[FULL BENCH.]

Present: Bertram C.J., Ennis and De Sampayo JJ., and Schneider A.J.

WEERAKOON (*for the Crown*) *v.* RANHAMY.

628—P. C. Kegalla, 30,327.

Chena—Forest Ordinance, ss. 4 and 21—Clearing land at the disposal of the Crown—Bona fide *claim of title—Land in the Kandyan Provinces—No grant or sannas*—Mens rea—*Mistake of fact—Penal Code, ss. 38 and 72—When Magistrate should refer the case to a Civil Court.*

BY THE FULL COURT.—The jurisdiction of a Police Court in a prosecution under the Forest Ordinance to determine a question of title, in pursuance of section 4 of that Ordinance, is not ousted merely by the circumstance that the claim of title set up is a *bona fide* claim.

Per BERTRAM C.J., DE SAMPAYO J., and SCHNEIDER A.J.—Where, however, the prosecution appears to be in abuse of the process of the Court, and in particular in the following classes of cases :—

(1) Where the claim does not arise incidentally, but has already been the subject of dispute between the claimant and the Crown, and it appears to the Magistrate that the real object of the proceeding is not to protect Crown lands, but to obtain an expeditious decision of the claim ;

(2) Where the questions involved appear to him to be of such intricacy and magnitude that he cannot effectually adjudicate upon them in ordinary summary proceedings ; and

(3) Where the circumstances are such that it would be essentially unfair that the rights of the parties interested should be determined by such proceedings ;

the Magistrate ought to refer the prosecution to a Civil Court.

Held, further (ENNIS J. *dissentiente*), that in the circumstances of the present case the accused, who was charged with clearing Crown land without a permit, was acting under a mistake of law, namely, a mistaken belief that it was possible for him to acquire a good title to chena lands in the Kandyan Provinces merely by notarial deeds and possession, and that consequently he was not entitled to the benefit of section 72 of the Penal Code.

Per ENNIS J.—The mistake of the accused was a mistake of fact. On various grounds he entertained the mistaken belief that the land he cleared was private land, and he was consequently entitled to the benefit of this section.

Per BERTRAM C.J., DE SAMPAYO J., and SCHNEIDER A.J.—The doctrine of the English criminal law, known as the doctrine of *mens rea*, only exists in Ceylon in so far as it is embodied in the express terms of sections 69 and 72 of the Penal Code.

Per BERTRAM C.J.—In one respect the doctrine of the Ceylon section is wider than the English doctrine in that it extends to all penal enactments alike, including enactments which under the English law are outside it[illegible]y, enactments which

prohibit a thing absolutely, and which, but for this section, would be construed as imposing an obligation which every man, whatever his knowledge, violates at his peril. On the other hand, unlike the English doctrine, it extends to mistake only, and does not extend to mere ignorance.

Per SCHNEIDER A.J.—The word "mistake" in section 72 must be taken to include "ignorance." Sections 69 and 72 are a paraphrase of the English common law maxim in its application to criminal law—"*ignorantia facti excusat; ignorantia juris non excusat.*"

THE facts appear from the judgment.

J. S. Jayawardene, for the appellant.—The accused cleared the land in the *bona fide* belief that he was the owner of it. He bought it in 1902 and 1906 from those who claimed to have inherited the land. He planted it about sixteen or seventeen years ago, and has planted again two and a half years ago. It was held by Lascelles C.J. in *Chena Muhandiram v. Rawapper*[1] that in such circumstances the Police Court has no jurisdiction. Counsel also cited *Silva v. Banda;*[2] *Chena Muhandiram v. Banda;*[3] *Pahalaganhaya v. Andris;*[4] *A. G. A. v. Perera.*[5]

The ruling that no title can be set up against the Crown to chena lands in the Kandyan Provinces, save a title by sannas or by grant, or by proof of customary taxes, dues, or services within the prescribed period. *The Attorney-General v. Punchirala*[6] does not in any way affect the principle laid down by Lascelles C.J. See *A. G. A., Kegalla, v. Siyadoris Mudalali;*[7] *Chena Muhandiram v. Julius;*[8] *Soysa v. Podi Sinno.*[9]

The decision of Shaw J. in *Obeyesekera v. Banda*[10] is not really a decision to the contrary. Shaw J. tries to distinguish that case from the judgment of Ennis J. in *Obeyesekera v. Naide*[11] on the ground that in the latter case the accused claimed under a talipot. That does not appear to be so.

[BERTRAM C.J.—The jurisdiction of a Criminal Court is not ousted by a claim of title impossible in law.] This principle has been considerably modified. See *1 Gour Penal Code 227.* Even accepting the principle, the title set up by the accused is a possible one. Section 6 of Ordinance No. 12 of 1840 is not to declare the title set up by the accused impossible in law, but it merely precludes the accused from proving it.

The accused had a *bona fide* belief that he had a good title. There was no *mens rea* which is essential for a conviction. The accused can plead section 72 of the Penal Code in defence. The

[1] *(1914) 17 N. L. R. 225.*
[2] *(1914) 17 N. L. R. 227.*
[3] *(1914) 17 N. L. R. 228.*
[4] *(1914) 3 Bal. N. C. 62.*
[5] *(1915) 1 C. W. R. 24.*
[6] *(1919) 21 N. L. R. 51.*
[7] *(1916) 3 C. W. R. 53.*
[8] *S. C. Min., Dec. 23, 1920.*
[9] *(1919) 21 N. L. R. 252.*
[10] *(1918) 20 N. L. R. 447.*
[11] *L. R. 448.*

question as to a private right of ownership is a mistake of fact. *Cooper v. Phibbs;*[1] *Regina v. Hall;*[2] *Cumberland v. Dewarakkita Unnanse.*[3]

A mistake where there is mixed question of fact and law is a mistake of fact—*Gour Penal Code.*

The land was not a chena land at the time of the alleged offence. It was at one time a chena land, but has ceased to be so as it was cleared and planted by the accused with coconuts and arecanuts sixteen years ago and not cultivated in chena.

Akbar, S.-G. (with him *Dias, C.C.*), for the Crown, respondent.—The principles of English criminal law are not in force in Ceylon. *Kachcheri Mudaliyar v. Mohamadu.*[4] Therefore, the principle of the English criminal law, that the jurisdiction of a Magistrate is ousted by a *bona fide* claim of title, has no place in our criminal law. The principles enunciated by Lascelles C.J. in *Chena Muhandiram v. Rawapper*[5] cannot be applied to our law.

Under the English criminal law a Magistrate has no jurisdiction to try a civil claim, and that was the reason why the Magistrate's jurisdiction was ousted by a *bona fide* claim of title. *Hudson v. McRea.*[6] Section 4 of the Forest Ordinance gives the Magistrate the right to try question of title in respect of offences under the Forest Ordinance.

The doctrine of *mens rea* as understood in the English criminal law is not in force in Ceylon. Where a particular intention is a necessary ingredient of an offence, our Statute law expressly provides for it; and where it is not provided by the Statute, no *mens rea* need be proved. See *Casie Chetty v. Ahamadu.*[7]

The accused can only avail himself of the exceptions provided by sections 69 and 72 of the Penal Code, which embody so much of the English doctrine of *mens rea* as is applicable to us. But, as far as offences under the Forest Ordinance are concerned, section 4 of the Ordinance excludes the application of section 72 of the Penal Code; for under the Forest Ordinance the guilt of the accused would depend on whether or not he had title, and the Magistrate is given power to investigate questions of title.

Even if section 72 of the Penal Code is available to the accused in prosecutions under the Forest Ordinance (section 22), the accused in this case cannot avail himself of it, as he relies on a mistake of law and not of fact, in view of the decision in *The Attorney-General v. Punchirala.*[8] For the accused in this case relies upon a title which cannot be maintained in law.

