

1962 Present: Basnayake, C.J., and Abeyesundere, J.

SIDDAPPUHAMY, Appellant, and ATTORNEY-GENERAL,
Respondent

. S. C. 117/61—D. C. Kegalle, 12879

*Crown Lands Encroachments Ordinance (Cap. 321)—Section 2—Procedure at inquiry—
Meaning of expression “in a summary way”—Information must be filed by
Attorney-General himself.*

When information of encroachment is laid under Section 2 of the Crown Lands Encroachments Ordinance, the respondent must be given an opportunity of presenting his defence. The expression “in a summary way” in the Section does not preclude the District Judge from trying the issues arising in the proceedings as in an ordinary action between subject and subject.

Information of encroachment must be initiated in the prescribed form filed by the Attorney-General himself and not by petition filed by the Attorney-General's proctor.

APPEAL from an order of the District Court, Kegalle.

M. L. S. Jayasekera, for Respondent-Appellant.

Mervyn Fernando, Crown Counsel, for Petitioner-Respondent.

June 13, 1962. BASNAYAKE, C.J.—

On 19th March 1959 the Attorney-General through his Proctor in Kegalle filed a petition in the District Court in which he stated—

“2. By virtue of the provisions of section 7 of the Crown Lands Encroachments Ordinance (Chapter 321) the Crown is entitled to the allotment of land depicted as Lot No. 8 in Preliminary Plan No. A-45 situate within the local limits of the jurisdiction of this Court and more fully described in the Schedule hereto.

“3. The said Lot 8 in P. P. A. 45 forms part of Lots 5088, 5089, 5090 and 5097½ in Chena P. P. 241 of 1883, is forest land and has been proclaimed a Reserved Forest by Gazette No. 5519 of 23rd December 1897.

“4. On or about the 25th day of June 1957 the respondent above-named has without the permission of the Government, entered upon the said land and illegally continues to be in possession thereof. A sketch of the said land is filed herewith marked “A” and pleaded as part and parcel of this information.

“5. The land encroached on is reasonably worth Rs. 1000.”

The Attorney-General asked for an order directing Epalatotuwa Gamaralalage Siddappuhamy, whom he named as respondent to his petition, and all those holding under him to deliver to Her Majesty through her agents and servants peaceable possession of a land known as Kiridana Mukalana depicted as lot 8 in Preliminary Plan No. A-45. With the petition the Attorney-General also filed an affidavit from the Village Headman of Kinigama Wasama. In it the affirmant stated—

“ 2. To the best of my knowledge and belief the said land belongs and has, at all material times, belonged to Her Majesty, Her Heirs and Successors.

“ 3. The Crown is entitled to the said land by virtue of the provisions of section 7 of the Crown Lands Encroachments Ordinance (Chapter 321).

“ 4. The said land is depicted as Lot No. 8 in Preliminary Plan No. A45 and is situate within the local limits of the jurisdiction of this Court.

“ 5. The said Lot 8 in P. P. A. 45 forms parts of Lots 5088, 5089, 5090 and 5097½ in Chena P. P. 241 of 1883, is forest land and has been proclaimed a Reserved Forest by Gazette No. 5519 of 23rd December 1897.

“ 6. On or about the 25th day of June 1957 the respondent above-named without the permission of the Government entered upon the said land, took possession thereof and continues to be in possession thereof.”

The petition with the accompanying affidavit was entertained and summons was ordered for 14th May 1959. On 17th September 1959 the respondent filed objections. He said—

“ 1. This respondent avers that he is in possession of premises depicted as Lot 5171 in Preliminary Plan No. 243 in extent Sixteen Acres (A 16-R 0-P 0) situated at Epalatotuwa and more fully described in the schedule hereto.

“ 2. That by virtue of Booth Settlement dated 29th June 1893 Gamaralalage Appuhamy and Hinhamy were declared entitled to the aforesaid premises and were in possession thereof.

“ 3. That Appuhamy and Hinhamy aforesaid lived in association and died leaving as heir this Respondent who entered into possession thereof.

“ 4. Further answering this Respondent avers that the identity of the land described in the plaint is in dispute and a Plan made with reference to Lot 5171 in P. P. 243 is necessary for the proper determination of this case.

“ 5. This Respondent and his predecessors in title have been in the undisturbed and uninterrupted possession of the said Lot 5171 of the said land for a period of 30 years and upwards next before the grievances

hereinafter complained of by a title adverse and independent of that of the plaintiff and all others and this respondent pleads the benefit of 3rd clause of Ordinance No. 22 of 1871.”

He asked that either the petition be dismissed or that he be permitted to make a plan with reference to Lot 5171 in P. P. 243 and the lot described in the plaint.

At the hearing Crown Counsel objected to the respondent being permitted to lead evidence. He submitted—

“The information was supported by affidavit and the Court was satisfied on the evidence of that affidavit and process was issued. He says that when the respondent is present in Court in answer to the process the Court’s duty would be to examine him in a summary way and ask him whether he has cause to show why an order should not be made against him ordering him to deliver possession. The only cause he can show is that he is in possession with the permission of the Government. As the section now stands he cannot come into Court and try to claim title because if he has some bona fide title, section 3 gives him the remedy and, in fact, he can even claim damages.”

