Present: Pereira J.

SAMUEL *v.* SENATHIRAJAH.

708—P. C. Negombo, 20,261.

Bias—Expression of opinion by Magistrate before trial—Criminal trespass—Action for declaration of title—Is it advantageous to be defendant ?

Observations by PEREIRA J.—(1) On the impropriety and inexpediency of a Magistrate so expressing, in open Court, in the course of one case, conclusions that he has arrived at on the evidence as to give rise to the suspicion that he has already made up his mind to convict the accused in another case yet to be tried by him;

(2) On the erroneous and mischievous notion that it is more advantageous to go to the Civil Court as a party defendant than as a party plaintiff in a case for the vindication of rights to landed property.

Held, that a person who enters upon land in the possession of another and, with the sole object of molesting him in order to drive him to take legal proceedings for the purpose of having his (the trespasser's) own rights to the land adjudicated upon, remains on the land, and in fact commits acts of annoyance on it, is guilty of criminal trespass.

THE facts appear from the judgment.

J. Grenier, K.C. (with him *Samarakody*), for the accused, appellant.—The Magistrate was greatly prejudiced against the accused, and had expressed himself in very strong terms against accused in a case against another person. In the judgment in that case he says that the main culprit was this accused. He should not have tried this case under the circumstances.

There is not sufficient evidence to support the conviction for mischief.

The accused acted in the *bona fide* assertion of his right in entering on the land. He had no intention to annoy or intimidate any one.

The parents of accused's wife were married in community, and the mother predeceased the father. The mother's share devolved on all her children. The complainant's master claims the whole estate under a will of the father. The antenuptial contract does not affect the property acquired after marriage.

Counsel argued on the facts.

H. J. C. Pereira (with him *Allan Drieberg*), for the respondent.—It is clear from the evidence of the accused himself that his

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intention was to drive Mr. Muttunayagam to Court as plaintiff. His object was to annoy him and thus drive him to Court. The accused is therefore guilty of criminal trespass.

Counsel argued on the facts.

Cur adv. vult.

October 4, 1913. PEREIRA J.—

The Magistrate begins his judgment in this case by saying that the case is connected with case No. 20,057 of the Police Court of Negombo, in which Mrs. Brito and her son were convicted of criminal trespass on Dambawina estate; and counsel for the accused has invited my attention to certain observations made by the Magistrate in his judgment in that case, and based thereon a complaint against the action of the Magistrate in taking upon himself to try this case, having allowed his mind to be seriously prejudiced against the accused. On referring to the judgment in the older case, I find that the Magistrate says: "She (meaning Mrs. Brito) is a puppet in the hands of the man behind the scenes, Senathirajah, who will be dealt with in due course"; and further: "The main culprit (meaning the present accused) has not yet been dealt with." There is, so far as I can see, very little justification, if any at all, in the evidence in the case for these observations. Anyway, it is clear that the Magistrate approached this case in a frame of mind by no means calculated to inspire confidence in his ability to sift the evidence properly, and to arrive at a fair and dispassionate verdict. In one part of his judgment in the older case he says: "He (meaning the present accused), it appears, is an experienced litigant." Beyond the fact that the accused once sued his father-in-law for his dowry, and the matter was referred to an arbitrator, who awarded to the accused Rs. 10,000 and the estate promised, I can find no justification in the evidence for this observation. In the course of the argument in appeal I was anxious to know the foundation of the Magistrate's remark, and I looked in vain to the counsel engaged in the case for the information. If the Magistrate had formed so strong an opinion against the conduct of the accused as is indicated by the observations referred to above—indeed, if he had already made up his mind that the accused was the "main culprit," he would have done well to refrain from hearing this case. At the same time I am free to admit that there are minds so constituted that in spite of the strongest impressions formed in one proceeding they can bring themselves to bear on another with perfect impartiality; but it is now almost a trite saying that it is necessary that "judicial proceedings should not only be free from actual bias or prejudice of the Judges, but that they should be free from the suspicion of bias or prejudice." The observations referred to above were presumably read out in open Court, and whether the accused heard them then, or became aware of them since his trial,

it is but natural, as his counsel has contended, that there should be a lurking suspicion in his mind that justice has not been meted out to him. I would on this account quash the proceedings, but that the independent opinion that I have formed on the evidence for the prosecution is rather in favour of the accused; and the decision that I have arrived at, so far as it is adverse to him, is largely based on the evidence given by himself.