A mistake in respect of a mixed question of fact and law is not a mistake of fact only, and section 72 of the Penal Code cannot be

[1] *(1867) L. R. 2 H. L. 149.*
[2] *(1828) 3 C. & P. 409.*
[3] *(1916) 3 C. W. R. 102.*
[4] *(1920) 21 N. L. R. 369.*
[5] *(1914) 17 N. L. R. 225.*
[6] *(1863) 33 L. J. Magistrate's cases 65; 4 B & S 591.*
[7] *(1915) 18 N. L. R. 184.*
[8] *(1919) 21 N. L. R. 51.*

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pleaded in respect of such mistakes. Mistake is not the same thing as ignorance.

The fact that this land was cleared and planted with coconuts and arecanuts seventeen years back does not make it anything other than chena.

Cur. adv. vult.

September 1, 1921. BERTRAM C.J.—

This case was referred to the Full Court with a view to the final determination of a question on which there had been a conflict of judicial opinion. The question is a question of the interpretation of section 4 of the Forest Ordinance, No. 16 of 1907, and its history is as follows :—

In February, 1914, in the case of *Chena Muhandiram v. Rawupper*,[1] Lascelles C.J. took occasion to review the principles on which this section should be applied. The case before him was one in which the accused "failed to indicate any title at all," and his appeal was accordingly dismissed, but Lascelles C.J., speaking *obiter*, indicated certain classes of cases which were not appropriate cases for the application of the section. A few weeks later De Sampayo J. in a case reported in connection with *Chena Muhandiram v. Rawupper* (*supra*), namely, *Silva v. Banda*[2] expressed himself as being "in entire agreement with the broad principles enunciated by Lascelles C.J." He was precluded by technical consideration from applying those principles to the case before him. In June of the same year, in a third case reported in the same volume, *Chena Muhandiram v. Banda*,[3] Lascelles C.J. applied those principles to a case actually before him, and set aside the conviction. In October of the same year in *Pahalaganhaya v. Andris*[4] De Sampayo J. also applied one of the principles which Lascelles C.J. had enunciated, and again, a few months later, in *A. G. A. v. Perera*,[5] the appeals in both cases being allowed. The decisions of this Court had thus imposed certain restrictions on the exercise of the jurisdiction conferred upon Magisterial Courts by section 4 of the Forest Ordinance. I venture to think, however, that the extent of these restrictions has at times been misunderstood. I believe that I am right in stating that an impression has prevailed at the Bar (which in some cases has been communicated to the Bench) that the effect of those decisions was that a Magistrate ought not under the section to try a *bona fide* claim of title.

The situation created by the above decisions was affected by a subsequent development. In 1916 Wood Renton C.J. sitting alone in *The Attorney-General v. Punchirala*[6] decided that no prescription ran against the Crown in respect of chena lands in the Kandyan Provinces. In 1918 this decision in a case of the same name,

[1] *(1914) 17 N. L. R. 225.*
[2] *(1914) 17 N. L. R. 227.*
[3] *(1914) 17 N. L. R. 228.*
[4] *(1914) 3 Bal. N. C. 62.*
[5] *(1915) 1 C. W. R. 24.*
[6] *(1915) 18 N. L. R. 159.*

The Attorney-General v. Punchirala,[1] was confirmed by a decision of the Full Court. This decision has a most important effect on the title to chena lands in the Kandyan Provinces. Up to this point it had indeed been recognized that the occupier of a chena, who could show no Crown grant or sannas, but could only rely upon a series of notarial deeds, could not on these deeds alone support his claim to title. But as long as it was uncertain whether the plea of prescription was open to him, these deeds had a possible value as the foundation of a title by prescription. Now that it is clear that such a person cannot, as against the Crown, plead prescription at all, it is apparent that all such deeds are valueless. Under these circumstances, it became open to the Crown to contend that where a title based upon such deeds alone is set up in a chena prosecution, it would be futile for a Criminal Court (most particularly where it is vested with a special jurisdiction to adjudicate upon title) to refer such a plea for the determination of a Civil Court. The question therefore arises: To what extent have the decisions in *The Attorney-General v. Punchirala* (*supra*) affected the principles enunciated by Lascelles C.J.?

We have been referred to six cases (five reported, one unreported) which have been decided since the decision of Wood Renton C.J. in *The Attorney-General v. Punchirala* (*supra*), in addition to the previous decision of Schneider A.J. in this very case. All of them relate to chena lands in the Kandyan Provinces. In two of these, namely, *A. G. A., Kegalla, v. Siyadoris Mudalali*[2] and *Chena Muhandiram v. Julius*,[3] Shaw J., and in another, *Soysa v. Podi Sinno*,[4] De Sampayo J., notwithstanding the two *Punchirala* decisions (*supra*), applied the principles which Lascelles C.J. had enunciated. In two others, namely, *Cumberland v. Dewarakkita Unnanse*[5] and *Obeyesekera v. Naide*,[6] my brother Ennis approached the question from an entirely new point of view, namely, that of the interpretation of section 72 of the Penal Code, a question which we now realize to be the vital question. He held that the persons prosecuted acted under a *bona fide* mistake as to their legal rights, and that this was a "mistake of fact" within the meaning of the section. Finally, in *Obeyesekera v. Banda*,[7] Shaw J., where the accused, who held chena land only under a notarial deed, pleaded that he was acting under a *bona fide* claim of right, held that the plea was insufficient, inasmuch as the right claimed was not one which could exist in law. This decision was followed by Schneider A.J. in the present case, which was accordingly sent back for trial. The learned Magistrate having now taken further evidence has felt himself bound to follow the decision of Schneider A.J., and, no material fresh facts being disclosed, convicted the accused and imposed a fine. It is the appeal from this

[1] *(1919) 21 N. L. R. 51.*
[2] *(1916) 3 C. W. R. 53.*
[3] *P. C. Kegalla, No. 29,775 (S. C. Min., December 23, 1920).*
[4] *(1919) 21 N. L. R. 252.*
[5] *(1916) 3 C. W. R. 102.*
[6] *(1918) 20 N. L. R. 448.*
[7] *(1918) 20 N. L. R. 447.*

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conviction which has been referred to the Full Court, with a view to the legal position being fully elucidated.

In the argument, Mr. J. S. Jayawardene, for the appellant, laid before us all the cases above cited. With regard to the point that the title pleaded was one impossible in law, he contended that the effect of Ordinance No. 12 of 1840 was not to declare such a title, as that pleaded, impossible in law, but merely to preclude the accused from proving it. On the further question, as to the interpretation of section 72 of the Penal Code, he cited a dictum of Lord Westbury in *Cooper v. Phibbs*[1] to the effect that " private right of ownership is a matter of fact," and also the case of *Regina v. Hall*,[2] where ignorance of the effect of a particular Statute was held a sufficient defence to a charge of robbery as negativing the *animus furandi*.

On the other side, the Solicitor-General, in a very interesting and ingenious argument, laid before us the following propositions: Firstly, he contended, the principle of the English criminal law, that the jurisdiction of a Magistrate is ousted by a *bona fide* claim of title, has no longer any place in our legal system, having itself been ousted by the decision of this Court in *Kachcheri Mudaliyar v. Mohamadu*,[3] which declared that the general principles of the English criminal law are not in force in Ceylon. The judgments of Lascelles C.J., therefore, which, as he conceives them, proceeded upon that principle, are no longer of authority. In any case, he contended that those judgments were erroneous. The judgment of Blackburn J., in *Hudson v. McRea*[4] explains that the basis of that principle is that the Justices have no jurisdiction to try a civil claim. Here section 4 expressly gives such a jurisdiction to the Magistrate. Having thus disposed of the English doctrine of the ouster of magisterial jurisdiction and of the principles laid down by Lascelles C.J., the Solicitor-General next proceeded to disembarrass our legal system of the English doctrine of *mens rea*. The case of *Kachcheri Mudaliyar v. Mohamadu* (*supra*) was fatal to this also. Only so much of this doctrine survives in Ceylon as is expressly embodied in sections 69 and 72 of our Penal Code. All our criminal law is thus statutory. The question, whether a particular intention or a particular knowledge is a necessary ingredient of any criminal offence, must be determined by the actual words of the enactment which creates it. Where no such intention or knowledge is essential, the only escape for the offender is by section 69 or section 72, to which all criminal enactments are subject. With regard to the Forest Ordinance, however, section 4 excludes the application of section 72. In empowering the Magistrate to try and determine the question of title, the Ordinance intended that the Magistrate should give judgment in accordance with his determination. The liability, therefore, of a person who unlawfully clears land at the

[1] (1867) L. R. 2 H. L. 149 at p. 170.
[2] (1828) 3 C. & P. 409.
[3] (1920) 21 N. L. R. 369.
[4] (1863) 4 B. & S. on p. 591.

disposal of the Crown, is absolute. In any case, even if this is not so, a person who clears a Kandyan chena under the belief that notarial deeds can furnish a valid title to such land is acting, not under a mistake of fact, but a mistake of law, and is consequently not within section 72.