When the counsel for the respondent sought to lead evidence in support of his case, the learned District Judge made order refusing to permit him to do so and intimated to him that he was prepared to hear only such evidence as would enable him to prove that the respondent was in possession of this land with the permission of the Government and nothing more.

The learned District Judge was wrong in not allowing the respondent to lead evidence. Section 2 reads—

“It shall and may be lawful for the District Court, upon information supported by affidavit charging any person or persons with having, without the permission of the Government, entered upon or taken possession of any land which belongs to, or which immediately prior to such entry or taking possession was in the possession of Her Majesty, Her Heirs, or Successors, to issue its summons for the appearance before it of the party or parties alleged to have so illegally entered upon or taken possession of such land, and of any other person or persons whom it may be necessary or proper to examine as a witness or witnesses on the hearing of any such information; and the said District Court shall proceed in a summary way in the presence of the parties, or in case of wilful absence of any person against whom any such information shall have been laid, then in his absence to hear and determine such information; and in case on the hearing thereof it shall be made to appear by the examination of the said party or parties, or other sufficient evidence to the satisfaction of such District Court, that the said party or parties against whom such information shall have been laid hath or have entered upon or taken possession of the land mentioned or referred to in such information without the permission of the Government, such

District Court is hereby authorized and required to make an order directing such party or parties to deliver up to Her Majesty, Her Heirs, or Successors, peaceable possession of such land, together with all crops growing thereon, and all buildings and other immovable property upon and affixed to the said land, and to pay the cost of such information; and in case the party or parties against whom any such order shall have been made shall not, within fourteen days after service thereof, deliver up possession of the said land and premises, pursuant to the said order, or shall afterwards make or cause to be made any further encroachments upon the said land or premises, contrary to such order or in evasion thereof, then and in such case it shall be lawful for such District Court to adjudge such party or parties to pay a fine not exceeding fifty rupees, or to be imprisoned, with or without hard labour, for any time not exceeding fourteen days, and to make a further order for the immediate delivery over of the possession of such land and premises to Her Majesty, Her Heirs, or Successors; and the District Court shall thereupon cause possession thereof to be delivered to Her Majesty, Her Heirs, or Successors, accordingly."

The procedure prescribed in the above section is the ancient English procedure by information. Informations are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king (Tomlin's Law Dictionary, Vol I). It is the latter sort of information we are concerned with here. The informations that are exhibited, in the name of the Sovereign alone, are also of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the Attorney-General; or, during a vacancy of that office, by the Solicitor-General. Secondly, those in which, the king is nominal prosecutor, yet it is at the relation of some private person, or common informer, and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office, who is for this purpose the standing officer of the public (*ibid*). Of those two kinds of informations we are here concerned with the first viz. those which are truly and properly the Sovereign's own suits and filed *ex officio* by her own immediate officer, the Attorney-General. The Sovereign's own prosecutions filed *ex officio* by the Attorney-General were in the case of such enormous misdemeanours, as peculiarly tend to disturb or endanger the government, or to molest or affront him in the regular discharge of his royal functions, filed in the King's Bench Division; but informations in the form of suits for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the Crown, were filed in the Exchequer Division. We are here concerned with the last mentioned class of information instituted to redress a private wrong, by which the property of the Crown is affected; as distinct from the information that is filed in the King's Bench Division calculated to punish some public wrong or heinous misdemeanour in the defendant. The information filed in the Exchequer Division is grounded on no writ under Seal, but merely on the intimation

of the Attorney-General, who "gives the Court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those for any trespass committed on the lands of the Crown, as by entering thereon without title; holding over after a lease is determined; taking the profits; cutting down timber; or the like (*ibid.*). As the law relating to Information in the Exchequer Division is not easily ascertainable the Judges of this Court in 1842 made rules and orders regulating the procedure under section 2. They are in accord with the law stated above and are set out in an Appendix to this judgment as they are not readily available in the provincial law libraries.

The learned District Judge appears to have misconceived the procedure to be followed under section 2 and been led by the learned Crown Counsel's submissions to hold that the expression "summary way" precluded him from trying the issues arising in the proceedings as in an ordinary action between subject and subject. The expression "summary way" in this context cannot be and is not a reference to the summary procedure prescribed in the Civil Procedure Code which is a later legislative instrument. The "summary way" contemplated by the section is the summary procedure known to criminal proceedings as opposed to non-summary procedure where the Court does not try the matter but holds a preliminary investigation with a view to committing the case for trial to a higher Court. The words "hear and determine" imply that the person who has to answer the complaint after being cited by summons should have an opportunity of presenting his case (Dwarris on Statutes, p. 671, 672). There is also the legal requirement in the law relating to informations that in a proceeding by way of Information in the Exchequer Division the trial is had as in suits between subject and subject. That requirement is reflected in rule 4 of the Rules of Court reproduced in the Appendix hereto which provides that the District Court shall inquire into the matters charged in the Information by hearing the witnesses produced in support thereof, and for the defence; and by the examination of the party or parties relative thereto, if such examination shall appear to the Court necessary or expedient.

