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CAPPER *v.* WAYMAN.

P. C., Colombo, 76,361.

Telegraphic press message—Ordinance No. 19 of 1898, s. 2—Wilfully printing and publishing telegram before lapse of 48 hours from time of first publication—Liability of editor for unlawful act of sub-editor.

The *Times of Ceylon* newspaper having printed and published a telegraphic message in its evening issue of the 20th June, 1902, the sub-editor of the *Ceylon Standard* published in the *Ceylon Standard* the substance of the said message. In a prosecution against the editor of the *Ceylon Standard* for wilfully printing and publishing the said message, in violation of section 2 of the Ordinance No. 19 of 1898,—

Held, per MONCREIFF, A.C.J., that section 5 of that Ordinance, which provides that: "proof that any person is acting as editor of any newspaper in which there has been any publication contrary to the provisions of this Ordinance shall be *primâ facie* evidence that such person has wilfully caused such unlawful publication," means that the person who acted as editor is presumed to have wilfully caused the unlawful publication, and that the onus lay on him to show that he did not act wilfully.

Where the sub-editor of the *Ceylon Standard* explained that, in the absence of the editor of that newspaper, he wrote the paragraph complained of, upon information received from a person who happened to come into the office shortly after 6 P.M. on the 20th, and after writing it glanced at the evening copy of the *Times of Ceylon*, but did not look at the portion of the paper where the telegrams were printed, nor considered it part of his duty to ransack the paper to find out whether the news he had received from the casual visitor was there, knowing as he did that that paper was one of the two usual recipients of such telegrams,—

Held, that such conduct on the part of the sub-editor of the *Ceylon Standard* amounted to wilfulness.

Held further, that, though a master is not responsible for the criminal act of his servant done during his absence and without his authority, yet, as the editor of the *Ceylon Standard* knew that his sub-editor had been in difficulties on previous occasions with regard to the special telegrams of the *Times of Ceylon*, and as he neglected to issue to him such instructions as would prevent a recurrence of the unlawful publication complained of, his conduct amounted to wilfulness, and was an offence under section 2 of the Ordinance.

THE editor of the *Ceylon Standard* was convicted by the Police Magistrate of Colombo for wilfully causing to be published on the 21st day of June, 1902, in the *Ceylon Standard*, matter contrary to the provisions of the Ordinance No. 19 of 1898, to wit, the following paragraph containing the substance of a telegram received by the *Times of Ceylon* on the 20th June, at 6 A.M., and printed and published by it in its evening issue of the same date.

The paragraph complained of was as follows:—

"The second Ceylon contingent due here on the 10th July. We have received information to the effect that the second Ceylon

contingent, who left these shores early last month for South Africa, will be on their way homeward-bound in a few days, and are due here on the 10th proximo. Although the members of the contingent have had no opportunity of distinguishing themselves, a hearty welcome back will no doubt await them."

The Magistrate (Mr. R. B. Hellings) found that the accused was engaged in the management of the *Ceylon Standard* as editor till about 5 P.M. on the 20th June; that during his absence one Mr. Staples was in charge of the office as sub-editor; and that the latter wrote the foregoing paragraph and published it, overlooking the telegram of the *Times of Ceylon*, though it was printed with the largest head-lines. The Magistrate sentenced the editor to a fine of Rs. 50.

The accused appealed.