From the first part of this argument I wholly dissent. The principle that the jurisdiction of a Magisterial Court is ousted by a *bona fide* claim of title is not a principle of substantive criminal law. It is a principle of criminal procedure, and may be legitimately "received" into our system under section 6 of the Criminal Procedure Code. It has been so received, and, together with its necessary corollary—that the title must not be a title impossible in law—has obtained the *imprimatur* of the Full Court in *Sourjah v. Faleela.*[1] It was because of this principle, and to empower a Magisterial Court in the case of forest offences to try and determine claims of title, that section 4 of the Forest Ordinance, 1907, was expressly enacted.

Further, with regard to the salutary principles enunciated by Lascelles C.J., I do not agree with the view that they are inconsistent with the terms of section 4, or that they are affected by the judgment of Lord Blackburn, which the Solicitor-General quotes. Properly understood, these principles are not open to criticism, and will, I trust, always be observed. But it is important to note what those principles actually are. Neither Lascelles C.J. nor any reported judgment of this Court has ever declared that a Magisterial Court under this section ought not to try a *bona fide* claim of title. Nor, if the matter was fully considered, could it have been so declared. As for claims to title which are not *bona fide*, every Magisterial Court in all matters is competent to dispose of them without any special section. It is only a *bona fide* claim of title which ousts the jurisdiction.

What, then, are the principles in question? Lascelles C.J. declared that, notwithstanding the terms of section 4, there were certain claims which ought not to be determined in criminal proceedings. He had in mind certain specific classes of cases which he carefully defined. Thus, in *Chena Muhandiram v. Rawapper* (*supra*) he said that the questions contemplated by the section were "such as may occur incidentally in the course of prosecutions," and that "the section was not intended to" authorize the Crown to proceed criminally in cases, where "there is from the beginning" (that is, from the inception of the prosecution) a *bona fide* question of title between the "Crown and the accused." This was the first class of cases he referred to, namely, cases in which the Crown was already at issue with the subject on a question of title, and had instituted criminal proceedings, by way of a short cut, to get that question determined. The other classes of cases he mentioned are: Firstly,

[1] *(1913) 16 N. L. R. 249.*

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cases on which a Police Magistrate cannot " effectually adjudicate " by reason of the difficulty or intricacy of the issues involved ; and secondly, cases in which a criminal prosecution is " not a fair course of procedure," or, as he puts it in *Chena Muhandiram v. Banda,* (*supra*), cases of "essential unfairness," as, for example, if the Crown sought to eject members of a village community, *bona fide* claiming under an ancient grant by means of a series of individual prosecutions. He develops and applies the same views in *Chena Muhandiram v. Banda* (*supra*). No doubt the last two classes of cases referred to would generally be combined with the first mentioned, as it is difficult to imagine the claims in such cases coming up incidentally and by way of surprise to the Crown. But the cases which Lascelles C.J. is referring to may be briefly summarized as (1) cases whose object is to determine a question of title which has already arisen ; (2) cases which must be " [illegible]tile ; " and (3) cases of " essential unfairness."

With regard to the first of these classes, his observations were based upon an interpretation of the words of the section. The question must " arise " in the prosecution. He took this to mean " incidentally arise." If the matter is already the subject of dispute, it is not so much a case of a question arising in the course of the prosecution, as of a prosecution arising in the course of the question. I may add that, as I understand it, a claim would arise " incidentally," if on the defence opening its case it produced a deed and set up a claim to title based on that deed. It would, I think, be none the less incidental if this title proved to be the only point in the case.

With regard to the other two classes of cases, in referring these to a Civil Court, a Magisterial Court would only be exercising the same power which it exercises every day in cases of cheating, breach of trust, and criminal trespass, namely, its inherent power to restrain the abuse of its jurisdiction by proceedings, which, though strictly within its jurisdiction, are contrary to the spirit of the enactment by which that jurisdiction is conferred.

If the subsequent cases are examined, it will be found that with one, or possibly two, exceptions . . . . they all proceed upon the same principles. Thus, in *Chena Muhandiram v. Banda* (*supra*) the question really at issue was the effect of a document known as " the Kiralawa sannas," which had already been the subject of dispute and litigation between the Crown and people claiming thereunder. It cannot justly be described as a question of title arising incidentally in the criminal proceedings. *Pahalaganhaya v. Andris* (*supra*) dealt with certain swampy stretches of land along the banks of a river, parts of which would appear for a series of years to have been cultivated by the villagers. In this case my brother De Sampayo expressed the opinion that, " when the point is purely a question of title of the possessors of land, it is undesirable that the conviction should turn upon the

finding of a Police Magistrate with regard to title." There is only a very brief note available in this case, but I take it that the title in this case must have been already the subject of dispute. In *A. G. A. v. Perera* (*supra*) the dispute was an old one, and there was *primâ facie* evidence that the claim was allowed by the Forest Settlement Officer twelve years previously. De Sampayo J. said: "Although the Ordinance vests jurisdiction in the Police Court, the inquiry into title so far as the determination of title is necessary for the purpose of the prosecution, it has been pointed out by this Court that the provision was not intended to apply to cases where from the beginning there is a *bona fide* question of title between the Crown and the accused, or to dispose of disputes which are essentially of a civil nature, by means of a criminal prosecution." In *A. G. A., Kegalla, v. Siyadoris Mudalali* (*supra*) the claim of right was one which had been "made and persisted in for many years," and was "only properly to be tried in a Civil Court after pleadings and issues." In *Soysa v. Podi Sinno* (*supra*) the dispute was really between the Crown and the proprietor of an estate who was before the Court. The title in dispute went back to 1837, and the case was obviously one of considerable complication. De Sampayo J. said at page 254: "In these circumstances, I think, Mohamadu Usoof had good grounds for believing that he was entitled to lot No. 4, and his claim of right must be considered as quite *bona fide*. A criminal prosecution such as this is wholly unsuitable for determining the question of title. This will appear obvious from one circumstance alone. Mohamadu Usoof is not an accused in this case, nor in any sense a party to the proceedings. He was only a witness, and as such could not be expected to go fully into his claim as though he were a party. All this shows that that the question between the Crown and Mohamadu Usoof, proprietor of Kotalanda estate, should properly be fought out in a civil action." I take my brother to mean, not that it is necessarily fatal to a prosecution that the accused sets up a *bona fide* claim of title, but that the particular claim in question was not one which could effectually be disposed in a criminal prosecution.

There is one case, however, in which the supposed principles of the previous decisions of this Court have been expressed in very much wider terms, namely, the unreported decision of Shaw J. in *Chena Muhandiram v. Julius* (*supra*). He there observed: "It has been held in a series of decisions that the provisions of the Forest Ordinance are not meant to give Police Magistrates jurisdiction to decide *bona fide* questions of title to lands." His decision in that case might conceivably be justified on the principles above explained, because it appears that in a Crown plan, dated some fourteen years before the case, the land in question had been described as "land claimed by natives." It might be said, therefore, that the dispute was an old one, but I do not think that his judgment

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was based upon this circumstance. The subject cannot have been very fully placed before him. His judgment is inconsistent with his previously reported judgment in *Obeyesekera v. Banda* (*supra*). In both cases the lands were in the Kandyan Provinces, and in neither case did the alleged title comprise either a Crown grant or a sannas. There is no note of that decision having been brought to his notice. In both the reported and in the unreported judgments, Shaw J. seems to be under the impression that this Court had determined that a *bona fide* claim of right ousted the jurisdiction of the Magistrate under section 4. I myself at one time shared that impression, but a careful examination of the previous decisions shows it to be erroneous. I do not think that the decisions of Shaw J. in *Chena Muhandiram v. Julius* (*supra*) ought to be regarded as representing his considered opinion, or to be treated as authoritative.

