Present : Dalton and Drieberg JJ. 1928

DIAS *v.* SPECIAL OFFICER.

60—D. C. (Inty.) Ratnapura, 4,622.

Waste Lands Ordinance, 1897—Presumption in favour of Crown—Nature of proof required in rebuttal—Lekam mitiyas—*Refusal to produce—Evidence Ordinance, s. 123—Ordinance No. 12 of 1840, s. 6.*

In a proceeding under the Waste Lands Ordinance the presumption created in favour of the Crown by section 24 can only be rebutted in the manner indicated by section 6 of Ordinance No. 12 of 1840.

Section 24 of the Waste Lands Ordinance is not inconsistent with the provisions of the earlier enactment.

Kiri Banda v. Government Agent, Sabaragamuwa,[1] followed.

No adverse presumption can be drawn from the refusal of the Government Agent to produce registers known as *lekam mitiyas* where the party demanding production has failed to take the steps provided by section 123 of the Evidence Ordinance.

THIS was a reference under section 5 of the Waste Lands Ordinance, the claimant being the plaintiff and the Special Officer, the defendant.

The plaintiff claimed title to an undivided 2/5 of an undivided 71/84 of Kahatagahadeniyahena. The learned District Judge held that the land was chena and was situate in the Kandyan Provinces. The main question argued in appeal was as to the manner in which the presumption created in favour of the Crown by section 24 of the Waste Lands Ordinance could be rebutted.

H. V. Perera (with *D. E. Wijewardene*), for plaintiff, appellant.—The Waste Lands Ordinance, No. 1 of 1897, is self-contained and must be read apart from Ordinance No. 12 of 1840. Section 24 (*a*) of Ordinance No. 1 of 1897 states that " all chenas . . . . shall be presumed to be the property of the Crown, until the contrary be proved." Any method of proof is here contmplated, *e.g.*, proof by the production of title deeds or by prescription

In *Mudalihamy v. Kirihamy* [2] Bertram C.J suggested that it was open to a party to set up a plea of prescription against the Crown in proceedings under the Waste Lands Ordinance.

Equitable claims should be considered. See *Hamine Etana v. Assistant Government Agent of Puttalam.*[3]

[1] *4 A. C. R. 69* [2] *24 N. L. R. 1.*

[3] *23 N. L. R. 289.*

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In proceedings under Ordinance No. 1 of 1897 it is open to the Judge to adjudicate on the equitable claims of two plaintiffs. The Judge is not restricted to an inquiry is to whether the land is Crown or not. He must make such order " as he may consider just and proper."

S. Obeyesekere, Acting Solicitor-General (with *Mervyn Fonseka, C.C.*), for Crown, respondent.—Ordinances Nos. 12 of 1840 and 1 of 1897 must be read and construed together. They are statutes *in pari meteria.*

" Proved " in section 24 (*a*) of Ordinance No. 1 of 1897 means proved according to law, and the only method of proof available to the plaintiff was that set out in section 6 of Ordinance No. 12 of 1840, as the land is a chena situate in the Kandyan Provinces.

In *Kiri Banda v. Government Agent, Sabaragamuwa* (*supra*) the point was expressly considered. It was there held that section 6 of Ordinance No. 12 of 1840 was not impliedly repealed by section 24 of Ordinance No. 1 of 1897 and that the two sections were not inconsistent. See also *Gamarala v. Vigors.*[1]

Lekam mitiyas contain evidence as to " affairs of state " within the meaning of section 123 of the Evidence Ordinance. Where an official refuses to produce a *lekam mitiya*, the aggrieved party should appeal to His Excellency the Governor.

In proceedings under Ordinance No. 1 of 1897 the Court has merely to determine whether the lands are Crown or not.

H. V. Perera, in reply.

October 15, 1928. DALTON J.—

This appeal arises out of a reference under section 5 of the Waste Lands Ordinance, No. 1 of 1897, the claimant being the plaintiff and the Special Officer the defendant in the case. The notice required by section 1 was given on October 17, 1924, and published in the *Gazette* of that date. The total area of all the land in the notice was 271 acres situated in the village of Nedurana, but the claim of the plaintiff related to a land called Kahatagahadeniye-henyaya, which is stated to be 4 amunams of paddy sowing in extent.