Rudra (with him *H. Jayawardene*), for the accused, appellant.—The offence created by the Ordinance No. 19 of 1898, sections 1 and 2, was the wilful printing and publishing of a telegram received by another newspaper, but the plaint submitted to the Magistrate did not allege wilfulness; the plaint was therefore essentially defective (*Soose v. Arumugam, 4 S. C. C. 36.*) It cannot be said that section 425 of the Criminal Procedure Code cured this defect, because it has been held not to apply to substantial errors of law. The Ordinance did not define the term "wilful." In *Queen v. Badger* (*25 L. J. M. C. 90*) "wilful" was held to denote evil intention. There was no evil intention on the part of Mr. Wayman, the editor, whatever might be said against Mr. Staples. In *Queen v. Holbrook* (*3 Q. B. D. 62*) the principal was held not liable for the act of his agent, unless he was made so by statute or it was done at his bidding. That was the law in India (Mayne's *Criminal Law of India, p. 242*). In Ceylon, too, the Supreme Court has held so (*Herft v. Northway, 9 S. C. C. 142*). The paragraph complained of was written and published by Mr. Staples in the absence and without the knowledge of Mr. Wayman. That was a complete answer to the prosecution. Mr. Staples may be made responsible for his own act, but Mr. Wayman was innocent (*R. v. Bradlaugh, 9, Ruling Cas. 121; Chisholm v. Doulton, 22, Q. B. D. 736; Roberts v. Woodward, 25 Q. B. D. 412; Ramasamy v. Lokananda, I. L. R. 9 Mad. 387*).

Dornhorst, for complainant, respondent.—In section 1 of the Ordinance, printing *or* publishing without the consent of the receiver of the telegram is prohibited, but in section 2 wilful printing *and* publishing is made penal. The sections read together showed that "and" in section 2 was an error for "or". Obviously the printer was intended to be made responsible as

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well as the publisher. The omission of the word "wilful" in the plaint is not fatal. That objection was not taken in the Court, below, nor in the petition of appeal. The decision in *Soose v. Arumugam* (*4 S. C. C. 36*) was characteristic of years gone by, when purely technical objections were taken and allowed, but now section 425 of the Criminal Procedure Code prevents such a course, except when the accused appears to have been prejudiced. No prejudice has been suffered. The decision in *Chisholm v. Doulton* does not apply to the circumstances of the present case, because the Legislature here has enacted that mere proof of the unlawful publication should raise a presumption of wilfulness. The term has been defined in Stroud's *Judicial Dictionary* to mean negligengce, or maliciousness, or want of proper caution or care (*R. v. Stephens, 35 L. J. Q. B. 201*). The question is, whether Mr. Staples was guilty of negligence in not satisfying himself that the information he published was to be found in the columns of the *Times of Ceylon*, and if negligent or wanting in proper caution, whether Mr. Wayman was responsible for his conduct. There were two sources of telegraphic information in Ceylon, one was Reuter's Agency and the other was paid for heavily by the proprietors of certain newspapers. Mr. Staples must have known that the subject of his paragraph was not sent by Reuter. If he thought that Mr. van Cuylenburg, who is said to have given him the information, had it from the Volunteer headquarters, he could have easily inquired there and ascertained whether such information reached the headquarters by means of a special telegram, official or otherwise, from abroad. He made no such inquiry, did not call for Reuter's telegrams to see whether it had come by that channel, nor did he scan the *Times of Ceylon* for it. He took no precaution whatever. His conduct was wilful in the sense that he shut his eyes, purposely blinded himself, not wishing to see what he might have easily seen. Mr. Wayman was clearly responsible for the wilfulness of his sub-editor, in that he might have prevented the unlawful publication of such telegrams, but took no measures to bring about that result. The Ordinance made the very fact of the unlawful publication a wilful offence, and held the editor liable. It declared him liable *primâ facie*. It did not indicate the defences that would rebut such liability. The English Act (6 and 7 Vict., cap. 96, § 7) provided, in the case of libel, that a defendant may rebut the presumption that the paragraph complained of was inserted and published without his knowledge, authority, or consent, and without any want of due care or caution on his part. If some such principle be imported into the Ordinance, it would be for Mr. Wayman to prove not

merely absence of knowledge or authority, but absence of any lack of caution or care. His defence wholly fails in this respect. His paper went to press at 2 A.M., but he leaves the office and goes away at 4.30 P.M. He knew that the evening papers came in after he went. He knew also that the Ordinance had been infringed three times before, and yet he gave no instructions as to preventing the recurrence of similar offences. He was as wilful as his sub-editor.

Cur. adv. vult.

