Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

1909.
March 17.

FERNANDO *et al.* *v.* ASSISTANT GOVERNMENT AGENT, KEGALLA.

D. C., Kegalla, 2,539.

Waste Lands Ordinance — " Enter " — Continuing in occupation — Ordinance No. 1 of 1897, s. 22.

The word " enter " in sub-section (1) of section 22 of Ordinance No. 1 of 1897 does not refer merely to the original entry, but includes every entry subsequent to the publication of the notice prescribed by section 1 of the Ordinance.

Assistant Government Agent v. Kulatunga [1] referred to.

APPEAL by the plaintiffs from an order of the District Judge directing them to deliver possession of a certain land and of everything on it within seven days under sub-section 2 of section 22 of Ordinance No. 1 of 1897. The material facts appear in the judgments.

Bawa, for the plaintiffs, appellants.

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

Cur. adv. vult.

March 17, 1909. HUTCHINSON, C.J.—

This is an appeal by the plaintiffs against an order made on February 13, 1909, under section 22 of Ordinance No. 1 of 1897.

On September 27, 1907, the Assistant Government Agent of Kegalla issued a notice under section 1 of the Ordinance which was published in the *Gazette* of that date. It declared that unless the persons, if any, claiming any interest in the lands therein mentioned, should within three months appear before the Assistant Government Agent and make claim to the lands, the Assistant Government Agent would, in pursuance of the powers vested in him by the Ordinance, declare the lands to be the property of the Crown.

On February 12, 1908, the plaintiffs made a claim, which was duly referred to the District Court.

On October 7, 1908, the Assistant Government Agent made complaint to the District Court under section 22, charging the plaintiffs with having acted in contravention of that section. The District Court heard the complaint and made an order on October 9, 1908, dismissing it, which, however, was set aside on appeal, and the case was sent back for further evidence.

[1] *(1901) 5 N. L. R. 37.*

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HUTCHINSON C.J.

On February 13, 1909, the District Court, after hearing further evidence, held that the plaintiffs, since the publication of the notice, without the requisite consent, entered on the land and were then working mines on it, and ordered the plaintiffs to deliver up possession of it and of everything on it within seven days.

The first point taken by the appellants is that the foundation of the authority given by the first section of the Ordinance to issue the notice is that it appears to the Government Agent that the land is forest, chena, waste, or unoccupied, and that the notice issued in this case does not state, and there is nothing on the record to show, that it so appeared to the Government Agent. This point was not taken until the hearing of this appeal, and the plaintiffs filed their claim and fought this application in the District Court without making this objection. The form of the notice under section 1 is given in the schedule to the Ordinance, and was followed in this case; it states that the Government Agent is acting under the powers vested in him by the Ordinance; if the form had stated that it appeared to the Government Agent that the land was forest, &c., no proof would have been required that it so appeared to him; and in my opinion when the notice follows the form (as it must do), no such proof is required.

The point of substance urged by the appellants is that there is no proof that they, after the publication of the notice, entered upon or took possession of the land. It is proved that they had entered on the land long before the date of the publication of the notice, and that they, before that date, were working and afterwards continued to work a mine of plumbago on the land by means of a pit on their adjoining land through a tunnel leading to the land in dispute; and there is also evidence that they have some buildings and works on the land in dispute.

In *Assistant Government Agent v. Kulatunga*,[1] Bonser C.J., with whom Browne J. concurred, held that in sub-section (1) of section 22 the words "with intent" only apply to the clause immediately following them, viz., "to establish ......ownership," and do not govern the other infinitives which follow, so that the clause, "or to use any mine therein," means—not that it is unlawful "to enter with intent to use any mine," but that it is unlawful to use any mine therein. It seems from the reference in the judgment to Mr. Bawa's argument that he had contended that the evidence showed that the appellant had not "entered" the land since the notice, but that having previously cultivated it he had done nothing more after the notice than clear the weeds and hoe up the ground. Bonser C.J., refused to accept Mr. Bawa's contention that the words "with intent" in sub-section (1) governed the whole of the succeeding clauses. He then said that he accepted the District Judge's finding that what the appellant did was to make

[1] *(1901) 5 N. L. R. 37.*

a clearing for the purpose of cultivation. But he does not refer to the circumstances that the order had been made under sub-section (2); he finds that the appellant had "made a clearing for the purpose of cultivation," "a thing which is expressly forbidden by the Ordinance," *i.e.*, by sub-section (1), according to the construction which he put on sub-section (1). He says nothing more about the appellant having "entered upon or taken possession of the land," which is the only thing that gives jurisdiction under sub-section (2). I gather from the Mudaliyar's evidence quoted in the judgment, and accepted by the District Judge and by the Appeal Court, that the appellant had not previously cultivated the land; but the Court does not in terms so find. It seems to me that the Court was so taken up with the argument as to the construction of sub-section (1) that it overlooked the fact that the order was made under sub-section (2), and could only be made on proof that the appellant had entered upon or taken possession of the land with one of the intents there mentioned. However that may be, I think, as I thought on the occasion of the former appeal, that the decision was that, upon proof that after notice a clearing had been made for the purpose of cultivation, an order could be made under sub-section (2)—a decision which I should like to have reviewed by a Court competent to over-rule it, if I thought it was absolutely necessary, but which we must follow until it is over-ruled.

But I think that the order of the District Judge should be affirmed on the ground that the word "enter" does not refer merely to the original entry. It has no technical meaning. Every time a man goes on the land, he enters upon it. If he enters upon it without any of the intents mentioned in the sub-section, he is not liable to have an order made against him; but if he enters with one of those intents, he is so liable. The object of the section seems to me to be to prevent a man, after the notice, exercising rights of ownership, or building or planting or clearing the land or felling trees or opening or working mines on it. The plaintiff went on the land after the date of the notice with intent to work a mine on it, and therefore the order was rightly made. I would dismiss the appeal with costs.

WENDT J.—

I agree that the appeal should be dismissed. I concur with my lord both in thinking that the decision in *Assistant Government Agent v. Kulatunga*[1] is open to question, and in holding that in the present case the appellants after the issue of the *Gazette* notices "entered upon the land......with intent to......work or use a mine thereon," and thereby rendered themselves liable to the order which has been made against them.

Appeal dismissed.

[1] *(1901) 5 N. L. R. 37.*