This then appears to me to be the effect of the previous cases (with the exception of the one last discussed). They do not say that a Magisterial Court ought not to try a case under this Ordinance where the accused sets up a *bona fide* claim of title. They cannot, indeed, have meant this, as such claims are the only claims which section 4 could have had in contemplation. The effect of the decisions of the Supreme Court in the *Punchirala* cases on the principles thus developed, I will consider after I have dealt with the second part of the Solicitor-General's argument, namely, that dealing with the doctrine of *mens rea*.

With that part of the argument, except as to one point, which I will discuss below, I find myself in agreement. I think he is correct in stating that for the doctrine of *mens rea* as it exists in our law, we must look exclusively to sections 69 and 72 of our own Penal Code.

Our own doctrine is undoubtedly based upon the English doctrine, and for the purpose of understanding the extent to which the English doctrine has been embodied in section 72 of our Code, it is necessary to give a brief account of that doctrine. It has been the subject of much judicial discussion and of certain expressions of judicial dissatisfaction. The best exposition of it will, I think, be found to be the judgment of Lord Esher (then Brett J.) in *Regina v. Prince*,[1] and of Stephen J. in *Regina v. Tolson*;[2] and the passage from *Mayne's Criminal Law of India* (*3rd ed.*) *pp. 242 et seq.*, cited by Ennis J. in *The Attorney-General v. Rodriguesz.*[3] It really consists of two parts: the first positive, and the second negative. As to the first, it appears to be simply that where a particular state of mind is a necessary ingredient of any offence either at common law or by Statute, the Crown must prove that that state of mind exists. With this aspect of the doctrine we need not concern ourselves. The second part relating to cases in which no such special state of mind is

[1] *(1875) L. R. 2 C. C. R. 154.*

[2] *(1889) 23 Q. B. D. at p. 184.*

[3] *(1916) 19 N. L. R. at p. 65.*

defined as being a necessary ingredient for the offence, but in which, nevertheless, the absence of *mens rea* is held to be an excuse. As is said in *Bank of New South Wales v. Piper:*[1] "The question whether a particular intention is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations." It is with this latter aspect of the doctrine that we are concerned.

The absence of *mens rea* is really a plea in justification. It is based upon a principle of construction applicable to criminal enactments. That principle is that in every criminal enactment creating an offence it is implied (even though it is not stated) that the person charged has a "guilty knowledge" of the existence of the facts which constitute the offence. Thus, in *Regina v. Cohen*[2] (which was concerned with the possession of Government stores) it was said: "It is true that the Statute says nothing about knowledge, but this must be imported into the Statute." This principle is not absolute, it is a presumption only. Certain exceptional enactments contain prohibitions which are interpreted as unqualified. The principal examples of such enactments are classified by Wright J. in his judgment in *Sherras v. De Rutzen.*[3] In such cases every man, whatever his knowledge, does the prohibited acts at his peril. Whether any particular enactment is of this character is to be determined by an examination, not only of the words of the enactment, but of its purpose and of its subject-matter. (See the judgment of Wills J. in *Regina v. Tolson (supra).*). The presumption with regard to every criminal enactment is that a "guilty knowledge" in the offender is implied. The presumption is liable to be displaced if it can be shown that the enactment belongs to prohibitions of this special nature. Brett J. in *Regina v. Prince (supra)* prefers to put it in another way. He says (at page 133): "The enactments do not constitute the prohibited acts into crime or offences against the Crown, but only prohibit them for the purpose of protesting the individual interests of individual persons or of the revenue."

This principle can only be made available by way of defence. When the definition or statement of the offence contains the word "knowingly," or some corresponding expression, it is for the prosecution to establish the guilty knowledge. Where it does not, it is for the accused to prove the absence of *mens rea.* As it is often put, the absence of the word "knowingly" merely shifts the onus. (See the judgment of Stephen J. in *Regina v. Tolson (supra).*)

What, then, is it that must be proved in order to establish the plea? This cannot, I think, be better put than by a quotation from the judgment of the Privy Council in *Bank of New South Wales v.*

[1] *(1897) A. C. at p. 389.*
[2] *8 Cox. C. C. 41.*
[3] *(1895) 1 Q. B. 918.*

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Piper (*supra, at p. 389*) : "The absence of *mens rea* really consists in a . . . . reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent."

Now, in English law the justification is co-extensive with the principle to which it refers. That is to say, it extends only to enactments to which that principle applies ; it does not extend to the absolute and unqualified prohibitions above referred to—prohibitions which every man must observe at his peril. In such cases proof of the absence of *mens rea* is not an answer. But in our own Code the principle above discussed appears only in the form of a justification or " general exception." There is no direct statement that criminality necessarily implies guilty knowledge. The whole of our law on the subject (leaving out for the moment sections 69 and 73) is contained for our present purpose in the sentence " Nothing is an offence which is done by any person . . . . who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it." Our Code is intended to be an exhaustive Code. (See *Kachcheri Mudaliyar v. Mohamadu* (*supra*).) We cannot, therefore, import into this chapter any principle of English law, except in so far as it is expressed or implied in these words. In other words, the formula can neither be extended nor limited by reference to the principles of the English law. It must be taken as complete in itself.

Our own formula is at once more extensive and less extensive than the corresponding principles of the English criminal law. It is more extensive, in that it applies to all enactments alike, including those which are above referred to, as imposing an absolute obligation. Thus, in *Regina v. Tolson* (*supra at page 173*) Wills J., speaking of Municipal by-laws regulating the width of thoroughfares, the height of buildings, the thickness of walls, &c., says : " In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement." This is English law, but it would appear not to be the law of Ceylon.

On the other hand, in another respect, our formula is less extensive than the English principle. What that principle is may be best expressed in the words of *Blackstone's commentaries* quoted in the judgment of Brett J. in *Regina v. Prince* (*supra*). Having said that "to constitute a crime against human laws, there must be first a vicious will; and secondly, an unlawful act consequent upon such vicious will," Blackstone proceeded to except " three cases in which the will does not join with the act." The third of these is as follows : " Ignorance or mistake is another defect of will when a man, intending to do a lawful act, does that which is unlawful ; for

here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man intending to kill a thief or house-breaker in his own house by mistake kills one of his family, this is no criminal action ; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder."

Now, in the view I take of the effect of section 72, ignorance is not the same as mistake. Mistake, to my mind, implies a positive and conscious conception which is, in fact, a misconception. Thus, to take the case of the man who was convicted of selling a medicine containing a " trace of ganja," dealt with by the judgment of my brother De Sampayo in *Casie Chetty v. Ahamadu*,[1] it does not seem to me that this man made a *bona fide* mistake about this trace of ganja. He did not know that it was there. He simply did not think about it, and cannot be said to have made a mistake on the subject. As I understand the matter, therefore, the English doctrine covers both ignorance and mistake, our own formula only includes mistake. It may also be noted that our definition of " good faith " (section 51) is perhaps rather more strict than the meaning generally imputed to that expression in the English law.

The materiality of the above discussion in its application to the present case is this, that though section 21 of the Forest Ordinance was undoubtedly, in my opinion, an enactment belonging to the special and unqualified class of prohibitions above referred to, and although the Legislature intended that every person, whatever his state of mind, must observe this prohibition at his peril, it is nevertheless subject to the provisions of section 72 of the Penal Code, and if a man who would otherwise have been an offender proves that he acted under a *bona fide* mistake of fact, this is a sufficient defence.