11th August, 1902. MONCREIFF, A.C.J.—

The complainants in this case, Messrs. Capper & Sons, are the proprietors of the *Times of Ceylon*, and the defendant, Mr. Wayman, is the editor of the *Ceylon Standard*. Both of these journals are published in Colombo, the *Times* being published in the evening and the *Standard* in the morning. The complainants say that the defendant made use of a special telegram which appeared in the issue of the *Times* on the 20th June, 1902, in violation of the provisions of an Ordinance which was passed in 1898. By the terms of that Ordinance the burden was placed on the defendant to prove that he did not transgress the law. It seems to me that the questions involved in the case are these: First, has the defendant proved that he did not wilfully do the act charged against him? Secondly, did his sub-editor do the act in question, and, as a matter of law, that if the sub-editor did the act, was the defendant liable for what is a criminal act committed by one to whom his powers had been delegated?

The telegram published in the *Times* appeared in a prominent part of the paper under a full heading in leaded type, and runs thus:

"Special telegrams for the *Times of Ceylon*. Copyright. By submarine telegraph (from our own correspondent). (Received 20th June, 6 A.M.). Return of the second war contingent. Practically disbanded. Forty-nine remain. The main body due second week in July."

"Cape Town, 19th June, 11.35 A.M. There is an unexpected change. The contingent leaves Durban on the 20th instant by the ss. *Englishman*. Forty-nine members have been discharged and remain behind."

I may add, that in addition to this there was an editorial comment in the *Times* referring to the same subject, which indicated that in all probability the contingent would arrive in Colombo about the 10th July.

On the following morning appeared in the *Standard* newspaper this paragraph: "The second Ceylon Contingent due here on the

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10th July. We have received information to the effect that the second Ceylon contingent who left these shores early last month for South Africa will be on their way homeward-bound in a few days, and are due here on the 10th proximo. Although the members of the contingent have had no opportunity of distinguishing themselves, a hearty welcome back will, no doubt, await them."

The plaint was founded upon this publication, and without going into its terms, because they are set forth in the material section of the Ordinance, it is to be noted that the plaint only avers the publication, and makes no reference to the printing; the word used is " published ". Nor is the word " wilfully " employed. In the conviction, however, the Magistrate found that the defendant had wilfully printed and published in the *Ceylon Standard* the words complained of. I think that these variances are not material; if they are material, the necessary amendments could be made.

The Ordinance is No. 19 of 1898, and the material sections are Nos. 1, 2, and 5. The first section provides that " when any person publishes in any newspaper published and circulated in Ceylon any message by electric telegraph from any place outside the said Island, lawfully received by such person, no other person shall, without the consent in writing of such first-mentioned person, or his agent thereto lawfully authorized, print or publish or cause to be printed or published, such telegram, or the substance thereof, or any extract therefrom, until after a period of forty-eight hours from the time of first publication." Then follow some further provisions with regard to the period which must elapse from the receipt of telegram before a stranger can use it, and also with regard to the use of any comment upon or reference to the news contained in the telegraphic message in question. It is to be observed that the words in that section are " print or publish ", and that the word " wilfully " is not used. The section simply prohibits. It mentions certain acts which whether wilfully or not, are not to be done. The second section runs thus: " If any person wilfully print and publish, or cause to be printed and published, any matter contrary to the provisions of this Ordinance, he shall be liable to a fine not exceeding Rs. 100; and every person who is convicted a second time of any offence against this Ordinance shall be liable to a fine not exceeding Rs. 300." Now, it is observable that the word " wilfully " is used in this section, which is the penal section, and that the phrase is " print and publish," not " print or publish." Apparently there has been some slip of the pen or printer's error, but to my mind it is immaterial whether the word used was " and " or " or ".

I would observe, however, before leaving this section, that the word " offence " is used, from which I gather that it was the intention of the Legislature that the act complained of should not be treated as giving rise to a purely civil proceeding.

