Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Happuatchigey Baba Appoo and others v. *The Honourable Richard Francis Morgan* (*Queen's Advocate*), *from the Supreme Court of the Island of Ceylon; delivered June* 21*st*, 1879.

Present:

Sir James Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert Collier.

THIS Appeal arose under the following circumstances: Ten or twelve years ago plumbago was found in a portion of the forest or waste land in Ceylon, whereupon the Appellants began to work for it by sinking pits. Upon that some other persons, bearing nearly the same name, commenced a suit of ejectment against them. While this suit was pending, the Crown intervened, and asserted its title to the land where the pits were dug, against both the litigants. The case in the first instance came before the Subordinate Judge in Ceylon, and he found that the present Appellants were entitled to the land as against the Plaintiffs in the suit and as against the Crown. On appeal to the Supreme Court, that Court decided that the Crown was entitled to all the land within a certain district which will be presently referred to, except such as the Appellants had brought into cultivation; and remanded the case for the purpose of its being ascertained what land they had brought into cultivation. Upon this being found by the Subordinate Judge, the Supreme Court affirmed his finding and

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decreed that the Appellants were entitled to be quieted in possession of so much of the land as he had found them to have cultivated, and that the Crown was entitled to the rest, which included the plumbago mines. This is the judgment appealed against.

The title of the Crown depends upon an ordinance passed in the year 1840, the material terms of which are these:—"All forest, waste, unoccupied, or uncultivated lands shall be presumed "to be the property of the Crown until the contrary thereof be proved;" and after referring to certain specified districts: "In all other "districts in this colony such chena and other "lands which can only be cultivated after "intervals of several years shall be deemed to "be forest or waste lands within the meaning of "this clause." The Crown asserts its title to the land in dispute under this ordinance as being forest or waste land. The Appellants seek to show their title to it under a grant made by the Dutch Government in the year 1736 to an ancestor from whom they claim. There are several translations of this grant in the Record, but inasmuch as one of them appears to have been made, at the instance of the Supreme Court, by a gentleman of competent authority, and to have been agreed to by both sides, their Lordships think it convenient to refer to that translation only, which is to be found at page 11 of the Record and is in these words: "Whereas Happuatchigey Lewis Perera, Las-"coreen of the Alapattu of Meewanapalane in the "Oodugoha Pattu of the Rygam Korle, has "stated before me that having for many years "faithfully served the Honourable Company "without a due parveny accommodessan, and "representing that he had not a means of living, "he applied to the late Dessawes for a piece of "high ground to make a garden, and a piece of

" low ground to asweddumize, but that he failed " duly to obtain, from within the boundaries of " the Ratmahara garden Delgahawatte and Com- " pany's ground Pelpittigodde, viz., Mawak on " the east, Paretota on the south, the canal " running through Gorokadu on the west, and " Angurawawala on the limit of the Hoole on the " north, an allotment of waste ground sufficient " to plant about 100 cocoa-nut trees, and two " amonams extent of the marshy ground lying " near the garden to be asweddumized, I " have granted the said garden to be cleared, " planted, and improved with cocoa-nut, jack, " arrecca nut trees, &c., without injuring " the cinnamon and valuable timber, and a " portion of low ground to be likewise asweddu- " mized and possessed, together with the said " garden, as a freehold for the service of Las- " coreen, asweddumizing and paying to the " Honourable Company ottu upon any excess of " the said low ground beyond the extent of the " said freehold, including the high chenas."

It has been contended, and this has been the chief contention on behalf of the Appellants, that the effect of this grant is to give to the Appellants the whole of the soil in the tract of land amounting to about 350 acres or thereabouts, which is described within the boundaries contained in this document. Their case is, that the garden granted to be cleared, planted, &c., is the whole of the "Ratmahara garden;" they further contend that inasmuch as there was a power of asweddumizing or bringing into rice cultivation any portion of the land beyond that, — if any lay beyond it,—that this amounted in effect to a grant of the whole, subject as to all but a part to the payment of ottu or revenue on the land to be brought into cultivation. They have also contended that even if that

be not so, still they are entitled to as much as they have cultivated by a process called "chena cultivation," that is, cultivation by cutting down the jungle and sowing seed occasionally after long intervals. The contention of the Crown is, that the document has a much more limited character; that it conveys only a freehold in a small portion, together with a power of asweddumizing a certain other portion on the payment of ottu, that is, a land tax consisting of one tenth of the produce.