Plaintiff's original plaint sets out that by right of purchase, by deed of transfer (P 12) of December 10, 1919, from Jeronis Peiris, he is entitled to an undivided 2/5 of an undivided 71/84 of Kahatagahadeniyehenyaya forming part of the land under reference. In his amended statement of claim he sets out a chain of title relating to these 71/84 shares from the year 1885. In both original and amended claims he then refers to inquiries before and negotiations with the Settlement Officer prior to this reference. It is

[1] *3. A. C. R. 95.*

set out that Jeronis Peiris was offered 40 acres in respect of his claim, of which only 16 acres were offered to the plaintiff. In his first claim, on the basis that Jeronis was not entitled to any more than he sold to plaintiff, he asked that he be allotted the whole of the 40 acres. This is subsequently amended. In his amendment he, after setting out his alleged title, states he has been offered 16 acres and Jeronis Peiris has been offered 24 acres. He then asks that he be allotted this 16 acres, but that the 16 acres include a portion of 4 acres which the Settlement Officer is stated to have offered to another claimant named Jayawardena Arachchi. This offer is stated to have been made to Jayawardena Arachchi in respect of a claim made by him upon an informal agreement between him and one Punchi Mahatmaya. This statement, it should be added here, is not borne out by the evidence of the Settlement Officer. The claim adds that Punchi Mahatmaya's interest has passed in part to the plaintiff.

With regard to the prayer of the plaintiff, objection was taken at the outset of the trial to all the issues which related to negotiations before and offers by the Settlement Officer. Even if all the allegations in respect of them in the statements of claim had been proved, it seems to me the Court had no power to do what plaintiff asked, that is, allot to him 16 acres of Kahatagahadeniye-henyaya, whether it included the 4 acres offered to Jayawardena Arachchi or not. In negotiations between the parties, as is usual when action is taken under the Waste Lands Ordinance, offers are made by the one side and considered by the other, the claims of the parties are also considered and sometimes the offers are accepted. An offer can presumably only be accepted by the claimant, if the offer is one to give a good and valid title to the land offered, on the footing that the land is Crown land and not the property of the claimant. If the offer is not accepted and the negotiations fall through then both parties are where they were before and then it is open to the claimant to prove that the land he claims is his, and is not the property of the Crown. The suggestion in the argument for the appellant, that the proceedings in a reference under this Ordinance allow a sort of paternal inquiry or arbitration by the District Judge to do what seems to him just and proper without being bound by any rules of proecdure save those set out in the Ordinance or by any provisions of the law of the land whether on a matter of evidence or otherwise, has not been supported by any authority, nor would I expect any such authority to be found. In *Hamine Etana v. Assistant Government Agent, Puttalam*,[1] Bertram C.J. does point out that the Waste Lands Ordinance is not an Ordinance intended for the bare determination of legal rights but that its object was the equitable settlement of even undefined claims. But so far

[1] *23 N. L. R. 289.*

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as the Courts are concerned, dealing with questions of law, as the plaintiff there failed to establish any title to land, she failed in her action. He then goes on to consider the position of and treatment of the plaintiff in that case prior to and during the proceedings, expresses a definite opinion, and then concludes that whether it may be found possible to make any equitable consideration to plaintiff, either in connection with the land in question or other land, is a matter for decision of authorities other than the Court. That is a state of affairs which sometimes arises in cases other than cases under such an Ordinance as this. Pereira J. expresses the same opinion in other words in *Cooke v. Freeman.*[1] The Waste Lands Ordinance supplies special machinery for the adjudication of these claims and, subject to the special provisions of the Ordinance, disputed claims come before the District Judge or Commissioner to be tried by him as an ordinary action between plaintiff and defendant. Section 13 provides that except where the Ordinance provides otherwise, the Civil Procedure Code shall apply. On the claim before the Court the only issue the Court could try in my opinion was as to whether plaintiff was entitled to 2/5 of 71/84 of Kahatagahadeniyahenyaya by virtue of the deeds set forth by him. This works out, according to his evidence, at about 5 acres.

There is no provision in the special procedure allowed by the Ordinance for any answer by the defendant, which may be a hardship on the plaintiff. In this case, however, as presumably in all cases under the Ordinance, the answer is that the land is claimed by the Crown, but if plaintiff discharges the onus which the statute places upon him by directing that he shall be plaintiff in the action there is an end of the defence. The important question to be decided in this case is what legal presumptions exist in favour of the Crown in such a case as this, and whether plaintiff has displaced these presumptions by proper and sufficient proof to the contrary.