Section 5, provides, amongst other things, that " proof that any person is owner, or is, or is acting, or appears to be acting, as editor or manager of any newspaper in which there has been any publication contrary to the provisions of this Ordinance, shall be *primâ facie* evidence that such person has wilfully caused such unlawful publication." The effect of this to my mind is that the editor is in this instance presumed to have wilfully caused the unlawful publication; that is to say, the fact of his being the editor is *primâ facie* evidence that he did so, and it is for him to show that he did not do what he is charged with. Mr. Dornhorst urged that the meaning of this provision was that the defendant had to rebut the presumption by some proof such as is required in the English Libel Act. 6 and 7 Vict., chapter 96, section 7, whereby defendants are called upon to show that the publication was made without their authority or consent or knowledge, and that it did not arise from want of due care or caution on their part. On the other hand, Mr. Rudra urged that the words of section 499 of the Indian Penal Code would better apply, and that it was enough for the defendant to show that he did not intend to harm, and that he neither knew nor had reason to believe that the publication in question would do harm. I think, however, that the Ordinance has supplied the word which the Legislature considered apt for the occasion, and to that, as far as possible, I should adhere. The onus is, in my opinion, on the defendant to show that he did not act wilfully.

The next question is, whether the sub-editor of the paper acted wilfully. The facts are that in the afternoon of the 20th June the defendant, according to his practice, left the office of the *Ceylon Standard* at 4.30 P.M., and went to his own rooms, which are within call, leaving the conduct of the newspaper in the hands of Mr. Staples, his sub-editor. A gentleman named Van Cuylenburg happened to come into the office shortly after 6, and he stated that he had heard the quartermaster at the Volunteer headquarters announce to a number of persons that the contingent was about to sail, and would be back in Ceylon on the 10th July. Thereupon Mr. Staples wrote the paragraph complained of. After doing so he glanced at the evening copy of the *Times*, but he says that he did not look at the portion of the paper where the telegram was printed; that he was busy that evening, and did not consider it part of his duty to ransack the

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paper to find out whether the news he had obtained from Mr. van Cuylenburg was there. I am of opinion that, although the admission made in this case shows that Mr. Staples was an experienced journalist and an honourable man who may be taken to have spoken the truth, his conduct under the circumstances does amount to wilfulness. He knew, he must have known, that the *Ceylon Standard* had been in difficulties on three previous occasions with regard to the special telegrams of the *Times*. He knew that the *Times* was one of the two usual recipients of such telegrams. He received the information from a casual visitor to the office, and he not only does not verify the information by reference to the quartermaster, but he does not even look at the columns of the *Times* to see whether the telegram appeared there. And that was done, although the news was brought into the office after the evening edition of the *Times* was published. It is difficult to enter into the mind of Mr. Staples on this subject. His duties are of a somewhat difficult description, calling for a great deal of discretion; but I am rather disposed to think that he was under the belief that, having obtained the information from a person not connected with the *Times*, he was justified in putting it in the newspaper without further inquiry. I think he was not justified. I think the act was wilful.

Now, was Mr. Wayman responsible for this wilful act of his sub-editor? We had a good deal of discussion on the point. It was argued for the complainant that there were cases in which a master or proprietor is liable for the criminal act of his deputy, and that this was one of the instances in which the principle of those cases should apply. In *Mullins v. Collins* (*9 L. R. Q. B. 292*), a publican was convicted under the provisions of a statute with having supplied beer to a constable. The act was committed by a servant without the knowledge of his master. The section under which the conviction took place has more than one sub-section. The first contains the word "knowingly"; the second sub-section does not contain the word, and it was under that sub-section that the conviction was obtained.

