Mr. Gomis. But the rest of the land will be surveyed and sold on account of Government." Here we have an admission that "the portion cultivated by Mr. Gomis" came within the 17 acres mentioned in the application, but we do not find, as the first respondent would have us believe, that the Crown offered to grant a transfer on payment of half the improved value. The Government Agent's offer was only to *secure* the purchase upon such terms. The plans produced in the action show that all the surrounding lands had been sold by the Government, for they are described as lots in title plans issued by Government for lands alienated by Government. Although the learned District Judge accepted the evidence as proving that the land mentioned in the application D 1 —formed part of the Rakawal *panguwa* and was an appurtenant to the field Welikumbura on the south, I do not think the evidence justifies his conclusion. As to those statements we have only the evidence of the two Durayas who gave evidence in the inquiry in 1856, but, on the other hand, we have the fact that the Crown declined to accept either statement since it claimed the land and sold portions of it, and to this day it owns two portions of the field to the south. It also sold the only other portion of the field to Mrs. Carthigaser. But, after all, it makes no difference whether the land was part of that *panguwa* and was an appurtenant to a field, because being a chena it is swept within the influence of the Ordinance.

As the conclusion I have come to so far, is, that the land under reference is Crown land, it is now necessary to ascertain whether the claimants have made out a case for a grant under section 8 of the Ordinance No. 12 of 1840. For this purpose it is necessary to consider the history of the land since 1856. That history falls into two distinct periods. The first period is that between 1856 and 1893, which is the date of the death of Mr. F. B. Bartholomeusz, the father of the first respondent. The second period is that which follows after 1893. The only oral evidence in support of the case of the respondents is that given by the first respondent. His evidence was to the following effect:—The land under reference

at the time of his father's death was planted. Adjoining it was a jungle portion from which firewood was taken by his father. On the land under reference there were three coconut trees, one of which is still in existence. There were also breadfruit, kitul, and arecanut trees. There were also about half an acre under tea. His father took the produce of all the trees till his death. He was told by his father that he occupied the land under a ticket of occupancy until he was able to pay half the improved value of the land. The documents referred to by the witness show that what he calls a "Ticket of Occupancy" is a lease of the land. He says his father occupied the land on a ticket of occupancy in 1889 and 1890, but since 1891 obtained no ticket of occupancy but continued to occupy the land. I cannot find in his evidence anywhere a statement that his father occupied any portion of the land under reference independently of the Crown. His evidence does not inspire me with any confidence as to its accuracy. He seems to speak loosely, and his evidence is contradicted at several points by the documentary evidence on record. The only document showing that his father had a lease of the land is D 4 of March, 1889. It is a lease of the northern portion of the land under reference of the extent of 3 acres 2 roods and 16 perches, and show in plan No. 223 (A 1). The southern boundary of this portion is given as Crown land leased to Casi Lebbe. This lease clearly proves that the claimants are not entitled to the portion of land comprised in the lease, because their father acknowledged the title of the Crown by taking a lease of it. If it can be ascertained what is the Crown land to the south of it which was leased to Casi Lebbe, it would considerably weaken the evidence of the claimants that the deceased, F. B. Barthlomeusz, possessed any portion in the land under reference in 1889 or thereabouts. The District Judge thought that the land leased to Casi Lebbe did not include the lot No. 11068 which he has allotted to the claimants, and that the claimant's father was, at the date of the lease, in possession of lot No. 11068 independent of the Crown. The land leased to the claimants' father is shown in plan A 1. The plan A 3 shows lots Nos. O 711 and 11068 separately. When A 3 is superimposed over plan Z, it would be seen that the land under reference are the two lots marked Nos. O 711 and 11068 in A 3. I superimposed plan A 2 upon plan A 3 and drew on A 2 in broken pencil lines the boundary between lots Nos. O 711 and 11068, and also the outline of lot No. P 711. I also drew on that plan in a firm line the southern boundary of the land shown in A 2 as leased to the first respondent's father. The District Judge thought that the land leased to Casi Lebbe was the small extent lying between the firm line and the broken line drawn by me on A 2. That he is wrong in thinking so is apparent when plan A 2 is superimposed on A 4 which shows that the land leased to Casi Lebbe included lot No. 11,068 and either a part or the whole of lot P 711. Besides, it

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is not the case of the claimants that the deceased, Mr. Bartholomeusz, occupied any portion of the land under reference since 1856, except under what the first respondent calls a ticket of occupancy. If the first respondent's evidence is to be accepted, it would show that even though he is mistaken in thinking that his father's lease included lot No. 11068, yet, his father and himself both considered that the father's occupation of lot No. 11068 was by virtue of the lease. I therefore conclude that when the first respondent's father possessed in 1889 and 1890 the northern portion of the land under reference, the southern portion, or at least a part of it, was occupied by Casi Lebbe upon a lease from the Crown. In this connection it is important to notice that the name of any one of the Bartholomeuszs does not appear in the description of the abuttals of the land in the lease to the deceased, Mr. F. B. Bartholomeusz, showing that at the date of that lease the Crown did not regard any of the abuttals as being claimed by the Bartholomeusz. On three sides of that leased land the boundaries are given as the land leased to different parties presumably by the Crown. The documents D 5, D 6, D 7, and D 8 prove that in 1891 Mr. F. B. Bartholomeusz was permitted to cancel the lease in his favour, and that a resale of the lease of the land had been ordered by the Government Agent. In this connection I should have mentioned another material document, namely, P 11 dated August 4, 1890, which the first respondent admits was written by his father to the Government Agent. In this letter he tells the Government Agent that in consideration of the great disappointment in regard to their claim for the land at Mahaiyawa, he would beg the Government Agent to grant him lot No. O 711 on payment of half the improved value " in lieu of the lot No. P 711 now offered to him." This letter clearly indicates that at that date the first respondent's father had not been offered a grant of lot No. O 711 but of the land to the south-west of it, namely, P 711, or, in other words, that the grant offered was to a portion of land entirely outside the land under reference. The letter also says that the writer could hardly get a sufficient return to make the lease money, Rs. 46, payable for " the lot No. O 711," which is the northern portion of the land under reference. There is no document proving what happened with regard to the request about lot No. P 711 contained in that letter. There is no specific evidence as to what happened in the period which intervened between 1891, when the first respondent's father surrendered his lease, and 1897, when the Government Agent granted lease D 9 in favour of Araby Pasha. In May, 1897, the Crown granted to Araby Pasha a lease for ten years. This lease beyond any doubt was of the land under reference. The plan upon which the lease was given is that shown in the tracing marked A 2 and is the land comprised of the lots Nos. O 711 and 11068. It is not disputed even by the first respondent that Araby Pasha possessed the land under that lease. The Pasha left