The evidence shows that the land—the subject of the reference—is in the Kandyan Provinces. The trial judge also finds that so much of Kahatagahadeniyehenyaya as comes within the reference is chena. That finding is contested by the plaintiff on his appeal. It was urged that there was no proof or no sufficient proof that the lands claimed by him, or at any rate the lot marked 3Q, was at the date material to these proceedings chena land. This lot 3Q on plan D 5 coincides, with the exception of a strip reserved on the east, with lot 1 on plan P 2. This lot 1 is area which is stated to have been offered to Jayawardena Arachchi and which plaintiff wished to be included in the 16 acres offered to him.

I do not propose to analyse again the evidence on this point. The trial judge has done so at considerable length. There is evidence to show that what are described by some of the witnesses

[1] *8 N. L. R at pp. 270 and 273.*

for plaintiff as a number of plumbago pits on lot 1 were merely small holes, about 3 feet square on the surface, which were probably made by neighbouring villagers, and that there was only one which deserved the name of " mine " on lot 1. Outside the land claimed by plaintiff there were however numerous abandoned pits, some of them large. In my opinion the evidence of J. S. Peiris and plaintiff on the subject of their mining ventures is far from conclusive as to their ventures being carried out upon the land now claimed by plaintiff. They say that Mr. E. L. F. de Soysa was in the venture, that the licence to mine was in his name and Peiris was called his manager. He was not called as a witness, but there is evidence to show that he had obtained mining rights on land belonging to or said to belong to the Ellawala family.

With regard to the pits on lot 1, there is evidence to show that it is not unusual for villagers to mine in areas cleared for chena cultivation. It is not questioned that up to 1908 the land was cultivated for chena crops. Peiris, mining operations, wherever they were carried on, took place between 1909 and 1918, when they were abandoned. There is also evidence to show that the chena cultivation was not interfered with by the pits on lot 1. It was on lot 1 particularly that it was urged there had been no chena cultivation since 1908, but it is clear from the evidence accepted by the trial judge that the amount of mining for plumbago there was far from being so extensive as plaintiff would try to make out. It is around this lot that the dispute chiefly centres. In 1923 Mr. de Saram describes lot 3Q as a chena land with 6 or 7 years' growth of jungle, whilst in 1924 the Settlement Officer on his inspection noted in his field book from his personal observations, although there was then no cultivation or occupation of lot 3Q, that Kahatagahadeniyehenyaya was chena.

On the evidence before him, in my opinion, the trial judge was fully justified in his conclusion that Kahatagahadeniyehenyaya was chena. I see no reason whatsoever to differ from his conclusion on that point.

With regard to the ground of appeal based upon the refusal by the Government Agent to produce certain registers or *lekam mitiyas* which are said to be in his possession, it is clear that, when the proctor for plaintiff in his letter (P 39) asked for an extract relating to the lands in Nedurana village he was asking for a great deal that was quite unnecessary for his purposes, even supposing that the register contained any entry in respect of the particular land the subject of this reference. The statement of inability to issue the extracts was followed by a summons to produce. To this the Government Agent in his letter to the Court of September 30, 1927, replied that the documents are confidential and that he was unable to produce them. On this letter no further

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action was taken by the plaintiff to compel production or to question the right of the Government Agent not to appear with them on the ground put forward by him. If these records fall within those mentioned in section 123 of the Evidence Ordinance and the provisions of that section are applicable, plaintiff could have applied to the Governor, but he took no further steps. If the officer was actincg in the exercise of his public duty in refusing to produce these dooments, no such presumption can follow as to the contents of thse documents from the refusal of the witness to produce them as Mr. Perera contends. It is admitted plaintiff was quite ignorant as to whether the registers contained any entry that could help him, and no provision exists we are told for his being allowed to search them or any other public records. He made no request to the final authority mentioned in the section and took no other steps as he could have done.

