Present : Middleton J. and Wood Renton J. *July 27, 1911*

DON ANDRIS *v.* JAMESHAMY.

232—*D. C. Tangalla*, 1,116.

Crown land—Presumption as to Crown property—Extensive jungle adjacent to cultivated land—Appeal—Refusal to frame an issue.

The principle that the Crown is not to be presumed to be the owner of scraps of uncultivated land adjacent to the cultivated land belonging to its subjects can find no application where the extent cultivated is a small portion, as compared with the uncultivated land.

The refusal by a Judge to frame an issue, the determination of which depends on *vivâ voce* evidence, is an order which under ordinary circumstances ought to be made the subject of an immediate interlocutory appeal.

THE facts are set out in the judgment.

Bawa, for the defendant, appellant.

Sampayo, K.C. (with him *Balasingham*), for the plaintiff, respondent.

Walter Pereira, K.C., S.-G., for the Crown.

Cur. adv. vult.

July 27, 1911. WOOD RENTON J.—

The facts of this case are clearly set out in the judgment of the learned District Judge, and I do not propose to repeat them. After careful consideration of the arguments on both sides. I have myself come to the following conclusions. I think that the identity of the land in suit has been clearly made out. The evidence shows that at the date of its being sold by public auction by the Settlement Officer, namely, on July 20, 1909, it was not land of a character which could give rise to the presumption in favour of the Crown enacted by section 6 of Ordinance No. 12 of 1840. The land in suit—lot No. 7—was no doubt part in one sense of lot 6. But even if the District Judge is right in the opinion that he expressed that if lot No. 6 had been in dispute the defendant-appellant and his predecessors in title had made out in regard to it a title by prescription against any Crown claim, that finding does not conclude the case in the appellant's favour as regards lot No. 7, which is land of a different character, and has been subjected to different treatment. The principle enunciated by Lawrie J. in *Saibo v. Andris*,[1]

[1] *(1898) 3 N. L. R. 218.*

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that the Crown is not to be presumed the owner of scraps of uncultivated land adjacent to the cultivated land belonging to its subjects, can find no application in the present case. Lot No. 7 is not a scrap of land as compared with lot No. 6. It consists of 8 acres 2 roods 3 perches, whereas lot No. 6 comprises only 1 acre 2 roods 30 perches. Although lot No. 7 was not at the date of its sale by the Settlement Officer land which could give the Crown the benefit of the provisions of section 6 of Ordinance No. 12 of 1840, it was undoubtedly chena land originally, and the chena permits produced at the trial clearly prove an acknowledgment of the title of the Crown to portions of this land by a vendor to the appellant Welligamage Baba, by Kandabige Dingi Appu, one of his co-owners, by his brother Pedris, and by his father Abeyhamy, within periods of time which negative the acquisition of any prescriptive title to the land by the appellant.

At the trial the learned District Judge was invited to frame an issue as to whether under the common law the appellant was entitled to compensation for improvements. Counsel for the respondent objected on the ground that that question had not been raised in the pleadings, and the matter seems to have been dropped without any formal order having been made in regard to it by the learned District Judge. I can find, at least, no such trace of such an order in the record. If the appellant regarded the matter as of importance, he might have pressed the Judge for a formal ruling on the question, and have appealed at once if that ruling was adverse to him. The refusal of an issue of this kind, the determination of which depends on *vivâ voce* evidence, is an order which, under ordinary circumstances, ought to be made the subject of an immediate interlocutory appeal. The point is not taken in the petition of Appeal, and it was raised only at the close of the appellant's arguments before us. There is no evidence in the record of any improvements having been effected by the appellant of such a character as to justify us in sending the case back for further inquiry and adjudication on that point now.

I would dismiss the appeal with costs.

MIDDLETON J.—I entirely concur.

Appeal dismissed.