Present: Mr. Justice Wood Renton.

1906.
March 8.

SCOVELL *v.* MOOTAMMAH.

P. C. Hatton, 1881.

Indian labourer—Desertion—Non-payment of wages for over 60 days—Payment to kangany—Implied assent—Subsequent statute on the same subject-matter as a previous statute—Fresh desertion—Ordinances Nos. 11 *of* 1865, 3 *of* 1889, *and* 7 *of* 1890.

The accused, an Indian labourer, was charged under section 21 of Ordinance No. 11 of 1865 with quitting service without leave or reasonable cause. It appeared that at the date of the desertion a sum of 60 cents due to her as wages had remained unpaid for over 60 days; it also appeared that this sum was paid by the Superintendent to the kangany in reduction of a debt due by the accused to the kangany, in respect of certain advances made by him to her, without her express assent; the accused also accepted subsequent payments without demur.

Held, that the assent of the accused to the appropriation above stated ought to be implied, and that the circumstances, in view of such implied assent, and in view of section 6 (3) of Ordinance No. 13 of 1889, did not afford her a valid defence to the prosecution under section 7 of Ordinance No. 13 of 1889.

WOOD RENTON J.—An implied assent to an appropriation of debt is good both under the English Law and under the Roman-Dutch Law.

WOOD RENTON J.—Equally with implied assent, section 6 (3) of Ordinance No. 13 of 1889 is decisive of the present point.

WOOD RENTON J.—Sections 6 and 7 of Ordinance No. 13 of 1889, covering as they do the same ground as section 21 of Ordinance No. 11 of 1865, supersede that section entirely where Indian coolies are concerned.

Welayden v. Perumal (2 *N. L. R.* 210) followed.

WOOD RENTON J.—If the accused has illegally deserted her work, she cannot go back to the estate and make the fact that through her own unlawful act her wages are in arrears for more than the prescribed period a successful ground for a fresh desertion.

APPEAL from an acquittal with the sanction of the Attorney-General.

The complainant, Mr. T. Scovell, Superintendent of Derryclare estate, Kotagala, charged the accused with quitting service in November, 1905, without notice or reasonable cause under section 21 of Ordinance No. 11 of 1865, as amended by Ordinance No. 13 of 1889 and Ordinance No. 7 of 1890, sections 1 and 2. The defence was that at the date of the alleged desertion the wages due to the accused for June, 1905, had remained unpaid for over sixty days, and

1906. March 8.

that the desertion was justified under section 7 of Ordinance No. 13 of 1889. It appeared that there was a sum of 60 cents due to accused as balance wages due for June, and that this sum was paid by the Superintendent to the kangany, in payment of a debt due by accused to the kangany in respect of advances. The Superintendent did not get the express assent of the accused to such payment, but he was informed by the kangany that he had the consent of the accused to receive the same, and the accused accepted subsequent payments without protest. The Police Magistrate acquitted the accused, holding that the circumstances afforded a good defence under section 7 of Ordinance No. 13 of 1889.

In appeal.

C. B. Elliott, for the complainant, appellant.

E. H. Prins, for the accused, respondent.

8th March, 1906. Wood Renton J.—

This case comes before me as an appeal, with the sanction of the Attorney-General, against the acquittal by the Police Magistrate of Hatton of a Tamil woman, named Mootammah, on a charge of having quitted Derryclare estate, on which she was working as a cooly, without leave or reasonable cause, in contravention of the provisions of section 21 of Ordinance No. 11 of 1865, as amended by Ordinances No. 13 of 1889 and 7 of 1890, sections 1 and 2. On behalf of the accused it is contended that, as at the date of her desertion a sum of 60 cents due to her for wages had remained unpaid for over 60 days, she was justified in leaving the estate without further parley. It is admitted by the complainant that this balance of wages was outstanding.

If matters had rested there, the defence would clearly have been good under section 7 of Ordinance No. 13 of 1889. But it appears that at the time when this balance of 60 cents was struck the accused was herself indebted to the kangany of the estate in respect of certain advances made by him to her, that Mr. Scovell, the Superintendent of Derryclare estate, paid (with other wages) the balance due to Mootammah to the kangany, and that he in turn set it off against her indebtedness to him. The Superintendent states that he had no personal dealing with Mootammah in the matter, and had no knowledge as to whether or not she assented to the manner in which the balance of her wages was disposed of; and the learned Police Magistrate has held that she did not, in fact, expressly assent to it. I accept the finding of the Magistrate on this point.

1906.
March 8.

WOOD RENTON J.

The question that has now to be dealt with is, whether the absence of such express assent entitled Mootammah to an acquittal. The Police Magistrate has answered this question in the affirmative on the authority of a decision by Mr. Justice Browne in the case of *Farquharson v. Muttu* (1). This decision was previously followed by the same learned Magistrate in P. C. Hatton, No. 416, S.C., No. 325, in which an attempt was made to challenge its soundness on appeal to the Supreme Court, but the appeal was decided on the facts alone, and the important legal problem raised in the present case was left unsolved (see S. C. Minutes, 12th May, 1905).