The land therefore claimed by plaintiff is chena land and within the Kandyan Provinces. The next question that arises is, what presumptions arise from those two facts, and how can they be rebutted by the plaintiff. It is urged for plaintiff that, under section 24 of the Waste Lands Ordinance, chenas are presumed to be the property of the Crown " until the contrary thereof be proved. The contrary can be proved, it is argued, by the production of deeds, and also by prescription for a third of a century. For the defendant, who defends the action on behalf of the Crown, it is urged that under the provisions of section 6 of Ordinance No. 12 of 1840 that presumption can only be rebutted by proof of a *sannas* or grant for the same or of taxes, dues, or services having been rendered as set out in that section. This is the principal point arising on the appeal.

It has been decided by a Bench of Three Judges in *Attorney-General v. Punchirala* [1] that in the case of chena lands in the Kandyan Provinces title by prescription cannot be proved against the Crown. That was an action by the Crown for a declaration of title to certain lands. In the course of his judgment there de Sampayo J. says :—

> " So far as I can discover there is no trace of prescription in the Kandyan law, and with great respect I should say that under the Kandyan law the principle *nullum tempus occurit regi* was equally applicable . . . . Section 5 of Ordinance No. 5 of 1852 provides that where the Kandyan law is silent on any matter arising for adjudication within the Kandyan Provinces for the decision of which other provision is not specifically made, the Court shall have recourse to the law on the like matter in force within the Maritime Provinces. Consequently the law of prescription above laid down may be considered to have

[1] *21 N. L. R. 51 at pp. 59 and 60.*

become applicable to the Kandyan Provinces. That being so, if a question arose as to title to "forest, waste, or unoccupied or uncultivated lands" within the meaning of section 6 of Ordinance No. 12 of 1840 or to chenas in Provinces other than the Kandyan Provinces, the private claimant might rebut the presumption in favour of the Crown by proof of prescriptive possession for a third of a century. But the question now is as to chenas situated within the Kandyan Provinces, and that depends on the construction of the special provision in the same section with regard to them."

In *Mudalihamy v. Kirihamy*,[1] in which a question arose as to whether the presumptions enacted by section 6 of Ordinance No. 12 of 1840 must be considered as having reference to the state of the land in question at the time when some dispute arises between the Crown and a subject, or whether they may be considered with reference to the state of the land at any time which may be material to the title, Bertram C.J. expresses a doubt as to whether the reasoning he follows would apply to proceedings under the Waste Lands Ordinance, as he says the material time there is the date of the issue of the notice under section 1 subject to the retrospective effect of section 24 (c). He then goes on to say :—

"The presumption there enacted in section 24 (*a*) is merely for the purposes of the Ordinance, and the object of any legal proceeding under the Ordinance is to determine whether the land in question at the date of the notice came within any of the categories to which the presumption applies.

"It may also be noted that the formula of thepr esumption in the Waste Lands Ordinance is not the same as that in section 6 of Ordinance No. 12 of 1840, and; consequently if the reasoning of my brother de Sampayo (in which Loos J. concurred) in *Attorney-General v. Punchirala* (*supra*) is to be taken as expressing the law—a point on which I should like to reserve my own opinion—there is nothing to prevent a plea of prescription being set up to chena lands in proceedings under that Ordinance."

With regard to these two cases, it seems to me that, having regard to the provisions of section 6 of Ordinance No. 12 of 1840, there is statute law which, in respect of the Kandyan Provinces, in clear and explicit terms, provides for a certain presumption in respect of chenas which can only be rebutted upon proof to be adduced in a particular way.

[1] *24 N. L. R. 1.*

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When Bertram C.J. says that he doubts whether the reasoning applied in this case would apply to proceedings under the Waste Lands Ordinance, it is to be remembered that the question with which he is dealing is what is the material time. That, he points out, is the date of the issue of the notice under section 1. He then goes on to refer to the reasoning of de Sampayo J. in *Attorney-General v. Punchirala* (*supra*), which he says might justify a plea of prescription being set up to chena lands in proceedings under the Waste Lands Ordinance. I have carefully read that judgment but I am unable to find any reasoning there, taking the judgment as a whole, which to my mind would satisfactorily support that position being taken up. Even if such reasoning be there, de Sampayo J. comes to the conclusion that section 6 of Ordinance No. 12 of 1840 is a general enactment declaratory of the rights of the Crown, having earlier pointed out that if it had been intended that section 5 of Ordinance No. 5 of 1852 imported the law of the Maritime Provinces in respect of chenas into the Kandyan Provinces, the legislature would have been much more explicit in expressing their intention. That reasoning applies, it seems to me, just as well to the provisions of section 24 (*a*) of the Waste Lands Ordinance.

