1914.

Present: De Sampayo J.

THOMSON *v.* LOUBU.

1,632—P. C. Matale, 4,544.

Labour Ordinance, 1865, section 19, "Seduction"—Employing estate coolies on Sundays—What is "taking into service"?—Is Sunday a dies non?

The accused, who was owner of a garden in the neighbourhood of another's estate, employed two coolies of that estate to work in his garden on three Sundays, which are off-days on the estate.

Held, that the accused was not guilty under section 19 of the Labour Ordinance, 1865.

There is no law declaring Sunday to be a *dies non* for estate labour, and if the superintendent desires to break through the custom of observing the Sunday as a holiday, and requires the coolies to work on that day, he may well do so, and the coolies will be bound to attend work, at the risk of prosecution.

THE facts are set out in the judgment.

R. F. Dias (with him *Sansoni*), for the accused, appellant.—The accused had no intention of permanently depriving complainant of the services of his servant. Sundays were holidays on the estate, and the coolies were not bound to work on the weeding contract of the kangany. They were free to work for pay elsewhere, under the circumstances. *Boss v. Allagen Kangany*, [1] *Maddock v. Meydeen*. [2]

Wadsworth, for the complainant, respondent.—Sundays are not *dies non* on which the coolies can refuse to work. It was held in *Taylor v. Carlinahamy* [3] that it was not necessary that a cooly should be taken into the permanent employment of another in order to render him liable under section 19 of the Labour Ordinance.

Cur. adv. vult.

November 1, 1915. DE SAMPAYO J.—

This appeal raises an interesting point in the law relating to master and servant. The accused is the owner of a small garden in the

[1] *Ram. (1875) 303.*

[2] *(1907) 1 Leader 54.*

[3] *(1910) 5 Bal. 25.*

neighbourhood of Marakona estate in the District of Matale, and on September 5, 12, and 19 last he employed two coolies of Marakona estate to work in his garden. He has been charged under section 19 of Ordinance No. 11 of 1865 with having wilfully and knowingly taken the two coolies into his service, and he has appealed from a conviction on that charge.

The days above mentioned are all Sundays, which it appears are off-days on the estate and are the usual holidays for the coolies. In these circumstances the question arises whether it is an offence for a third person to get any cooly to work for him on a Sunday. A holiday means that a cooly is free from work and is at liberty to go out of the estate, and the law does not prevent him from occupying his time as he may please and from eking out his earnings, if he chooses, by doing some extra work for any one. It is said, however, that weeding work goes on even on Sundays, on contracts taken by kanganies, and that the kangany had in this instance complained to the superintendent that the coolies did not work on his contract and preferred to go out. The weeding work on contract appears to be the business of the kangany, and not to be the ordinary work of the estate coolies as servants of the superintendent. The superintendent says that the kangany can employ Sinhalese or any other labour for that purpose. The kangany may, of course, get the estate coolies to work on his contract, if he can, but such employment would be a matter of choice with the coolies, and it is the kangany who would pay for their trouble and not the estate. In my opinion the work which the coolies may do on the kangany's weeding contract will not be work done in the service of their employer, the superintendent, and I think the fact of weeding being done on Sundays makes no material difference in the consideration of the point involved in this case. The real question is, what is the meaning of the expression " take into his service " in section 19 of the Ordinance? It is clear that the various provisions in that section as to seducing from service, harbouring, and taking into service, import that the person charged has done something which has the effect of breaking the cooly's contract with his employer. See *Marshall v. Denison* [1]. When a person gets a cooly to do some odd job for him, the result cannot reasonably be said to amount to a breach of the cooly's monthly contract of service; and, conversely, the cooly's performance of such a job is not equivalent to entry into the service of the person who gives the job. To my mind, " service " in this connection implies something more enduring than momentary employment of that kind. Otherwise a kangany who gets a cooly to do weeding work on his contract on an off-day may just as well be held guilty of taking the cooly into his service. This point is not devoid of judicial authority. In *Boss v. Allagen Kangany* [2] it was held that a kangany who had taken a cooly away for part of a day for doing some work

[1] *2 S. C. C. 82.*

[2] *Ram (1875) 303.*

1915.

DE SAMPAYO A.J.

Thomson v. Loubu

in his own garden, but had no intention of permanently withdrawing the cooly from the complainant's service, was not guilty of seducing or attempting to seduce the cooly from his employer's service. That was a stronger case than the present, because there the accused had taken the cooly away on an ordinary working day. A still more direct authority is *Maddock v. Meydeen* [1]. There the facts were very similar to those of this case, with the difference that there also, as in *Boss v. Allagen Kangany* [2], the days in question were not off-days, but working days. Wendt J. in that case observed: "I am very doubtful that proof of employing a servant on such fitful and isolated occasions, apparently to do odd jobs, will amount to a taking of him into one's service or employment. Surely it must be a permanent taking with the intention and effect of permanently depriving the lawful master of his servant's service?" Instancing the very case of a person employing a cooly to weed his vegetable garden on the off-days, the learned Judge asked: "Would that amount to a taking into his service within the meaning of the Ordinance?" He answered the question in the negative, and acquitted the accused.

I am in entire agreement with the above decisions, which, I think, are in accordance both with law and with reason. Mr. Wadsworth for the complainant has, however, referred me to *Taylor v. Carlinahamy* (P. C. Matale 34,174), decided by Grenier J. on May 16, 1910. There the learned Judge considered that Wendt J. had not made a definite ruling that for the conviction of a person it was necessary that he should have taken the cooly into permanent employment. That may be so, but he quoted, apparently with approval, the opinion of Wendt J. that the service rendered to the accused person must at least be shown to be inconsistent with the contract of serving the prosecutor. Moreover, in the case with which he had to deal, the accused had employed the coolies for some days continuously, and had deprived the complainant of the benefit of their labour. I do not think that decision is sufficient to support the conviction in this case. With reference to an argument on behalf of the complainant, it may be conceded that there is no law declaring the Sunday to be a *dies non* for estate labour, and if the superintendent desires to break through the custom of observing the Sunday as a holiday, and requires the coolies to work on that day, he may well do so, and the coolies will be bound to attend work at the risk of prosecution. But that does not affect the question of disability of a third person who engages a cooly on a mere job when the cooly is lawfully off work.

The appeal is entitled to succeed. The conviction is set aside and the accused acquitted.

Set aside.

[1] *(1907) 1 Leader 54.*

[2] *Ram. (1875) 303.*