I have had some difficulty in making out what it was that Mr. Justice Browne in *Farquharson v. Muttu* (*ubi. sup.*) actually intended to decide. It was a case of three-cornered indebtedness with a double appropriation of debt. The estate owed wages to the cooly. The cooly was in debt to the kanakkapulle. The kanakkapulle on his side was in debt to the estate. Accordingly the Superintendent set off the wages due to the cooly against the debt due to the estate by the kanakkapulle. No express assent to this appropriation by the cooly, (to confine our attention to him) was proved. Mr. Justice Browne held that the set off was bad, even although the cooly was shown to have accepted payment of subsequent wages without making any reference to the previous balance due. " In any civil action " he says, " I would require clear proof of the actual amount set off by whoever alleged it—debtor or creditor—ere I allowed it, and I will require no less in such a case as this, when it was a defence against a criminal charge. " If we are to infer from this passage that there was some uncertainty as to the amount due by the cooly to the kanakkapulle, I can quite understand the decision. It must always be open to a labourer, under such circumstances, to raise any question as to the wages due to him, or his own indebtedness, and the fact that he had no opportunity of doing this might in a particular case go far to negative his assent to an appropriation. But if Mr. Justice Browne intended to lay it down as a rule of law that no such appropriation can take place, unless it is expressly assented to by the cooly in the presence of the Superintendent of the estate, I can only say, with the greatest respect, that I think he is wrong and that I am unable to follow his decision. An implied assent to an appropriation of debt is clearly good by English Law: *Newmarch v. Clay* (2); *Young v. English* (3), and there is strong Roman-Dutch authority to the same effect (see Nathan's Common Law of South Africa, vol. II, p. 596).

(1) (1897) 3 *N. L. R.* 23. (2) (1811) 14 *East* 238, 243.
(3) (1843) 7 *Beavan* 10.

1906.
March 8.

WOOD RENTON J.

In the present case I am of opinion that Mootammah's assent to the appropriation ought to be implied. There was no doubt or dispute as to the wages due to her, or her indebtedness to the kangany. She accepted subsequent payments without demur. She left the estate without making any claim for the balance due to her, and she did not come forward at the trial to give her version of what had happened. It was not to meet cases of this description that the Legislature enabled coolies whose monthly wages were unpaid for more than 60 days to abandon their work without leave or notice. On this question of implied assent see further P. C., Matale, No. 24, 689, S.C., No. 484, and P.C., Matale, No. 24,744, S.C., No. 464. But there is more. Section 6 (3) of Ordinance No. 13 of 1889 expressly empowers and requires the master to deduct from the wages due to a labourer for any period of service all advances of money properly made to him during such period. Unless *Farquharson v Muttu* (*ubi. sup.*) is to be explained on some such special ground as I have indicated above, I cannot understand why this provision was not considered by Mr. Justice Browne in deciding it. In any event, equally with implied assent, it is decisive of the present case. The ground on which Mootammah claimed the right to quit her work without leave or reasonable cause was the set off against her monthly wages of an advance made to her and then outstanding. But under the statutory provision I have referred to, the master had a right to make the set off in question. Here again, as in the case of appropriation at Common Law, she might raise any ground of objection as to the amount of the wages due or of the advance. But in the absence of any dubiety on these points, the appropriation took place by the authority of the statute, and whether she assented to it or not is immaterial.

In view of these findings as to implied assent and the statutory right of appropriation, independent of any assent, express or implied, there is, strictly speaking, no need for me to go further. But there are two points on which I ought, perhaps, to say a word: (1) I do not think that the account between an employer and a cooly with regard to wages is a "running account." Ordinance No. 13 of 1889, as amended by Ordinance No. 7 of 1890, not only is of later date than the principal Labour Law (No. 11 of 1865), but is an Ordinance specially defining the legal position of Indian coolies. I am inclined to agree with Mr. Justice Lawrie in *Welayden v. Perumal* (1), that sections 6 and 7 of Ordinance No. 13 of 1889, covering as they do the same ground as section 21 of Ordinance No. 11 of 1865, supersede that section entirely where Indian coolies are concerned. It would follow, for instance, that the requirement as to 48 hours' notice is no longer

(1) (1896) 2 *N. L. R.* 210.

in force in such cases. But in any event the later Ordinance must prevail against the earlier one wherever it has introduced new provisions inconsistent with those of the older law. Now the Ordinance No. 11 of 1865 authorized deductions in respect of advances from " the amount of wages due *at any time.*" But section 6 of Ordinance No. 13 of 1889, after providing for the payment of wages monthly (sub-sec. 1) says that in computing the amount due " for any period of service " deductions not merely *may* but *shall* be made for advances " during such period. " In my opinion each period of service (in the absence of contractual arrangement to the contrary) is, if I may borrow a term from the Law of England, a " rest " at which the accounts between master and servant must be finally adjusted so far as past advances are concerned. There is nothing that conflicts with this view in P. C., Haldummulla, No. 5,062 (S. C. Minutes, 2nd July, 1879); P. C., Rakwana, No. 2,094 (S. C. Minutes, 2nd March, 1887); and P. C., Nawalapitiya, No. 16,236 (Vand, D. C., 64)—they were decisions under the Ordinance of 1865—and it is supported by the decision of Lawrie J. in *Sinclair v. Ramasami* (1). I must with deference decline to follow on this point the dicta of Clarence J. in *Henly v. Wellayan* (2). (2) I observe that the learned Police Magistrate, at the close of his decision, gives expression to the opinion that the prosecution in this case must necessarily be fruitless, inasmuch as, even if Mootammah went back to the estate, unpaid wages more than 60 days in arrears would still be due to her, and she would therefore at once be entitled to desert again with impunity. I do not see that when a Magistrate is called upon to decide a point of law he has any occasion to consider whether the prosecution which gives rise to it will be fruitless or not. But apart from that, I entirely dissent from the view that if this cooly woman has illegally deserted her work she could go back to the estate and make the fact that through her own unlawful act her wages are in arrears for more than the prescribed period a successful ground for a fresh desertion. I set aside the acquittal and sentence the accused to one day's simple imprisonment.

(1) (1895) 1 *N. L. R.* 43.

(2) (1892) 1 *S. C. R.* 136.