At this point I must refer to one of the propositions of the Solicitor-General. It is that the effect of the special enactment of section 4 of the Forest Ordinance was to exclude the application of section 72 of the Penal Code. He seems to think that the Legislature in authorizing the Court to try and determine questions of title intended that it should give judgment simply in accordance with its determination. It was possibly this contention which was referred to by my brother De Sampayo in his judgment in *Silva v. Banda (supra)* : " The Ordinance gives jurisdiction to the Magistrate to inquire into and decide the claim of title for the purposes of the criminal prosecution ; and that being so, it may be suggested that the question of offence or no offence turns upon the fact of title, and not upon the accused person's state of mind." I am not able to agree with this contention. It seems to me that section 4 of the Forest Ordinance and section 72 of the Penal Code are not

[1] *(1915) 18 N. L. R. 184.*

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inconsistent, and may be perfectly well applied together. The Court may have to determine, first, whether the accused had title; and secondly, whether, if he had not, he acted upon a mistake of fact.

This brings me to the decisive question in the case, namely, whether a person who has inherited or acquired chena land in the Kandyan Provinces, and has cleared the growth upon it in the belief that it is private land and that he is the proprietor of it, but is not able to show any Crown grant or sannas, has acted under a mistake of fact or under a mistake of law. The question is a question of some difficulty. Mr. Jayawardene cited a *dictum* of Lord Westbury in *Cooper v. Phibbs,*[1] repeated and adopted by Hall V. C. in *Jones v. Clifford,*[2] which is as follows: "It is said: *Ignorantia juris haud excusat,* but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."

In the first place, I would observe that, even if this *dictum* be accepted as authoritative for the present purpose, it does not carry Mr. Jayawardene home. Lord Westbury says: "Private right of ownership is a matter of fact; it may be the result also of a matter of law," but to come within section 72 a person must show that he acted "by reason of a mistake of fact, and not by reason of a mistake of law." A person, therefore, who acts by reason of a mistake of fact, which is "the result of a matter of law," does not seem to me necessarily to come within the section. I cannot follow the reasoning of Dr. Gour in paragraph 548 (*The Penal Law of India, 2nd ed.*), that a mistake of mixed fact and law is, for the purpose of this section, to be treated as a mistake of fact. The passage which he cites as his authority is concerned with the law of larceny and the meaning of *animus furandi,* which is governed by wholly different considerations.

The observations of Lord Westbury, however, are not concerned with criminal responsibility, but with the equitable doctrine of relief against common mistakes. The question of the extent to which equity could give relief in such circumstances does not seem to me to be necessarily governed by the same principles as those which relate to criminal responsibility. A Court of Equity may well give relief in a contract where the parties act under a common mistake as to their rights, though the plea of such a mistake by one of the parties might not be an answer to a criminal charge where he had committed an offence by reason of that mistake.

[1] *(1867) L. R. 2 H. L. 149 at p. 170.*
[2] *(1876) L. R. 3 Ch. D. 779 at p. 792.*

My brother Ennis appears to hold that a mistaken belief that the land in question was private land is, in all cases, a mistake of fact. I very respectfully differ from that conclusion. It seems to me that it cannot be affirmed in all cases that a mistake as to one's title to property is a mistake of fact. The question requires further analysis. In some cases the mistake may be a mistake of fact, in others it may be a mistake of law. Thus, to take the case decided by my brother Ennis, *Cumberland v. Dewarakkita Unnanse* (*supra*), in that case, it seems to me, the mistake was a mistake of fact. In that case the accused cut timber from Crown land, because he believed that the land from which he cut the timber was within his boundaries. His belief was based upon a survey and a path cut along what was believed to be the western boundary; it was proved that the survey and the boundary cut in accordance therewith was erroneous. Because of this mistake the defendant believed that the place where the trees were cut was not Crown property, but was private land. In this case, it seems to me, the mistake was a mistake of fact. Other instances of such a mistake, in the class of cases we are now considering, might be a mistake as to the boundary line of the Kandyan Provinces; a mistake as to the genuineness of a sannas which was in fact forged, or, in other cases, a mistake as to the fact of a marriage which was a necessary element in the title; a mistake as to a death or a birth or as to the date of the length of possession where prescription is in issue.

On the other hand, where the mistake as to a man's private rights is based upon a misconception of some general principle of law or the ignorance of some statutory enactment, then, it seems to me, his mistake is a mistake of law. Thus, to take an extreme case, supposing that a man in the maritime provinces knew that his brother-in-law had chenaed a land three times in succession in the course of ten years without interference by the Crown or anybody else, and supposing that he had the mistaken idea that a prescriptive title against the Crown should be acquired by ten years' possession and thereupon bought the land and chenaed it himself, such a man, in terms of section 72, by reason of a mistake, would in good faith believe himself to be justified by law in so doing, but surely there can be no doubt that his mistake would be a mistake not of fact but of law. So in the class of cases which we are now considering, for what reason do men, like the accused in the present case, who many years ago bought chena land on the basis of possession and notarial deeds, proceed to treat it as their own and clear it for cultivation? It is because they mistakenly imagine that ownership of such lands can be acquired by such a title. They do it because they have not realized that the decisions of this Court, taken in conjunction with section 6 of Ordinance No. 12 of 1840, have converted their deeds into waste paper. Had they known the law, they would neither have paid money for the transfer nor

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chenaed the land. Owing to a mistake of law, namely, a mistaken opinion that title to such lands can be based on deeds and possession alone, they in good faith believe themselves to be justified by law in clearing it.

With regard to the case of *Regina v. Hall* (*supra*) cited by Mr. Jayawardene, the state of mind there in issue was not merely mistake, but *animus furandi*. *Animus furandi* imports an intention to take from a person property which the taker knows or believes not to belong to him. It does not matter for this purpose whether the mistake of the taker is a mistake of fact or of law. If he takes the money under a claim of right, whether that claim is erroneous in law or not, he has not the necessary guilty intention. Nor can I think that there is any substance in Mr. Jayawardene's subtle plea that the title set up in this case is not an impossible title, but only a title which it is impossible to prove. *De non existentibus et non apparentibus eadem est ratio.*

I will now recur to the question as to what action should be taken by a Magisterial Court in cases under this Ordinance when a plea of title is set up. I leave out of account claims which appear to be dishonest. Such claims any Magisterial Court is entitled to ignore. If the claim arises incidentally, and it is necessary to decide the claim in order to give judgment on a criminal charge, then by section 4 the Magistrate is authorized to try it, and in ordinary cases should do so. He should certainly not refuse to try it simply because the claim appears to him to be made in good faith.

As Lascelles C.J. said in *Chena Muhandiram v. Banda* (*supra*): "There are many cases where this power may be exercised properly and without injustice to those concerned," and in making this observation, he was certainly not confining himself to claims not made in good faith. In the following classes of cases, however, that is to say:—

(1) Where the claim does not arise incidentally, but has already been the subject of dispute between the claimant and the Crown, and it appears to the Magistrate that the real object of the proceeding is not to protect Crown land, but to obtain an expeditious decision of the claim ;

(2) Where the questions involved appear to him to be of such intricacy and magnitude that he cannot effectually adjudicate upon them in ordinary summary proceedings ; and

(3) Where the circumstances are such that it would be essentially unfair that the rights of the parties interested should be determined by such proceedings ;

in all these cases he ought to refer the prosecution to a Civil Court.

I do not say that these cases are exhaustive. Others may present themselves in which the prosecution may seem to the Magistrate to be an abuse of criminal process.

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With regard to the cases we are now considering, namely, claims to Kandyan chena lands based upon notarial deed and possession alone, if these are of an ordinary character, it seems plain that the Magistrate should dispose of them. If he may justifiably dispose of claims which are arguable, still more justifiably may he dispose of claims which are not. But it seems to me that the principles I have above indicated apply to these claims as such as to any other claim, subject to this observation, that if the claim is a claim to chena lands based solely upon notarial deeds and possession, it is difficult to see how it could be put forward otherwise than incidentally. Such a claim would hardly now be the subject of serious dispute. Further, if this point is the only point in the case, it is difficult to see how it can be said that a Magisterial Court cannot effectually try it.