It is true the formula of the presumption in the Waste Lands Ordinance is not the same as that in section 6 of Ordinance No. 12 of 1840, but from the preamble of the former Ordinance it would appear that the principal purpose of the Ordinance is to provide a means for the speedy adjudication of claims to forest, chena, waste, and unoccupied lands. This is confirmed on reference to the various sections of the Ordinance itself. It is provided however by section 24 that certain presumptions shall arise. The material part of that section is as follows :—

> 24. For the purposes of this Ordinance—
>
> (*a*) All forest, waste, unoccupied, or uncultivated lands and all chenas and other lands which can be only cultivated after intervals of several years shall be presumed to be the property of the Crown until the contrary be proved.

Having regard therefore to the words " For the purposes of this Ordinance " it is argued that in the case of chenas in the Kandyan Provinces the provisions of this section are inconsistent with the provisions of section 6 of Ordinance No. 12 of 1840. In so far then as section 6 provides that all chenas in the Kandyan Provinces are to be deemed to belong to the Crown except upon proof of a *sannas* or grant for the same, it has been implicitly repealed, in so far as proceedings under the Waste Lands Ordinance are concerned, by the provisions of section 24 of that Ordinance.

It is admitted that the question has already been decided by authority against the interpretation contended for by appellant. In *Kiri Banda v. Government Agent, Province of Sabaragamuwa*,[1] Wendt and Wood Renton JJ. held that the later section was not inconsistent with the earlier enactment. Mr. Perera has not asked this Court not to follow that decision, but to reconsider it and refer the question to a Bench of Three Judges should we have any doubt as to its correctness. After due consideration of his argument and examination of the authorities I have not any difficulty in following that decision, nor do I feel there is any justification in referring it for decision to a higher Bench. The judgment of Wendt J. is, it is true, brief, but to the point, if I may be allowed to say so. In the same year a similar case under the Waste Lands Ordinance came before Wendt and Middleton JJ. (*Gamarala v. Vigors* [2]). No question was raised for the appellant there that section 6 of Ordinance No. 12 of 1840 had no application in proceedings under the Waste Lands Ordinance. The plaintiff was in possession of a genuine ola for the land in question from a private individual. Mr. A. St. V. Jayewardene who appeared for him on the appeal argued, not that the presumption under section 24 had been rebutted, but that the ola was a grant within the meaning of section 6 of Ordinance No. 12 of 1840. He admitted that it had never been suggested before that the words "*sannas* or grant" did not mean a royal grant, but he actually relied upon the provisions of Ordinance No. 12 of 1840 rather than seek to show they had no application. That of course is no reason why the argument should not be raised at a later date, but it cannot be so obvious as Counsel would now seek to make out.

Numerous cases have been cited subsequent to *Kiri Banda v. Government Agent, Province of Sabaragamuwa* (*supra*), all of which were examined in detail in course of the argument. I can find nothing in any of them that is inconsistent or that expresses any dissent with that authority. For the major part, in proceedings under the Waste Lands Ordinance, when the question of chenas in the Kandyan Provinces is mentioned it seems to me to be unquestioned or taken for granted that section 6 of Ordinance No. 12 of 1840 still has the force of law for all purposes (*e.g.*, Pereira J. in *Silva v. Kindersley* [3]). Bertram C.J. in *Hamid v. Special Officer*,[4] a case which went to the Privy Council,[5] in the course of the argument read the two sections together, whilst in *Hamine Etana v. Assistant Government Agent, Puttalam* (*supra*), he speaks of the legal presumption created by Ordinance No. 12 of 1840 being extended and intensified by the Waste Lands Ordinance.

