1916.

Present : Ennis J. and Schneider A.J.

THE KING *v.* HARMANIS *et al.*

142 and 143—D. C. (Crim.) Kalutara, 2,985.

Conviction for removal of timber without a permit under Forest Ordinance, No. 16 of 1907—Subsequent charge under s. 367 of the Penal Code—Interpretation Ordinance, s. 8—Autrefois convict.

A person convicted under the Forest Ordinance for removing timber without a permit may be again tried and punished for theft of the same timber.

THE facts appear from the judgment.

A. St. V. Jayewardene, for appellants.

Garvin, S.-G., for the Crown.

Cur. adv. vult.

August 25, 1916. ENNIS J.—

The question referred to a Court of two Judges was whether a person who had been convicted or acquitted under the Forest Ordinance for removing timber without a permit could be again tried and punished for theft of the same timber. Mr. A. St. V. Jayewardene argued that section 8 of the Interpretation Ordinance, No. 21 of 1901, is a bar. That section runs:—

Where any act or omission constitutes an offence under two or more laws, whether either or any of such laws came into force before or after the commencement of this Ordinance, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws, but shall not be liable to be punished twice for the same offence.

Mr. Garvin argued that the word " act " must be read in a wider sense than the mere physical act, and must be considered with the other elements which cause the act to be an offence. This is undoubtedly so, because the act of removing timber does not by itself constitute an offence under any law. Removing it " dishonestly " or " without a permit " (with certain exceptions) does, *i.e.*, it is the act coupled with a dishonest intention or a *mala fide* omission which constitutes the offence. An act considered with its concomitant circumstances may constitute an offence under one law and a different kind of offence under another law, as in the present case. The suggestion of my brother Schneider that the word " same " in the last clause is the keynote of the section

seems to me to afford a construction of the section without any part being redundant, and to explain the occasion for the section considered as an addition to the provisions of the Penal and Criminal Procedure Codes. In the light of this suggestion, Mr. Garvin's contention would hold good, *i.e.*, the act of theft of timber would be a different act from the act of removing timber without a permit, although the element of "removing timber" is common to both. On this construction the present case does not fall within the section. The exact point has not been considered, so far as I am aware, but the effect of the section was considered in *Modder v. Perera*,[1] where it was held that the offence of theft of a postal parcel under section 370 of the Penal Code is substantially the same as the offence specified in section 62 of the Post Office Ordinance of 1908, and section 8 was held to apply. The point for consideration in applying section 8 seems to be whether or not the act which constitutes an offence under one law is substantially the same as the act which constitutes the offence under another law. The principle was applied in two Indian cases, *Queen v. Dalapald Rau*[2] and *Erran Redi*,[3] apparently without the aid of any law similar to section 8 of the Ceylon Ordinance No. 21 of 1901. I have, however, only a note and not the report of the latter case.

I would dismiss the appeal.

SCHNEIDER A.J.—

On December 13, 1914, the accused-appellants were detected when transporting by water certain logs of timber which had been illicitly felled by some unknown person from a Crown forest. The value of the timber was Rs. 200.45. The accused were then charged in case No. 33,243 of the Police Court of Kalutara: (1) With removal of this timber without a permit, in contravention of rule No. 2 dated April 21, 1909, made by the Governor in Executive Council, under section 24 (1) (*a*) of the Ordinance No. 16 of 1907. and published in the *Government Gazette* No. 6,306 of April 23, 1909; and (2) of the theft of this timber under section 367 of the Penal Code.

The Police Magistrate convicted them of the former charge under the Forest Ordinance, as by virtue of section 5 (*a*) of that Ordinance he had jurisdiction to try offenders. In regard to the second charge, the accused were committed to the District Court, as the value of the property was beyond the jurisdiction of the Police Court. The District Judge convicted the accused, and sentenced each of them to nine months' rigorous imprisonment. On appeal from this conviction, the accuseds' counsel contended that the accused, having been tried and punished under the provisions of the Forest Ordinance, could not be tried or punished under the Penal Code, by reason of the provision in section 8 of the

[1] *(1913) 16 N. L. R. 87.* [2] *1 Mad. 83.* [3] *8 Mad. 296.*

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Ordinance No. 21 of 1901. This contention was referred to a Bench of two Judges, and is the question for determination now.