Speaking generally, I can see no harm in a Police Magistrate, in most of the chena cases that come before him, giving a decision on the question of title. The value of the lands in such cases is generally less than Rs. 300, and it cannot matter whether a Magistrate tries these claims as Police Magistrate or as Commissioner of Requests, and I do not see that it is of any assistance to the villager that as the result of a point taken for the first time in this Court he should be for a second time assailed in the Court of Requests. But it may very well come to the notice of a Magistrate that the state of the law as now disclosed is causing hardship and injustice. The law was for some time uncertain, and villagers may have spent money in acquiring chenas which they would reasonably believe to be private lands. It may even appear that a man is charged with chenaing land which had been in the possession of his family time out of mind. I would note this circumstance also. When Ordinance No. 12 of 1840 was passed, it appears from the words of section 6 that there must have been in existence a certain number of holders of chena lands who had no sannas, but who had nevertheless paid customary taxes. There are now no customary taxes, and consequently successors in title of such holders, if any such successors exist, could not produce receipts for the payment of customary taxes within twenty years, and so would be liable to ejectment. It is possible that there are no successors of these people in existence. Their lands may have been absorbed by estates, or Crown grants must have been obtained, but the existence of such persons is physically and legally possible.

If any such case of hardship, as I have suggested, come to the notice of a Magistrate, I do not think that he should decline jurisdiction, unless there were some other special circumstances in the case which made it . . . . "essentially unfair" that he should exercise it. But I think that it is very desirable that he should bring the facts to the notice of the Government Agent with a view to that equitable action which we are given to understand the

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officers of the Crown in such cases are always anxious to take. He may do this either by adjourning the case with a view to the circumstances of the case being considered by the Government Agent, or by imposing a nominal penalty and forwarding the record to the Government Agent.

Following the course adopted at the argument, I have reserved for the conclusion of this judgment the consideration of the facts of the case. These are simple, but not altogether usual. The accused bought the lands several years ago from his brother-in-law Hetuhamy. The accused produces two deeds, one of 1902 from Hetuhamy, the consideration of which was Rs. 100; and the other of 1906 from one Kirihamy, the consideration of which was only Rs. 10. An examination of the extent and boundaries produces the impression that this land is not the land he bought from Hetuhamy, but that it is Kirihamy's land, and Kirihamy's land alone. But the accused ought to have the benefit of any doubt in the matter. At a time fixed variously as from twelve to sixteen years ago, the accused cleared the land and planted it with plantains, coconut, arecanut, and other fruit trees; he built a hut on the land and lived there for about eighteen months, after which he apparently abandoned his plantations and let the jungle grow up again. The Gan-Arachchi knew of this plantation, but never reported it. In 1918 the accused cleared the land again and planted it in rubber. Still no action was taken, and it is only when the rubber had had nearly two years' growth that he was prosecuted.

For the first time, in this Court, it has been suggested that it has not been clearly proved that the land was actually chena. If the land was chena at the time of the first plantation, I do not think it ceased to be chena merely because after clearing it the accused planted it, not with dry crops, but with coconut and other trees; nor did it cease to be chena when, after the jungle had grown again, it was cleared and planted with rubber. At the time when it was so last cleared, there was nothing to distinguish it from other chena lands in the neighbourhood, except that these had been regularly planted, say, with kurakkan, whereas this on one occasion had a transient plantation of another character. I have not myself any reasonable doubt that the fact of this land being chena had been satisfactorily proved. The Chena Muhandiram in his evidence spoke throughout of the land being chena; so did the Gan-Arachchi. The case was twice before the Police Court, and the accused was defended by an experienced proctor, and it never appears to have been suggested that the land was otherwise than chena. I see nothing, therefore, in the facts to call for interference with the conviction, but the case seems to me eminently one for equitable treatment. The accused is an old man of sixty; he has known the land all his life; it appears to have been regularly chenaed. There was no interference by the Crown either with the accused or his

predecessors in title, and relying upon the security he thus enjoyed he has permanently improved it. It is only after the lapse of two years that he is now brought into Court. I would, therefore, reduce the fine to a nominal one of Re. 1, and would recommend the case to the favourable consideration of the Crown.

Ennis J.—

In this case the accused appeals from a conviction for clearing land at the disposal of the Crown in breach of the prohibition contained in section 21 of the Forest Ordinance, No. 16 of 1907.

The Chena Muhandiram, giving evidence for the prosecution, described the land as chena land, and as the land is in the Kandyan Provinces, the fact, if proved, would raise a presumption that it was the property of the Crown, a presumption that could be rebutted only by the production of a sannas or grant or proof that customary taxes, dues, or services have been rendered for such land, or for similar land in the same district (section 6 of Ordinance No. 12 of 1840).

For the defence the accused said he had purchased the land in 1902 and 1906, and he produced the conveyances. Hetuhamy, his vendor in one of the deeds, purported to sell the land and plantations. Both deeds recited that the land had been inherited by the vendors. Crown land is mentioned as a boundary on one side only in one of the deeds. The evidence shows that the accused planted the land sixteen or seventeen years ago in coconuts, of which only a few survive. He then planted rubber, which is now two and a half years old. It is in respect of the clearing, preparatory to planting the rubber, that the charge has been preferred.

The accused has been convicted upon the argument that a claim of right which is untenable at law is not such a *bona fide* claim as would oust the jurisdiction of the Court (*cf. Sourjah v. Faleela*[1]). In my opinion this doctrine has no application in the present case, because by section 4 of the Forest Ordinance the Police Court is specially given jurisdiction to try any question of title arising in the case, and no question of ouster of jurisdiction can arise. The real defence in the case is that the accused under a mistake of fact, and not of law, acted in a *bona fide* belief that the land was his by purchase. This defence is a general exception to all offences (sections 72 and 38 of the Penal Code). It is not the same thing as mistake, and the case of *Casie Chetty v. Ahamadu*[2] appears to have been decided on that basis. The distinction between ignorance and mistake is very fine. To say " I did not know that the land was land at the disposal of the Crown " is an admission of ignorance. To say " I thought this land was not land at the disposal of the Crown " is a plea of mistake, but it involves the corollary, " therefore I did not know it was land at the disposal of the Crown." Mistake

[1] *(1913) 16 N. L. R. 249.* [2] *(1915) 18 N. L. R. 184.*

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therefore, incidentally implies ignorance. In practice neither position is definitely taken up by an accused who narrates the facts and circumstances at the time and leave it to the Court to decide whether a reasonable person might, in the circumstances, have come to a mistaken conclusion. So a defence of a "*bona fide* claim of right" merely means that at the time of committing the act complained of the facts were such that any reasonable man would come to the conclusion that the act was right.

In this case the defence is, in effect, that the accused had no reason to believe that the land was land at the disposal of the Crown, because it has been in private possession for over (approximately) forty years, because it was surrounded on three sides by land similarly situated and privately owned, because the land bought from Hetuhamy had a plantation on it (*i.e.*, a permanent crop inconsistent with chena), and because everybody, including the Chena Muhandiram himself, thought it was private land. The question is purely one of fact, as to whether the accused *bona fide* believed the land to be private land. If mistaken in that belief, it would be a mistake of fact, which would fall under the general exception set out in section 72 of the Penal Code. The question of *bona fides* is really at the bottom of most criminal prosecutions for clearing forest, and if there is no *bona fide* belief, there is no mistake of fact. In my opinion the facts of the present case are such that the accused should be acquitted. The civil remedy will still be open.

De Sampayo J.—

There is a series of cases in which it has been held that where there is a *bona fide* dispute of title between the Crown and a person charged with an offence under the Forest Ordinance, the Police Magistrate should not convict as the result of a finding as to title, the provision of section 4 of the Ordinance not being intended to apply to such a case. It is unnecessary for me to refer to these cases in detail, as the Chief Justice, whose judgment I have had the advantage of perusing, has collected them and stated their effect. I need only say that in the cases which I myself had to deal with, I did not intend to hold that the jurisdiction of the Police Court was ousted, but only that in the presence of such circumstances as were indicated the Police Magistrate should not allow criminal process to serve an indirect purpose, and should leave the matter to be decided by a Civil Court, lest "a law calculated for wise purposes might be made a handmaid to oppression," as Willes J. put it in *Regina v. Tolson.*[1] I think still that the principle of the previous cases above referred to is right. In the present case we have to consider a different question, namely, whether, even in a case where the

[1] *(1889) 23 Q. B. D. at p. 175.*

Police Magistrate may properly exercise his jurisdiction under section 4 of the Ordinance, the accused may not plead want of guilty knowledge.