In the instant case the respondent was denied the opportunity of presenting his defence. He denies that he is a trespasser on Crown land, claims that the land he is in possession of is not the land described in the petition, and claims title to the land he is in possession of. Apart from the refusal to hear the defendant there is a further fundamental objection to these proceedings. They have been initiated by petition filed by the Attorney-General's proctor and not by Information in the prescribed form filed by the Attorney-General himself as is required by law. The summons issued on the defendant is also not in the proper form. Learned Crown Counsel's submissions were wrong and the learned Judge erred in upholding them.

At the hearing of this appeal when we allowed the appeal neither counsel drew our attention to the Rules and Orders referred to above and we therefore made order quashing the proceedings and directed the District Court to give the respondent a hearing. But before the judgment passed the Seal of the Court the Rules and Orders referred to above came to our notice and we directed that this case be listed after notice to the respective counsel so that we may prior to delivering this judgment hear the Attorney-General as a further fundamental defect which went to the root of the proceedings had come to light since we heard this appeal. We have now heard Crown Counsel and we see no reason to revise our conclusion that the proceedings which should be initiated by information have not been so initiated and that the petition filed by the Attorney-General's proctor is not in law an "Information".

We dismiss the petition with costs both here and below.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

APPEND X

Rules and Orders, for regulating proceedings under the Ordinance No 12 of 1840, entitled "An Ordinance to prevent encroachments upon Crown Lands"

PROMULGATED IN OPEN COURT ON THE SIXTEENTH DAY OF
DECEMBER, 1842

1. It is Ordered, that from and after the fifteenth day of January next all Informations exhibited by the Queen's Advocate, or any Deputy Queen's Advocate, in virtue of his office, charging any persons with having committed a breach of the Ordinance No. 12 of 1840, entitled "An Ordinance to prevent encroachments upon Crown lands," shall be, as near as may be, in the form following:—

In the District Court of _____ Filed _____ day of _____

A. B. Esquire, Deputy Queen's Advocate for the District of _____, who prosecutes for and on behalf of Her Majesty, presents and gives the Court to be informed.

That C. D. late of _____ in the District of _____
on the _____ day of _____ last,
at _____ in this District of _____
(here set forth distinctly the nature and description of the offence, as the case may be)
contrary to the provisions of the Ordinance No. 12 of 1840 entitled "an Ordinance to prevent encroachments upon Crown lands," in that behalf made and provided.

Wherefore upon due proof and Conviction thereof the said A. B. prays the Judgment of the Court against the said C. D. according to Law.

2. The Secretary of the District Court shall upon order of Court as soon as may be after the filing of any such information, and of the affidavit in support thereof required by the said Ordinance issue and deliver to the Fiscal the process of the said Court, for compelling the appearance, before the said Court, upon such day as the District Judge shall appoint, of the Defendant to answer the charge, of the witnesses in support thereof, and of such persons as the said Defendant may desire to have summoned in his behalf; and the said Fiscal shall serve a copy thereof on the Defendant, and on each of the witnesses therein named, and shall at the time of serving such copy on the said Defendant, ascertain from him the names and places of abode of the persons whom he requires to be summoned on his behalf, and shall

thereupon forthwith serve on each of such persons a copy of the said process; and the said process shall be by Summons under the hand of the said Secretary, and as near as may be in the form following.

In the District Court of

To the Fiscal of the said District
 C. D. of _____ to appear personally before this
 Court at _____ on the day of _____ next at
 o'clock in the forenoon, then to answer, and abide the Judgment of this Court, upon
 the Information of A. B. Esquire, who prosecutes for and on behalf of Her Majesty,
 that the said C. D. (*here shortly insert the particulars of the offence charged*) and summon
 also E. F. of _____ G. H. of _____
 &c., and such persons (if any) as you shall be required by the said
 C. D. to summon on his behalf, that they and each of them be and appear personally
 at the day and place aforesaid, to testify all they and each of them know concerning
 the said charge.—Serve on each of them the said C. D.—E.C.—G. H. &c., a copy
 of this summons and return to this Court on that day what you have done thereon.
 Dated at _____ the _____ day of _____

3. If either party, having neglected or omitted to cause any person or persons to be summoned to give Evidence on his behalf in manner aforesaid, shall desire to compel the appearance of any such person or persons to give Evidence at the Trial, he may sue out the process of the Court for that purpose; which shall be by summons under the hand of the Secretary in the form in use in other prosecutions before the said Court.

4. On the day on which the Summons is returnable the District Court shall, unless the said Court shall see fit to order the hearing to be postponed to some future day, inquire into the matters charged in the Information, by causing the Secretary to read the same, by hearing the witnesses produced in support thereof, and for the defence; and by the examination of the party or parties relative thereto, if such examination shall appear to the Court necessary or expedient. Provided that if the Prosecutor do not appear on such date the Information shall be dismissed.

5. The service of all Summonses and orders issued, or made, by any District Court under or by virtue of the Ordinance No. 12 of 1840, or under or by virtue of the foregoing Rules and Orders, shall be made by the Fiscal in the same manner as is provided to be done in other prosecutions before the said Court.

