1909.
October 8.

[FULL BENCH.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wood Renton, and Mr. Justice Grenier.

THE MUDALIYAR, PITIGAL KORALE NORTH, *v.* KIRI BANDA.

P. C., Chilaw, 29,537.

Forest—Clearing—Burden of proving that the forest is not included in a reserved or village forest—Evidence Ordinance (No. 14 of 1895), s. 105—Ordinance No. 16 of 1907, s. 21 (1).

In a prosecution under section 21 of Ordinance No. 16 of 1907, or the rules in force under that section, the burden of proving that the forest in which the offence is alleged to have been committed is "not included in a reserved or village forest" lies on the accused.

APPEAL by the accused from a conviction under section 21 of Ordinance No. 16 of 1907. The case came on for hearing before Wood Renton J., who referred it to a Full Bench. The facts and arguments sufficiently appear in the judgments.

Chitty, for the accused, appellant.

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

Cur. adv. vult.

October 8, 1909. HUTCHINSON C.J.—

This is an appeal reserved for the decision of three Judges. The question upon which our decision was required by Wood Renton J., who reserved the appeal, is whether in a prosecution under section 21 of Ordinance No. 16 of 1907, or the rules in force under that section, the burden of proving that the forest in which the offence is alleged to have been committed is "not included in a reserved or village forest" lies on the prosecution.

The enactment is that "no person shall clear, set fire to, or break up the soil of ..... any forest not included in a reserved or village forest, except in accordance with rules made by the Governor in Council." The defendant was convicted of clearing some forest land. There was no evidence as to whether or not the forest was included in a reserved or village forest; so that, if the burden of proving that it was not so included was on the prosecution, he ought to be acquitted.

The Evidence Ordinance enacts in section 105 that "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within ..... any special

exception or proviso contained in any ..... law defining the offence is upon him; and the Court shall presume the absence of such circumstances."

The prosecution contends that the words "not included," &c., are a special exception such as is intended by the enactment of the Evidence Ordinance. I think that they are. They are merely another way of saying "unless it is included in a reserved or village forest." The appellant is proved to have cleared land in a forest; that is an offence, unless the forest has been proclaimed as "reserved or village," or unless he has a permit; and the proof of the exception is on him. He contends that the words "not included," &c., are not an exception out of the generality of the term "forest," but that the offence is clearing land in a particular kind of forest, and that the prosecution has to prove that the forest is of that kind. I do not think so. It is a mere question of the meaning of the English words. My opinion is that the burden of proving that the forest is not included in a reserved or village forest is on the defendant, who relies on that defence.

WOOD RENTON J.—

I think that the words "not included in a reserved or village forest" in section 21 (1) of Ordinance No. 16 of 1907 are in the nature of an exception within the meaning of section 105 of the Evidence Ordinance (No. 14 of 1895). If a person charged under that section could show that the forest in question belonged to either of the categories to which the clause above cited relates, he would defeat the immediate proceedings against him. In addition to that, as I pointed out in my interlocutory judgment of September 17 last in this case, it may be easier to justify a clearing in a reserved forest than in one not so reserved; while, as regards a village forest, a member of the village community, for whose benefit it was constituted, might, in the absence of any prohibitory rule made under section 16 of Ordinance No. 16 of 1907 on the subject, set up a claim of right to effect clearings in it with success. In my opinion, when once the Crown has proved the fact that a clearing has been effected in a "forest," it rests with the accused to defeat that charge, if he can, by showing that it is a reserved or village forest. I do not think that there is any hardship in this interpretation of the law. The Crown could not readily adduce negative proof on the point which the Courts would accept, and persons who have a mind to clear forest land may fairly be required to make sure of their legal position before commencing operations.

I would dismiss the appeal.

GRENIER A.J.—

I agree that the words "not included" are in the nature of a special exception within the meaning of section 105 of the Evidence

1909.
October 8.
GRENIER A.J.

Ordinance. Once the Crown proves that a person has broken up the soil, or cleared, or set fire to ..... any forest, the onus is clearly on that person to justify his act, and claim immunity from it by proof that the land is included in a reserved or village forest. If he can produce a permit, or if he can show that the land is his private property, there will be an end to the prosecution. Such positive proof is directly in his power to adduce, and he ought to be made to adduce it instead of calling upon the prosecution to establish a negative; and I think, therefore, that the words of section 105 threw the burden of proof on the person charged to show the existence of circumstances which would exonerate him from the legal consequences of his act.

Appeal dismissed.