[1] *(1908) 4 A. C. R. 69.*
[2] *3 A. C. R. 95.*
[3] *17 N. L. R. 109.*
[4] *21 N. L. R. 150.*
[5] *23 N. L. R. 150.*

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It does not seem necessary to say more than this. There is however one point I would wish to refer to in respect of the argument put before us. It is admitted that section 6 either confers upon the Crown or is declaratory of a very valuable right. I do not think sufficient importance has been laid upon the word " deem " in that section. Whether it be the creation of a new right or the statutory declaration of an existing right as would seem to be the case, that right cannot be taken away by inference in a later statute, unless the terms used make the inference irresistible. Can it be said here that in section 24 the legislature has expressed its intention to deprive the Crown of its rights under section 6 in explicit terms, or in such terms as make the inference irresistible ? (See *Maxwell on Statutes, p. 102.*) It is impossible in my opinion to answer that question in the affirmative. The two sections do not appear to me to be necessarily inconsistent as has already been pointed out. It does not seem to me that the decision in *Munasinghe v. Assistant Government Agent, Puttalam,*[1] gives any assistance on this point in this case. For this further reason therefore I am also of opinion that the argument must fail.

The decision of the trial judge must be affirmed and the appeal be dismissed, with costs.

DRIEBERG J.—

I agree with the judgment of my brother Dalton.

On the question of the right of the appellant to establish title by prescriptive possession I would refer to the case of *Attorney-General v. Punchirala,*[2] where it was expressly held that section 5 of Ordinance No. 5 of 1852 has no effect as regards chenas in the Kandyan Provinces, because to hold that the law of prescription applied to such chenas would be to contravene directly the provision of section 6 of Ordinance No. 12 of 1840.

Section 5 of Ordinance No. 5 of 1852 introduced into the Kandyan Provinces the law of the Maritime Provinces only in matters to which there was no Kandyan law or custom applicable and " for the decision of which other provision is not herein specially made." Until this date the Kandyan customary law, which was customary law in the strictest sense of the term, was in full force by virtue of the Proclamation of May 31, 1816, which enacted that—

> " the ancient laws of Kandy are to be administered till His Majesty's pleasure shall be known as to their adoption *in toto* as to all persons within those Provinces, or their partial adoption as to the natives, and the substitution of new Laws and Tribunals for the Trial and Punishment of His Majesty's European Subjects, for offences committed therein."

[1] *13 N. L. R. 129.* [2] *(1909) 21 N. L. R. 51.*

No general provision for the introduction of other laws was made until the Ordinance No. 5 of 1852 was passed.

The Ordinance cannot possibly affect matters which were made subject of legislative enactment in the interval.

The summary procedure of section 1 of Ordinance No. 12 of 1840 became obsolete after a few years, but the provisions of section 6 have consistently been treated as a test of Crown ownership for all purposes.

In *Mudalihamy v. Kirihamy* Sir [1] Anton Bertram C.J. said :—

> "It is impossible to contend (though the attempt has been made) that the presumptions of section 6 were intended to apply only to the summary procedure of the first section. The Ordinance was a general enactment dealing with the whole question of encroachments of Crown property, and the section was intended, not only to declare or define the general law, but also to provide an instrument for enforcing certain particular provisions of the Ordinance."

In *The Ivies Estate Case* (*Appurala v. Dawson*)[2] Lawrie J. said :—

> "The application of the Ordinance No. 12 of 1840 to any case but those originating by affidavit, &c., under the first section of the Ordinance has been disputed. My opinion is that the 5th and 6th sections of the Ordinance are declaratory of the general law applicable to all cases in which the extent of the right of the Crown, or grantees from the Crown, is in question."

In contests between a purchaser from the Crown and a third party the right of the former to prove title in the Crown under section 6 of Ordinance No. 12 of 1840 has always been recognized. This was so in the two cases which I have just cited, and there are many such cases in the reports.

If therefore section 6 of Ordinance No. 12 of 1840 is a general declaration of Crown rights in land, it is not easy to see how the presumption referred to in section 24 of Ordinance No. 1 of 1897 can be rebutted in any other manner than that provided in section 6 of Ordinance No. 12 of 1840. The mere fact that Ordinance No. 1 of 1897 does not state the means by which that presumption can be rebutted cannot justify it being held that other means of rebuttal are allowed. The Crown cannot be deprived of the right of property conferred by section 6 of Ordinance No. 12 of 1840 unless the intention to do so is in explicit terms or is an irresistible inference (*Maxwell on Interpretation of Statutes, 6th ed., p. 224*).

Appeal dismissed.

[1] (*1922*) *24 N. L. R. 1.*

[2] (*1893*) *3 S. C. R. 1.* (*Full Bench*).