Mr. J. S. Jayawardene, for the accused, has, in the first place, submitted that an offence under the Forest Ordinance, like any other offence, cannot be committed without *mens rea*, and that a person who *bona fide* believes he has good title to a land as against the Crown has no *mens rea*. I agree with the argument of the Solicitor-General on the other side that the English doctrine of *mens rea* is not applicable to us, and that we must look to the Penal Code for any exception to criminal liability. Mr. Jayawardene next relied on the provision of section 72 of the Penal Code, which declares: "Nothing is an offence which is done by a person . . . . who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it."

By virtue of section 38 of the Penal Code this general exception is extended even to offences under any law other than the Penal Code. The Solicitor-General has contended that, inasmuch as section 4 of the Forest Ordinance gave jurisdiction to the Police Court to investigate the claim of title made by the accused, whether *bona fide* or not, the exception created by section 72 of the Code is rendered inapplicable to this class of cases. I am unable to agree with this contention. There is nothing in the two enactments which renders the one inconsistent with the other, and both are quite capable of having operation at the same time. I think the effect of section 72 of the Penal Code on offences of the Forest Ordinance must be considered.

Ordinarily there is no difficulty about the expression "mistake of fact." It is a misconception as to the existence of something which in reality does not exist. What, then, is a "fact" in this connection? I should say that it was something external to oneself. It cannot I think include a state of mind. It is, indeed, the supposed fact which produces the state of mind. The difference between "objective" and "subjective" well known in mental science is not an inappropriate distinction for the present purpose. Mr. Jayawardene's argument, as I understand it, is that the accused's belief on the strength of his deeds and possession that he had good title is "the fact," about which he was mistaken. I cannot accede to this argument. The mistaken belief is the result of a process of reasoning, whereby he gives legal effect to his deeds and acts of possession. This surely is a mistake of law and not of fact. I therefore think that the accused has not brought himself within the exception provided by section 72 so as to be exempt from criminal liability.

If I were to review the evidence, I should find it difficult to conclude that the land in question was "chena" at the time of the alleged offence. But as the argument centred on the question of

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law arising in the case, I shall say no more on the question whether the presumption of title in favour of the Crown under the Ordinance No. 12 of 1840 can be upheld. In the circumstances, while I think that the conviction should be affirmed, I agree that the sentence should be reduced as ordered by the Chief Justice, and also I would, if I might, support the Chief Justice's further recommendation for generous treatment of the accused by the Crown.

Schneider A.J.—

Under section 21 (1) read with section 3 and under section 22 of the Forest Ordinance, 1907, it is an offence to clear a chena not included in a reserved or village forest. This is an appeal from a conviction of having cleared such a chena. For the prosecution it has been proved that the land was cleared two and a half years before the date of the prosecution and planted with rubber; that it is chena land which had been cultivated with the usual chena products at intervals of eleven or twelve years; that it had been cleared about eleven or twelve years before the last clearing, and at the date of the clearing, which resulted in the prosecution, there was a jungle growth about eight years old. It was also proved that the chena was not included in a village or reserved forest. The appellant admitted the clearing. He pleaded that he had purchased the land by a deed dated 1906; that he cleared and planted the land about twelve or sixteen years before the date of the prosecution, and that no action had been taken by the Crown as regards that act. His vendor's title is set out as by inheritance. It is not disputed that the land is within the Kandyan Provinces, and that the appellant's title is not founded on a sannas or grant. It was not disputed in the lower Court that the land is chena. As arising out of the defence, four questions of law were discussed. I would summarize them as follows:—

(1) Whether the doctrine of *mens rea* of the law of England was applicable to the offence of which the appellant has been convicted?

(2) Whether the appellant could plead the exception contained in section 72 of the Penal Code so as to avoid a conviction?

(3) Whether the defence being a *bona fide* claim of right ousted the jurisdiction of the Magistrate?

(4) What is the effect and scope of section 4 of the Forest Ordinance?

The first question involves two distinct propositions: (1) Does the English law doctrine form a part of our criminal law; and (2) is *mens rea* as understood in the English law required for a conviction of an offence under section 22 of the Forest Ordinance?

It is necessary to inquire what the English law is on the subject of *mens rea*.

In the case of *The Attorney-General v. Rodriguesz*,[1] Ennis J. has embodied in his judgment a very instructive and useful passage from *Mayne's Criminal Law of India*. In this passage Mayne points out that the origin of the doctrine of *mens rea* is to be traced to the fact that the Common law of England attached names to certain crimes, such as treason, murder, &c., without defining what each crime consisted of. The meaning of the terms had in consequence to be gathered from text writers and from Case law. From these sources it was to be ascertained that a crime consisted, not only in the doing of a particular act, such as the killing of a man, but doing it with a particular knowledge or purpose. This superadded mental state was generally called *mens rea*. According to the history of the term, Mayne reduces the doctrine into this: "that nothing amounted to a crime which did not include all its necessary ingredients." As Mayne points out, the maxim is wholly out of place in a system of law such as ours, where under a Penal Code or other Statute law every offence is defined, not only with regard to the act, but with reference to the state of mind. But Mayne proceeds to say that there is a large and growing class of statutory offences where acts previously innocent are forbidden, or previously optional are commanded, from pure considerations of the interests of the State or of a particular class of the community. In regard to this class of offences, he points out that questions have frequently arisen whether a person is punishable when he has violated the provisions of the Statute in ignorance of the fact on which the violation depends. In such cases he states that it is now settled that the test is "to look at the object of each act that is under consideration to see how far knowledge is of the essence of the offence created." For arriving at a decision upon that question, he states that it has been held to be material to inquire (1) whether the object of the Statute would be frustrated if proof of such knowledge was necessary; (2) whether there is anything in the wording of the particular section which implies knowledge; (3) whether there is anything in other sections showing that knowledge is an element in the offence referred to in the section under consideration. He supports his statement by reference to *Regina v. Prince*;[2] *Regina v. Tolson*;[3] *Cundy v. le Cocq*.[4]

In *The Bank of New South Wales v. Piper*,[5] the respondent's stock which was under a lien to the appellant bank was sold by the respondent without the written consent of the bank. Under section 7 of the New South Wales Act, such an alienation was declared to be an offence. Sir Richard Couch, in delivering the judgment of the House of Lords, expressed himself thus: "It was urged in order to the constitution of a crime whether Common law or statutory there must be *mens rea* on the part of the accused, and that he may

[1] *(1916) 19 N. L. R. 65 at p. 68.*
[2] *L. R. 2 C. C. 151.*
[3] *(1889) 23 Q. B. D. 168.*
[4] *(1884) 13 Q. B. D. 207.*
[5] *(1897) L. R. A. C. 384.*

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avoid conviction by showing that such *mens* did not exist. That is a proposition their Lordships did not desire to dispute, but the question whether a particular intent is made an element of the statutory crime, and, when that is not the case, whether there was absence of *mens rea* in the accused are questions entirely different, and depend upon different considerations. In cases where the Statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent. The circumstances of the present case are far from indicating that there was no *mens rea* on the part of the respondent. He must be presumed to have known the provisions of section 7, whether he was actually acquainted with its terms or not. Then he knows that he had not the written consent of the mortgagee, and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known as *mens rea*."

It would appear, therefore, that there is nothing to support the proposition that the English law of *mens rea* has been imported into or forms a part of our criminal law. Nor is there anything in the origin of our criminal law to render such an importation necessary, because our law, unlike the English Common law, defines the ingredients requisite for each offence.