Ceylon, it is said, about three years after the execution of the lease. The history of the possession of the land after his departure is disclosed in the document D 10 dated November, 1903. The Pasha had left the land in charge of one Abdul Hamit who was found in possession of it in 1903 by the Gravets Muhandiram of Kandy. This document shows that Abdul Hamit had attempted the cultivation of plaintains on the land, but owing to its sterility had abandoned the plantation. Mr. Dullewe was the Muhandiram from 1906 to 1924. In his evidence given in this action he says that his predecessor had been in possession of the land presumably on behalf of the Crown, although he does not say so expressly, and that Mr. Dullewe himself, a few months after his appointment, was put in possession of the land on behalf of the Crown. This oral evidence of the Muhandiram is corroborated by the document D 11 dated July, 1907, in which he reports to the Government Agent that he took possession of the land leased to Araby Pasha on behalf of the Crown in August, 1907. By D 12 the Muhandiram was directed to see that the land was not encroached upon, and also to furnish a periodical report after personal inspection. The Muhandiram sent the report D 2 dated August, 1908. In this report he states that he visited the land several times, and on one visit found two women removing firewood, whom he prosecuted in the Police Court. In the report he also refers to a man called Pina as the lessee of the land to whom he had given a warning against allowing cattle to trespass on the land. The report shows that the man Pina had a lease of two kitul trees on the land. This report appears to have been rendered to the Government Agent upon an application made by one Hinno Appu, a Fiscal's peon, for a lease of the land. The Muhandiram reported against the lease being granted, as some valuable trees were just beginning to grow upon the land. He also points out that the land is reserved land. This witness also stated in his evidence that the first respondent once claimed the land when he visited it, and that he then informed the first respondent that he had nothing to do with that claim. He also says specifically that he was not aware of the claimant being in possession of the land. He speaks, too, of a lease of the land being given in 1918, during the rice crisis, to a milk man to be planted with vegetables, and says that the milk man made some plantations. Upon this documentary evidence I think there is but one holding possible, and that is, that neither the first respondent's father nor the first respondent had any possession till 1918. If any produce of the trees of the land had been taken by them, it was not taken in such a way as to interfere with the dealings of the Crown with the land. In December, 1910 the first respondent made an application to the Government Agent, in which he stated that he had been given to understand that his father was the owner of a land called Welikanda of the extent of about 8 acres, and that his father had not been in a position to pay

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half the improved value of the land when called upon to do so by the Government Agent, and that at that time his father was allowed a lease of the land. The first respondent then proceeded to ask for a grant of the land upon his paying half the improved value. This application was referred to Muhandiram Dullewe for report. He reported in 1911 that he had taken possession of about 4 acres of the land which had been leased to Araby Pasha about four years before the date of the report, and that the land was at that date in his charge. He also pointed out that the Government had reserved the whole of Welikanda as a segregation camp in the event of an outbreak of rinderpest. The report states that a portion of the land is forest. The oral evidence also proves that the Crown had felled and removed timber from the land within very recent times.

I do not think it necessary to consider the evidence in the case in any further detail. To my mind the weight of the evidence is entirely in favour of the defendant. It is not possible upon that evidence to hold that the first respondent's father, or the first respondent or any of the other respondents, have held uninterrupted possession of the land under reference for not less than ten years. That being so, the respondents are not entitled to a grant of the land, or any portion of it, under the provisions of section 8 of the Ordinance No. 12 of 1840. For these reasons I would set aside the order of the District Judge, and declare that the whole of the land under reference is the property of the Crown.

As regards cost, I think the appellant is entitled to the same in both Courts. At the time of the notice given by the Government Agent, namely, in April, 1921, the upper portion of the land was forest and the other land was "unoccupied land" within the meaning of section 24 of the Ordinance No. 1 of 1897, as it was land which had not been in the uninterrupted occupation of any private person or persons for a period exceeding five years next before the notice under section 1.

Nevertheless, the evidence on record shows that such plantations as are now to be found upon a part of the land were made either by Mr. Gomis, or by Mr. F. B. Bartholomeusz. The interest of Mr. Gomis in the land, whatever that interest was, was purchased by the three Bartholomeusz brothers. The respondents claim as heirs of one of the original purchasers. They are not even all the heirs of that purchaser. For some years the first respondent has been endeavouring to obtain some concession from the Government in regard to some portion of Welikanda. His claim is not without some foundation, and although it has no legal existence, it seems to me that his claim is one which should receive some consideration at the hands of Government.

JAYEWARDENE A.J.—I agree.

Set aside.

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