Attempts have been made to explain that decision. On one occasion it was said that that judgment only stated the rule that a principal is liable for the act of his agent within the scope of his authority; but I am inclined to think that, if any good reason can be given for it, it was rather that stated by Archibald, J., in the case, to the effect that the offence was one against public order. The case, however, upon which Mr. Dornhorst mainly relied was *The Queen v. Stephens* (*35 L. J. Q. B. 201*), where

contractor was found guilty on an indictment for a nuisance committed by his servants, who had thrown rubbish into a river and caused an obstruction. On the argument of the rule for a new trial, Mr. Justice Blackburn was at pains to explain that he did not mean to question the general rule that the principal is not liable for the criminal act of his subordinate. He went on to explain the reason why he thought that the defendant was properly found guilty, although he was entirely ignorant of the offence committed by his servants. He says: " If the circumstances under which he maintains those works are such that for the nuisance an action upon the case would lie by a private person, and if the nuisance includes an injury upon a public right so that a private action would not lie, but the remedy would be by indictment, the same proof that would prove the nuisance so as to entitle a person to recover in the action would prove the nuisance so as to entitle the public to indict." Mr. Justice Field (*Chisholm v. Doulton, 22 Q. B. D. 738*) seemed to doubt whether that decision was right, and he passed it by, perhaps rather insufficiently accounting for it by saying that the Judges regarded it as a civil proceeding.

My impression is, that the root of the decision in *The Queen v. Stephens* was, and I think Mr. Justice Blackburn partly admits it, that the offence was one against public order. The principle, however that the master is not responsible for his servant's criminal act, in spite of the decisions quoted, remains intact. In this case we were not placed entirely upon the basis of that principle, because the word " wilfully " enters into the composition of the act and, in my opinion, forms an essential part of it. The defendant must free himself from the imputation of a blameworthy condition of mind. It seems to me that, on that head, the question is very much what it was in *Chisholm v. Doulton*, where the liability was qualified by the essential word " negligently ". The word " wilfully ", therefore, being an essential part of this act, and the defendant not being responsible for the wilful act of his sub-editor, the only remaining question is whether the defendant has shown that he was not guilty of wilfulness. He is admitted to be a man of honour. His evidence is accepted as absolutely true. He left his office at 4.30 P.M., when the newspaper was practically made up. He left the sub-editor, Mr. Staples, in charge of the office, knowing that he was an experienced man, whom he could confidently trust with the duty of inserting late telegrams. He was within call in case of emergency, and he knew nothing whatever of the publication of this matter.

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If the case had stood there, I should have been disposed to make the further inference, which would have completed his rebuttal, that he had referred to this subject on the previous occasion to his sub-editor, and that he had given him absolute instructions upon the subject. Communications must have passed between them, and, in fact, I think that it was the duty of the defendant, in establishing his innocence, to show that, after what had occurred on previous occasions, he had given such orders as would render the repetition of the acts complained of impossible.

Now, unfortunately, Mr. Wayman has made statements in his evidence which make it impossible to draw that inference from his conduct. He says that on the following morning he made the fullest possible inquiries. I think he did not. True he saw Mr. van Cuylenburg, but he did not apparently see the quartermaster, or ask him where he got his information. He says he heard that the quartermaster had said that he thought he must have seen it in one of the papers. He does not communicate with the proprietors of the *Times* and ask them whether the telegram was theirs. What he does say is that Mr. Staple's statement was eminently satisfactory.

Now, as I have already said, I do not think Mr. Staple's explanation was eminently satisfactory; and I am sorry to say that, as this is the view which Mr. Wayman took of the duties which he had delegated to Mr. Staples, I have no alternative but to come to the conclusion that he did not give such instructions as he should have given to his sub-editor, with a view to preventing any recurrence of the vexatious acts complained of by the proprietors of the *Times*. He further says that he did not write to the proprietors of the *Times* because Mr. van Cuylenburg's explanation was so satisfactory, and because if a mistake had been made, it was made *bonâ fide*. This question has given me some anxiety, but it seems clear to me that if after this case anything of the same kind happened again, the defendant could not in a similar evidence pretend that his act was not wilful, because he has given us his impression of what is a *bonâ fide* mistake and an "eminently satisfactory explanation."

The question which troubled me was, whether I was justified, on considering the defendant's evidence, in coming to the conclusion that he had not taken proper steps to prevent this occurrence. I have had considerable hesitation in the matter. In the end, I have come to the conclusion that he did not take the proper steps, and that he has not rebutted the presumption that he wilfully caused the publication complained of.

I think, therefore, that the order of the Magistrate must stand.