Present : Mr. Justice Wood Renton.

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SAUNDERS *v.* SINNIAH KANGANY.

P. C., Nuwara Eliya, 2,686.

Cooly, wages due to—Non-payment—Desertion—Appropriation in payment of debt—Express consent—Implied assent—" Advances "—Staleness of prosecution—Ordinance No. 13 of 1889, ss. 2, 11, 6, sub-sec. (3).

WOOD RENTON J.—The wages due to a cooly cannot lawfully be appropriated to the payment of debts due by him other than advances, except with his consent, express or implied.

Scovell v. Mootammah [1] *and Ogilvy v. Carupper* [2] referred to and commented on.

The staleness of a complaint is no ground for its dismissal; it only affects the *quantum* of punishment.

APPEAL from a conviction under section 11 of Ordinance No. 11 of 1865. The facts and arguments sufficiently appear in the judgment.

H. J. C. Pereira, for the accused, appellant.

There was no appearance for the respondent.

Cur. adv. vult.

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In this case the appellant was convicted under section 11 of the Labour Ordinance, No. 11 of 1865, of having deserted Marigold estate, of which the complainant, Mr. Saunders, is superintendent, and he was sentenced by the learned Police Magistrate to undergo one month's rigorous imprisonment. On his behalf Mr. H. J. C. Pereira took a variety of points, some of which are of considerable legal and general interest. I propose to deal with them in turn.

In the first place, he contended that the prosecution ought to have been dismissed because of its staleness. The appellant is alleged to have quitted the estate on August 9, 1907, and, although complainant was aware of his absence, no summons was issued under the Ordinance till May 29, 1908. In support of this contention, Mr. Pereira referred me to a decision by Mr. Justice Lawrie in *P. C., Nawalapitiya, 24,726* (S. C. Minutes of September 19, 1898, reported in Browne's " Notes on the Labour Ordinance " at page 51), in which that learned Judge acquitted a labourer on a charge of desertion, on the ground that, while he had left his employer's service on April 28, 1895, the prosecution against him was not instituted till March, 1898. With all respect I am unable to follow this decision. Section 444 of the Criminal Procedure Code provides that the right of prosecution for any offence, other than that of

[1] *(1906) 9 N. L. R. 83.*

[2] *(1908) 11 N. L. R. 300.*

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murder or treason, shall be barred (only in absence of special legislative provision) by the lapse of twenty years from the time of its commission. If the Legislature propose to amend the Labour Ordinance, it would be, I think, an advantage for both employer and employed if a statutory limit on the presentation of charges under that Ordinance were created; but, in the absence of any such enactment at present, I hold that the staleness of a charge, which is presented within the period prescribed by the Criminal Procedure Code, is a ground of which a Court can take account only in estimating the *quantum* of punishment. I find that Wendt J. took the same view in *Bliss v. Sandai* (P. C., Gampola, 38,416 [1]).

In the second place, Mr. Pereira urged that the evidence showed that the appellant had been driven away from the estate by the complainant himself, and in that connection he referred me to the case of *P. C., Panwila, 14,568,* [2] in which Mr. Justice Stewart interpreted the words "he told me to go," used by an employer towards a labourer, as a direction to quit his service. If it were necessary now to decide the point, I should not be prepared to hold that the complainant intended, or that the appellant understood him to intend, in the present case, to terminate the contract of service.

But on the third point urged by Mr. Pereira, I think he is entitled to succeed. It is admitted and proved that at the time when appellant left Marigold estate his wages for more than sixty days were overdue, and that they had, in fact, been set off against the amount due by him on the payment of his tundu. I am clearly of opinion that no set-off of this description comes within the purview of section 6, sub-section (3), of the amending Labour Ordinance, No. 13 of 1889. I entirely agree with Mr. Justice Withers in the case of *Jacob v. Valaiden Kangani,*[3] and with Mr. Justice Lawrie in the case of *Sinclair v. Ramasami Kangani,*[4] that the word "advances" in the section that I have cited refers to advances by way of anticipated wages, and not to a loan or to a debt due on a promissory note by a kangany in respect of his tundu. There is no evidence in the present case that the kangany assented expressly to the appropriation in question. If there had been any evidence of implied assent, it would have been necessary for me to consider whether that is sufficient to justify an appropriation under the Labour Ordinance. In the case of *Scovell v. Mootammah* [5] I myself held that implied assent was sufficient. I understand, however, that in the later case of *Ogilvy v. Caruppen,*[6] for a report of which I am indebted to an excellent summary of the decisions under the Labour Ordinance, a copy of which Mr. Akbar has kindly presented to me, and which I hope will see the light in a more extended and authorized form, it was held by Mr. Justice Middleton that proof of express consent

[1] *S. C. Min., Feb. 28, 1907.*
[2] *(1873-74) Grenier, p. 85.*
[3] *(1893) 1 N. L. R. 42.*
[4] *(1895) 1 N. L. R. 43.*
[5] *(1906) 9 N. L. R. 83.*
[6] *(1908) 11 N. L. R. 300.*

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in such cases was indispensable. I am not quite clear whether Mr. Justice Middleton intended to go so far as this, for in an earlier part of his judgment he says that he has no doubt that an Indian cooly, not under disability, may consent to an appropriation of his wages in any form that he pleases. If all that was intended to be decided in *Ogilvy v. Caruppen*[1] was that it was desirable for planters to furnish themselves with proof of express consent, or that the Courts should insist on implied assent being clearly established, I entirely agree with the decision. But if it went further, and enunciated the doctrine that in the absence of proof of express consent it is not competent for the Courts even to look at evidence of implied assent, I can only say, with the greatest respect, that I think that this view of the law is not only not warranted by the Ordinance, which has, indeed, nothing to do with the question, but is contrary both to Roman-Dutch and to English Law. There is, however, no evidence of implied assent in the present case.

On the grounds I have stated I set aside the conviction and acquit the accused.

Appeal allowed.