Their Lordships will proceed to give the construction which they put upon this document. It begins by stating that Lewis Perera is a Lascoreen of Alapattu, and that he has faithfully served the Company without a due "parveny accommodessan." Referring to the history of Ceylon and some books of authority which have been written with reference to the island, it appears to their Lordships material to bear in mind that this Lewis Perera, the original grantee, was but a Lascoreen, or a common soldier; that it was usual to make small grants of land to common soldiers,—of course large grants would not be expected,—that the terms "parveny acoommodessan" indicate a grant of Crown lands upon the tenure of service performed, and would be *primâ facie* a grant only for the life of the applicant, renewable to the descendants of the grantee from time to time if the Government thought fit; and that it may have been usual to make renewals of such grants.

This Lascoreen makes an application for a certain piece of high ground to make a garden, and a piece of low ground to asweddumize, that is, to cultivate for rice. He states that he has failed duly to obtain them within certain boundaries. It may be that these were the boundaries within which he was authorised to prefer a claim, if he had any. He goes on to say that he has failed to

obtain "an allotment of waste ground sufficient " to plant about 100 cocoa-nut trees, and two " amonams extent of the marshy ground lying " near the garden to be asweddumized." His application is for that to which he assumes himself to have some claim, viz., an allotment of waste ground, which he describes as a garden sufficient to plant 100 cocoa-nut trees, and two amonams extent of the marshy ground lying near the garden to be asweddumized,—an amonam being so much land as is sufficient to plant a certain quantity of rice, viz., six bushels. It appears to their Lordships that the grant is to be construed with reference to the application, and the granting words are these: "I have granted the said garden to be " cleared, planted, and improved with cocoa-nut, " jack, arrecca nut trees, &c., without injuring " the cinnamon and valuable timber." The garden or portion of land asked for is granted, namely, enough to plant 100 cocoa-nut trees, which is in round terms somewhere about an acre; and the caution against injuring the other valuable timber is scarcely consistent with the supposition that the whole of the land belonged to the grantee. Then follows a further grant of "a portion of low ground to be likewise " asweddumized and possessed, together with " the said garden, as a freehold for the service " of Lascoreen." Their Lordships understand this grant to be of that which was asked for, namely, the two amonams of marshy ground to be held as freehold; and by "freehold" they understand "without the payment of ottu or tax." Then come some words which have been relied upon on the part of the Appellants: "Asweddumizing and paying to the " Honourable Company ottu upon any excess " of the said low ground beyond the extent of " the said freehold, including the high chenas."

Their Lordships understand this to mean that if the grantee asweddumizes more than the two amonams, whether he does it on the low ground or on the high ground,—for it would be possible to asweddumize, though perhaps at greater expense, the high ground,—then he is to pay ottu, that is, one tenth of the produce, to the Government, instead of paying half or more, which he would have to do if he enclosed or cultivated lands without any authority.

This view of the sannas seems to be confirmed by some extracts which have been put in from a thombo or land registry kept in the last century. This registry, originally written on palm leaves, was copied and put into some shape about the middle of the century. The first extract bears date 1747, ten years after the date of the original grant, and, though somewhat obscure, would seem to indicate that the Government had granted a portion of the land to persons who are called Padoas, people of a low caste; and this seems inconsistent with a grant of the the whole, ten years before, to the original grantee.