The material portion of the section is the following:—

> Where any act or omission constitutes an offence under two or more laws, ... the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws, but shall not be liable to be punished twice for the same offence.

Mr. A. St. V. Jayewardene, who appeared for the accused-appellants, contended that the removal of the timber was the act which constituted the offence under the Forest Ordinance and also under the Penal Code, and that, therefore, the accused could not be punished under the latter law.

The Solicitor-General, who appeared for the Crown, and argued his case with much ability, submitted that the word " act " does not signify a mere physical act, such as the removal of timber, but means much an " act " as constitutes an offence, that is, a physical act *plus* something else, which, when combined, constitute the offence. He said that the section did no more than state the well-recognized principle *nemo debet bis pro eadem culpa puniri.*

I am inclined to agree with the learned Solicitor-General.

The section in question I find has been adopted *verbatim* from section 33 of the Interpretation Act, 1889 (of England, viz., 52 and 53 Vict., c. 63). I have been unable to discover any decisions of the English Courts which are of any assistance in deciding the point under consideration; but it seems to me that there could be hardly any doubt that the intention of the enactment in England of section 33 of the Interpretation Act was to give statutory sanction to a well-recognized principle of English jurisprudence, that no man was to be punished twice for the same offence. The only local case which was cited was that of *Modder v. Perera.*[1] There a Post Office peon while employed as such in the General Post Office committed theft of a " postal article. " He was convicted under section 370 of the Penal Code, that is, of theft, while being a servant, of property in possession of the master. It was held that this conviction debarred a prosecution under section 62 of the Ordinance No. 11 of 1908, which penalizes theft or dishonest misappropriation of any postal article. Wood Renton J. in his judgment says that by virtue of section 8 of Ordinance No. 21 of 1901 the man could not be punished twice for the same offence, the conviction for theft under the Penal Code being for an offence " substantially identical " with that under the Ordinance No. 11 of 1908. The *ratio decidendi* of the case is, therefore, the identity of the offence, and the view taken seems to be that the test is whether the offence is the " same " in the one prosecution as in the other. But it is clear from the facts that the " act " was also identical as regards the offence under either law, because it was the theft of a postal article by a Post Office employè.

[1] *(1913) 16 N. L. R. 87.*

I am inclined to the opinion that the real test is the identity of the "act or omission which constitutes the offence." By "omission" must be understood the failure to perform a duty imposed by law. In this case the mere removal of the timber was not an offence under the Penal Code or the Forest Ordinance rules. That removal *plus* an intention to take the timber dishonestly was the "act" which constituted the offence under the Penal Code. That removal *plus* the omission to obtain a permit was the act or omission which constituted the offence under the Forest Ordinance rules. It is not possible to say that these two acts, or to be more precise, the act in the one case and the omission in the other, are identical. The only part identical to both is the removal, but that removal without more is not an offence.

In my opinion the meaning of the section is that where a given set of facts constitute an offence which is punishable under more than one law, the offender may be prosecuted and punished under any one of such laws, but may not thereafter be prosecuted or punished again under any other of such laws.

I would dismiss the appeal.

Appeal dismissed.

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713 and 714—P. C. Galle, 2,815.

August 29, 1916. DE SAMPAYO J.—

The two accused were convicted and sentenced upon two charges, namely, (1) felling and removing certain timber from a Crown forest without a permit, in breach of rule 1 of the rules framed under section 21 (*c*) of the Ordinance No. 16 of 1907, and (2) stealing the same timber under section 367 of the Penal Code. I may say that felling and removing timber without a permit are two distinct offences, and should not have been included in one charge as though they constituted one offence. The point taken in regard to the charges, however, is that the removal of timber in breach of the above rule and the theft of it are one and the same act within the meaning of section 8 of the Interpretation Ordinance, No. 21 of 1901, and that, therefore, the accused are not liable to be punished twice for the same offence. A similar point was considered by a Bench of two Judges in 142-143—D.C. (Crim.) Kalutara, 2,985, *Supreme Court Minutes, August 25, 1916*, and it was there decided by my brothers Ennis and Schneider, who formed the Bench, that the removal of timber in breach of the forest rule and the removal of it dishonestly in the definition of theft under the Penal Code were two distinct offences, and were punishable separately. That decision, with which I may say I agree, governs this case, and the objection cannot therefore be sustained. . . . . .