A Full Bench of this Court held, in *Kachcheri Mudaliyar v. Mohamadu*,[1] that the Penal Code had abolished such portions of the criminal law of England as had been imported into this Island. That is yet another reason for rejecting the proposition. The offence of which the appellant has been convicted comes within that class of offences which Mayne describes as Statute created out of pure considerations for the interests of the State. If the tests which he prescribes, and to which I have already referred, be applied to ascertain whether the appellant is punishable because he has violated the provisions of the Ordinance in ignorance of the fact on which the violation depends, it would become apparent that the object of the Ordinance would be frustrated if the onus lay on the prosecution in every case of an offence under section 21 to prove that the accused had knowledge that land was of a particular nature and was land at the disposal of the Crown. There is nothing in the wording of the section which implies such onus, nor is there anything in the other sections showing that such onus is upon the prosecution.

It is evident, therefore, that in this case all that the prosecution need have proved was that the appellant cleared a chena which is land at the disposal of the Crown, and not included in a reserved or village forest. To this charge any defence which is permissible

[1] *(1920) 21 N. L. R. 369.*

under chapter IV. of the Penal Code was open to the appellant for the reasons which I will state later. Even if our law permitted the appellant to plead the absence of *mens rea* on his part, the fact that the title he relied upon was one which was impossible in our law, as will be shown presently, and that this knowledge must be imputed to him, would constitute *mens rea*. There is still another reason why the English law doctrine of *mens rea* has no place in our law, and that is the existence of express provisions in our Penal Code of exceptions which may be pleaded in the nature of the absence of *mens rea* as understood in the English law. I would, therefore, hold that the doctrine of *mens rea* has no application to the offence of which the accused has been convicted.

Under the second question, which raises the applicability of section 72 of the Penal Code, the learned Solicitor-General argued that the effect of section 4 of the Forest Ordinance in vesting Magistrates with jurisdiction to adjudicate upon title to land being later in date than the Penal Code was to exclude the provisions of section 72 in regard to offences under the Forest Ordinance. I understood him to argue that as the Magistrate was empowered to try a question of title for the purposes of the prosecution, there was no room for the exceptions in section 72. The learned Solicitor-General appeared to have studied his brief carefully, and argued the whole of his case with much ability, but I find I am unable to agree with his argument on this point. I do not see that the provisions of section 4 necessarily exclude those of section 72. Even after the Magistrate had adjudicated upon the question of title, it is possible that there would still remain for adjudication the further question under section 72, whether the accused acted under a *bona fide* mistake of fact.

The effect of the definition of offence in section 38 (*b*) of the Penal Code is to render the general exceptions in chapter IV. of that Code pleadable even in respect of offences created by any law other than the Code. For the appellant it was argued that he was exculpated by the provision in section 72, which is as follows : " Nothing is an offence which is done by any person who by reason of a mistake of fact, and not reason of a mistake of law, in good faith believes himself to be justified by law in doing it." The appellant had acquired title by a deed dated 1906, he had cleared the land some sixteen years before the date of the offence, no charge had been made against him in respect of that act, he had therefore *bona fide* believed that the land belonged to him, and that he was legally justified in clearing it. It is true that his title was not one which could exist in the law, but the mistake was one of fact, not of law, viz., believing that to be his property, which in fact was not. The Solicitor-General conceded that the appellant had acted under a *bona fide* belief, but he contended that the appellant's mistake was not one of fact but of law, and the exception would not therefore save the appellant. I think the Solicitor-General's contention is right.

It is now settled law that no person can establish title to chena lands in the Kandyan Provinces as against the Crown, except by proof of a sannas or grant for such lands, or of payment of the customary taxes, as indicated in section 6 of the Ordinance No. 12 of 1840. The title relied upon by the appellant does not come within the above description, and is one therefore which the law would not recognize. The only mistake he made was in being ignorant that this was the law. He was not ignorant as to the facts relating to his title, nor as to the fact that the land was a chena within the Kandyan Provinces. He must be presumed to have known the law whether he was actually acquainted with it or not. It seems to me therefore that the mistake which the appellant would plead is a mistake of law and not of fact, and that section 72 therefore does not exculpate him. The word " mistake " in section 72 must be taken to include ignorance. Sections 69 and 72 are a paraphrase of the English Common law maxim in its application to criminal law. *Ignorantia facti excusat ; ignorantia juris non excusat.*"

I now come to the third question which was argued, whether the jurisdiction of the Magistrate was ousted by the claim of title pleaded by the appellant. His counsel contended that a *bona fide* claim of right ousted the jurisdiction of the Justices according to a well-recognized principle of the English law which had been adopted in our Courts. There could be no doubt as to the *bona fides* of the appellant's claim of title to the chena. The Solicitor-General met this contention with three arguments. His first argument was that the principle had no place now in our system, as the effect of the decision of the Full Bench in the case of the *Kachcheri Mudaliyar v. Mohamadu*[1] already mentioned was to repeal all those portions of the English law which had been imported into our law. I do not agree with him. The principle in question is not substantive law, but procedure. The Full Bench decision repealed only the substantive English law which had been adopted, not procedure. That decision therefore does not help his argument. The principle had been recognized and followed in our Criminal Courts for a very long series of years, and I am unaware that the question has been raised at any time of its not being a part of our procedure. Its existence as a part of our procedure was recognized by a Full Bench of this Court in the case of *Sourjah v. Faleela.*[2] I do not, therefore, consider this argument sound. His second argument was that the principle in question had no application in the case of prosecutions under the provisions of the Forest Ordinance, because by virtue of section 4 of that Ordinance. Magistrates are expressly vested with jurisdiction to adjudicate upon questions of title for the purposes of any prosecution. This argument is sound. The reason for that rule of the English law is thus expressed in *Hudson v. McRea.*[3]

[1] *(1920) 21 N. L. R. 369.*
[2] *(1913) 16 N. L. R. 249.*
[3] *(1864) L. J. R. (M.C.) 65.*

"When the question is one of fact, whether such a right as may exist in law does exist in point of fact, then title to property comes in question, and inasmuch as Justices cannot try that question, being an incompetent tribunal for the purpose, they should hold their hands on being convinced that the claim is *bona fide*." The reason for that rule of law, the absence of jurisdiction, therefore ceased to exist so far as offences under the Forest Ordinance are concerned. The maxim *Cessante ratione cessat lex* applies. The third argument was that as the result of the exposition of the law in regard to title to chena lands in the Kandyan Provinces in the cases of *The Attorney-General v. Punchirala,*[1] already referred to by me, the appellant's title is one which cannot exist in law, and therefore his claim of right does not operate to oust the jurisdiction of the Magistrate. The rule of law as to a claim of right ousting jurisdiction is well put in *Arnold v. Morgan,*[2] thus : "Where a claim of right is set up to do the act complained of, then, if upon the consideration of admitted facts it is clear that the law will not admit of the claim raised, the jurisdiction of the Magistrate is not ousted; but, if in order to decide whether a legal claim exists, it is necessary to determine some disputed question of fact, or if it is not clear that the right claimed is impossible in law, then the jurisdiction of the Magistrate is ousted." The proposition that an impossible claim of right does not oust the jurisdiction of the Magistrates is supported by a number of cases decided by English Courts, and also by a case decided by a Full Bench of this Court. I would mention *Hudson v. McRea;*[3] *Hargraves v. Diddama;*[4] *Cole v. Miles;*[5] *Arnold v. Morgan;*[2] and *Sourjah v. Faleela.*[6] I would therefore hold that the claim of right pleaded on behalf of the appellant did not oust the jurisdiction of the Magistrate.

As regards the fourth question, as to the effect and scope of section 4, since writing my judgment on this part of the appeal, I had the advantage of reading the judgment of His Lordship the Chief Justice. In view of his observations on this part of the appeal, I think I need say no more than that I entirely agree with them all. I also agree with the order he proposes should be made as regards the conviction and sentence of the appellant.

Conviction affirmed; sentence varied.

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[1] *(1915) 18 N. L. R. 152.*
[2] *(1911) L. R. 2 K. B. 314.*
[3] *(1864) L. J. R. (M. C.) 65.*
[4] *(1875) 10 L. R. Q. B. 582*
[5] *57 L. J. (M. C.) 132.*
[6] *(1913) 16 N. L. R. 249.*