The next document is without date, but appears to have been made in the time of the widow of the grantee, and begins in this way: "Bastiana Dias, widow of "the grantee, possessing one garden named "Delgahawatte Company's ground,"—the name Delgahawatte appears to have been applied to the whole of what is called the garden or any part of it,—"planted without permission—their Honours "share still unpaid—35 cocoa-nut, 25 jack, and "5 arrecca-nut trees." It is difficult to come to a clear conclusion as to the meaning of this. The more probable meaning would appear to be that, in addition to the portion which had been granted before, she had taken another portion and planted it without leave; but in any view,

this statement that she had planted without permission a portion of the land within the boundaries is inconsistent with the Appellant's claim to all within the boundaries. There is a further statement that, "According to the "exhibited sannas ola of the 7th September "1736, granted by the then Dissaive Ageran to "the husband of the above-named Bastiana "Dias, to be cultivated and possessed free for "his services lent, being in possession of "one amonam 16 coornies, viz., of the field more "than ordinary accommodessan, ottu must be "paid for the same in future." This appears to show what was actually done. That the grantee in his lifetime, or the widow after him had availed herself of the last clause in the deed to asweddumize more than had been granted by way of freehold to the extent of one amonam and 16 coornies, and it is declared that ottu must be paid for that. It is further to be observed that the words "and her son Juan is "to perform the service of Lascoreen" indicate that the tenure is by military service.

Another document, folio 111, is much to the same effect, containing the quantities of which the widow was in possession. There is one other document in 1767, 20 years after the original grant, in which Juan, the son of the original grantee and of the widow, is spoken of as Lascoreen and inhabitant of the village of Pelpittigodde, in which the lands in question are situated; in this document the following words are found: "Accommodessan one garden "called Delgohawatte, together with four paddy "fields," naming them, "in extent one amonan "and 24 coornies ninde sowing and lying in his "aforesaid village. The aforesaid Lascoreen "also possesses an owitte which is similarly "accommodessan and lying as above, and called "Halgahawatte, in extent 10 coornies. He is

" further permitted to plant the aforesaid garden " and to possess it as his accommodessan, and " also to cultivate the remaining waste ground " lying adjoining it, of the extent of two " amonams sowing, whereof he the aforesaid,"— then there is some obliteration,—" in proof of " which this voucher is granted to him princi- " pally in order that it may thereby appear " under whom he must perform his service, as " well as the lawful possession of his aforesaid " accommodessan; and whenever he is removed " for misconduct, or happens to die, these shall " be returned, and another issued in the name " of those who shall succeed in his place." This is an entry in the Register book, to the effect that the son was recognised by the Government as succeeding the father; that the extent of his possession was recognised; also his liability to perform services was insisted on, and the right of the Government to remove him for misconduct, or to place in his stead whoever they should think fit in the event of his removal for misconduct or by death. These documents, although somewhat vague and obscure, seem to their Lordships confirmatory of the construction which they have put on the sannas.

This being so, their Lordships are of opinion that the Supreme Court was right in holding that the Appellants had shown no title to the land in dispute. They agree with the Supreme Court that cultivation by means of what is called the chena process, that is, cutting down the jungle and sowing it once in a certain number of years, the only cultivation applied to the land now in dispute, is not cultivation within the meaning of the sannas, which refers in terms only to cultivation by the mode known as asweddumizing, and it is certainly not cultivation within the meaning of the ordinance. Whether the Appellants are entitled to hold all

the ground which they have regularly cultivated otherwise than by the process of aswed-dumization, it is not necessary to decide, inasmuch as there has been no appeal on behalf of the Crown, and the Crown professes itself satisfied to allow them to remain in possession of such lands.

It only remains to say a word with reference to costs in the Court below. Undoubtedly the Appellants were not justified in appealing from the final decree of the Supreme Court, which was as favourable as it could be to them. Whether the costs might properly have been apportioned in the inquiry which followed, in which the Crown failed to obtain quite as much as they claimed, may admit of question; but their Lordships see no ground for departing from the rule which they ordinarily adopt, not to interfere with the discretion of the Court below on a question of costs, unless some distinct rule as to costs is violated, or some very strong case indeed is made out, which appears not to have been done in the present case.

Under these circumstances their Lordships are of opinion that the decree of the Supreme Court was right, and they will humbly advise Her Majesty to affirm it, and to dismiss this Appeal with costs.