1947 *Present :* **Howard C.J. and Windham J.**

KIRI MUDIYANSE, Appellant, *and* THE ATTORNEY-GENERAL, Respondent.

S. C. 395—D. C. Kurunegala, 2,937.

Crown Lands Encroachment Ordinance—Public Tank—Declaration of title—Facts to be proved—Chapter 321—Surveys Ordinance—Chapter 316.

The provisions of the Crown Lands Encroachment Ordinance (Chapter 321) are not operative before 1840. In an action by the Crown, therefore, for declaration of title to certain paddy lands on the ground that they were part of abandoned tanks—

Held, that the provisions of section 7 of Chapter 321 were not applicable in the absence of proof that the lands were tanks after 1840.

Held, further, that a statemanet by a headman when a plan was made was not *prima facie* evidence of the facts deposed to by him within the provisions of section 6 of the Surveys Ordinance (Chapter 316).

[1] *An example of such an authority is the Electricity Commissioners (1924) 1 K. B 171.*
[2] *Words used at the argument.*

APPEAL from a judgment of the District Judge, Kurunegala.

H. V. Perera, K.C. (with him *Titus Goonetilleke*), for the first defendant, appellant.

Douglas Jansze, C.C., for the plaintiff, respondent.

Cur. adv. vult.

September 9, 1947. HOWARD C.J.—

In this case the appellant, the first defendant, appeals from a judgment of the District Court, Kurunegala, declaring that certain lands described as lots 6, 7 and 8 in the schedule to the plaint are the property of the Crown. The second defendant is not in actual possession of any of the lands, but has mortgaged her interests to the first defendant. The case for the Crown that the lots in dispute are Crown lands is based on the contention that though they are now paddy lands they are in fact part of abandoned tanks. The evidence in support of this contention is contained in a plan No. 2,903 of 1903 produced from the Surveyor-General's Office by the Government Surveyor of Anuradhapura. This plan (P1) shows 6 lots I 1228, J 2994, J 1228, 12995, 12996 and K 1228. Lots 12994, 12995 and 12996 are described in the plan as abandoned tanks. The other lots are described as paddy fields and there is also a note in the Remarks column to say that the Headman states that they are encroachments on Badahelagama tank. The Surveyor also gave evidence to the effect that he made a tracing (X) of the lots in question and that lots 6, 7 and 8 depicted on X are the lots in dispute. Lot 6 is part of lot J 1228. Lot 7 is part of lots 12994 and J 1228 and lot 8 is part of the old bund. Lot 6 depicted in P 1 as a paddy field is now a threshing-floor. Lot 7 is a paddy field while lot 8 is still part of the old bund. The Surveyor visited the land in 1943 and is unable to say how long ago the tanks in question were abandoned. The Village Headman also gave evidence for the Crown and states that the lots claimed by the defendants were at one time part of the tank. He also states that he has known these lands for the last 20 to 25 years and the defendants have always possessed them. He has not seen any tank in the area, but he can say there has been a tank there. The tank, he says, may have been abandoned in the time of the Sinhalese Kings. The evidence called by the defendants established possession by them and their predecessors in title for a period exceeding 30 years.

As the defendants are in possession the burden of proof of title lies on the Crown and the only question for decision is whether the District Judge was right in holding that this burden has been discharged. Mr. Jansze relies first of all on the provisions of section 6 of the Land Surveys Ordinance (Cap. 316). This provision is worded as follows :—

> "If any plan or survey offered in evidence in any suit shall purport to be signed by the Surveyor-General or officer acting on his behalf, such plan or survey shall be received in evidence, and may be taken to be *prima facie* proof of the facts exhibited therein; and it shall

not be necessary to prove that it was in fact signed by the Surveyor-General or officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, until evidence to the contrary shall have first been given."

Hence the plan must be received as *prima facie* proof of the facts exhibited therein. Mr. Jansze contends that the remarks of the Surveyor as to the fields in question forming part of an abandoned tank and his record of what the Headman told him must be taken as *prima facie* proof of the facts stated. I agree that the plan does supply *prima facie* proof that the fields were at one time part of a tank. But I am of opinion that too great a strain is being put on the words of the section when it is contended that an entry as to what the Headman said when the survey was made must be taken as *prima facie* evidence of the facts deposed to by the Headman. Having proved that the fields formed part of an abandoned tank Mr. Janszs then proceeds to call in aid section 7 of the Crown Lands Encroachment Ordinance (Cap. 321). This section is worded as follows :—

"All forest, waste, unoccupied or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan Provinces (within no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person—

(*a*) of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof ; or

(*b*) of such customary taxes, dues or services having been rendered to the Crown or other person for the same as have been rendered for similar lands being the property of private proprietors in the same districts ; or

(*c*) of his or his predcessor in title having made and maintained a permanent plantation in and upon the same for a period of not less than thirty years or of his having otherwise improved the same and maintained it in such improved state for such period, and in either case of his having held uninterrupted possession of the same during the whole of the said period.

In all other districts in this Island chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this section."

Mr. Jansze contends that the lands in dispute being part of abandoned tanks are unoccupied or uncultivated lands and therefore by reason of this provision presumed to be the property of the Crown until the contrary is proved. Mr. Jansze concedes that there is a difference between the two parts of the section and that, whereas in respect of chena lands situated in the Kandyan Provinces, private persons can establish their rights in the manner prescribed in paragraphs (*a*), (*b*) or (*c*) and not by

prescription, in regard to "forest, waste, unoccupied or uncultivated lands" private persons can establish their rights by prescription. That this difference exists is manifest from a perusal of the judgments in the *Attorney-General v. Punchirala*[1]. The period of prescriptive possession necessary for the acquisition of rights against the Crown would appear to be 30 years. Mr. Perera contends that the Crown has not established that the fields formed part of a public tank, that it is not established when the tank was abandoned and the defendants have established their rights by reason of over 30 years' occupation. With regard to the question as to whether it has been established that the tank was a "public" one Mr. Jansze relies on the case of *Attorney-General v. Sardiel*[2]. In this case it was held that the bed of an abandoned tank, the name of which appears on the list of public tanks, must be presumed to be the property of the Crown. In my opinion this case is distinguishable as the name of the tank appeared in the register of tanks as a public tank whereas in this case there is no evidence that the tank is a public one. There is no presumption on the evidence in this case arising from section 114 of the Evidence Ordinance. The Crown in these circumstances has only proved that the land in dispute formed part of an abandoned tank. It has not established when the tank was abandoned or whether it was a public tank. In regard to the date of abandonment Cap. 321 was enacted in 1840 and according to the decision of the Privy Council in *Hamid v.The Special Officer appointed under the Waste Lands Ordinance*[3]. it is doubtful whether the operation of the Ordinance is to date from the date of the Ordinance or from the time when the claim is made. Its provisions however are not operative before 1840. In these circumstances as there is no proof that the lands were tanks after 1840, it has not been established that section 7 of Cap. 321 is applicable. I am therefore of opinion that Mr. Perera's contention must succeed.

For the reasons I have given the appeal is allowed and the plaintiff's claim and objections must be dismissed with costs in this Court and the Court below.

WINDHAM J.—I agree.

Appeal allowed.