Present: Wood Renton A.C.J. and Ennis J.

1913.

THE ATTORNEY-GENERAL *v.* KALIYAMUTHU.

63—D. C. (Crim.) Badulla, 4,757.

Appeal—Order under s. 1 of Ordinance No. 12 of 1840—Encroachment on Crown land—Appeal should be prosecuted according to Civil Procedure Code.

Proceedings under Ordinance No. 12 of 1840 are civil in their nature. An appeal lies from an order made under section 1 of the Ordinance. The appeal should be prosecuted in accordance with the provisions of the Civil Procedure Code.

THE facts appear from the judgment.

Garvin, Acting S.-G., for the respondent.—No appeal lies against the order in this case. The party dissatisfied with an order under section 1 of Ordinance No. 12 of 1840 must bring a regular action to establish his title, as provided by section 2 of the Ordinance. Where the law provides such a remedy, it is not open to the party aggrieved to appeal. The Ordinance does not make any provision for an appeal; it expressly provides another remedy. The inquiry under section 1 is a summary inquiry for ejecting a party who had encroached upon Crown land; the object of this summary inquiry would not be gained if he were allowed to appeal. The party encroaching should surrender possession, and then bring another action to vindicate his title.

Even if the party aggrieved had a right of appeal, he should have appealed under the provisions of the Civil Procedure Code, as the proceedings are civil in their nature. The present appeal having been taken under the Criminal Procedure Code is irregular, and therefore the appeal fails.

A. St. V. Jayewardene, for the appellant.—Appeals against orders under this section have been taken. See *Queen v. Habibu Mohamado;*[1] see also *1 Bel. & Vand. 109.* Under the Courts Ordinance, sections 21 and 39, the Supreme Court has the right by way of appeal to correct all errors in fact or law committed by District Courts. See *Henry v. Aluwihare.*[2]

The Crown cannot now object that the proceedings are civil in their nature. It has itself treated the matter as criminal.

July 1, 1913. WOOD RENTON A.C.J.—

The accused-appellant was charged, on information by the Attorney-General, under section 1 of Ordinance No. 12 of 1840, with

[1] *Ram. (1843-45) 129.* [2] *(1907) 10 N. L. R. 353.*

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having encroached on certain Crown lands. The learned District Judge has given judgment in favour of the Crown, and has ordered the appellant to deliver up possession of the land and to pay the costs of the proceedings. He appeals against that order. The Solicitor-General takes a two-fold preliminary objection on behalf of the Crown; in the first place, that no appeal lies; and in the second place, that even if an appeal does lie, the proceedings under Ordinance No. 12 of 1840 are civil and not criminal in character, and that appeals from orders made under that enactment must therefore be prosecuted—a course which has not been taken here—in accordance with the provisions of the Civil Procedure Code. I am clearly of opinion that a right of appeal does exist in such cases as these, although it is not expressly conferred by Ordinance No. 12 of 1840. The fact that section 2 of that Ordinance enables a person, against whom an order has been made under section 1, to take proceedings for the recovery of land of which he has been dispossessed in favour of the Crown, does not to my mind at all show that no right of appeal under the section should be recognized. Apart altogether from statutory provisions, to which I will refer in a moment, it would be hard upon persons in the possession of land claimed by the Crown if they were to be held liable to be dispossessed by the summary procedure created by section 1, without any opportunity of contending in the Supreme Court that the materials necessary for the justification of an order under that section were not present. In addition to considerations of convenience, we have the fact that appeals from orders under Ordinance No. 12 of 1840 have been recognized in a series of cases going as far back as 1843. But the matter is, in my opinion, set at rest by the provisions of sections 21 and 39 of the Courts Ordinance, which give to the Supreme Court an appellate jurisdiction for the correction of all errors in fact or in law committed by courts of first instance. It was held by Sir Joseph Hutchinson in the case of *Henry v. Aluwihare*,[1] that by virtue of these sections an appeal lies from an order awarding damages for cattle trespass under the provisions of Ordinance No. 9 of 1876. The language of sections 21 and 39 of the Courts Ordinance, and the reasoning of the learned Chief Justice in the case of *Henry v. Aluwihare*,[1] are amply sufficient to cover the case before us. I would hold that an appeal lies, and that this branch of the Solicitor-General's preliminary objection fails. In regard, however, to the second branch of that preliminary objection, I think that he is entitled to succeed to a certain extent. It has been held by decisions of the Supreme Court, sitting in its collective capacity, that proceedings under Ordinance No. 12 of 1840 are civil in their nature. Appeals from orders made under that section are therefore civil also, and the present appeal should have been prosecuted in accordance with the provisions of the Civil Procedure

[1] *(1907) 10 N. L. R. 353.*

Code. I do not think that it would be right, however, in view of the fact that there is no recent case in which this question has been expressly raised, that we should treat the portion of the preliminary objection that I am dealing with just now as altogether fatal to the appeal. I would direct that the record should be sent back to the District Court of Badulla, and that the appellant should have leave, notwithstanding lapse of time, to prosecute his appeal from the order of which he complains as a civil appeal to the Supreme Court.

ENNIS J.—

I am of the same opinion, and would make the same order.

Sent back.