The accused has been fined Rs. 50 for mischief on a charge framed by the Magistrate *ex mero motu suo* after the commencement of the trial, the mischief being the cutting of the wire fence round the bungalow in the Dambawina estate. It is necessary to enter into the facts that are alleged to have led up to the cutting of the wire fence in order to test the veracity of the witnesses. Mrs. Brito, the accused in the other case referred to by the Magistrate, was at this time in the bungalow. The patch of ground within which the bungalow stood was enclosed by means of a wire fence, which had a wide gate on one side and a turnstile on another. The gate was guarded by a watcher, who might or might not allow anybody to pass and re-pass, and therefore the turnstile was of the utmost use to Mrs. Brito, for through it alone she and her servants had egress and ingress with the greatest freedom, and its removal was naturally calculated to inconvenience her. The turnstile suddenly disappeared, and in its place there was a stretch of wire fence. Who was responsible for this? Samuel, the chief witness for the prosecution, says: "The turnstile was removed by Mrs. Brito's men." Can this be true? In my opinion it is utterly false. It is certainly extremely improbable. Immediately after the turnstile disappeared, Mrs. Brito wrote letter K to the accused, in which she said: "The turnstile has been removed and barbed wire put in its place, the gate locked, three watchers are in front, and we are unable to go for water or to take a bath." This statement so promptly made corroborates the evidence for the defence. The accused came into the estate on September 9, and he says that one morning the inmates of the bungalow found the wire fence cut and the turnstile re-erected. In this evidence he is well supported by his witnesses, among whom is one Vincent, who appears to have been the assistant conductor of the estate. This man, of course, is charged by the counsel for the prosecution with having gone over to the enemy's camp, but there is nothing that I can see in the recorded evidence that supports the insinuation. Anyway, the evidence against the accused on the charge of cutting the wire fence is the evidence of the selfsame untruthful witnesses who attempt to support the charge against Mrs. Brito of removing the turnstile or causing it to be removed. I cannot believe them.

As to the charge of criminal trespass, the evidence is the evidence, more or less, of the same witnesses. The evidence of Baronchy should not certainly have been accepted. It depends largely upon

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what the accused is said to have told him through an interpreter. The interpreter was not called, and counsel for the accused properly objected to the evidence, but the objection was peremptorily over-ruled, with no reasons recorded.

The accused and Mrs. Brito have attempted to make themselves out to be persons with a grievance, and it is possible that they have a substantial grievance, but the question is whether that grievance can be said to justify their conduct. Their father-in-law, Mr. Brito, the original owner of Dambawina estate, appears to have devised the whole of his estate and effects to one child, and disinherited the rest of his children, the one child being the wife of Mr. Muttunayagam, one of the most prominent witnesses in this case. The testator, I suppose, had reasons for giving, and the sole devisee for taking, property depriving the rest of the children of their shares, and for making certain secret arrangements, as appears from Mr. Muttunayagam's evidence in the connected case, to comfort the unfortunates with some money as a solatium for their loss, but, in the circumstances, both the giver and the taker were naturally exposed to a great deal of opprobrium from those deprived of their inheritance. The accused and Mrs. Brito were smarting under the grievance; and it helped the accused, at any rate, to see in the antenuptial contract a meaning calculated to nullify partly the effect of the disposition in the will. The question raised in connection with the construction of the antenuptial contract, as explained to me by the accused's counsel, I will not say is not arguable, but, whether that be so or not, so far back as 1893 the accused's wife by her will devised to the accused an eighth share of Dambawina estate, and the accused had a conveyance for the same executed in his favour by the executor of the last will of his wife in February, 1906. Armed with this conveyance he was naturally awaiting an opportunity to assert his claim, and that opportunity presented itself to him when he received Mrs. Brito's letter of September 8, 1913. I do not think there is sufficient evidence to support the theory, accepted apparently by the Magistrate, that the accused and Mrs. Brito were acting in pursuance of a conspiracy. There are possibly grounds giving rise to a suspicion and nothing more, but suspicions should never be allowed to prejudice the position of an accused party in a criminal case. There is certainly no direct evidence that it was in pursuance of a conspiracy that the accused went to Dambawina estate on September 9, and I am not prepared to infer from the evidence anything other than that which it plainly indicates, namely, that the accused went to the estate in response to Mrs. Brito's invitation to help her in her distress there. When once in the estate, he found his chance to assert his own claim, and I have no doubt that he committed some acts which were calculated to cause annoyance to the occupants. With the exception of the cutting of the wire fence, which I totally disbelieve for

reasons given already, the evidence does not show that the accused was guilty of any very serious act of aggression, and the evidence, even so far as it goes, bears, to my mind, the impress of the grossest exaggeration. I would rather accept the version of the whole affair as given by the accused and his witnesses, but even so I cannot help thinking that the accused has brought himself within the penal provision of the law on the subject of criminal trespass. This offence is committed, not only by a person who enters into property in the occupation of another with a certain intent, but also by one who having lawfully entered unlawfully remains in the property with a similar intent. Now, the evidence of the accused is that he sent men to occupy what is referred to in the proceedings as the "pit bungalow" for the "purposes of a test case," and it is clear from his evidence that he did this and certain other acts of annoyance for the purpose of driving the possessor of the estate to take legal proceedings against him to test the validity of his claim so that he himself might figure in those proceedings as defendant, being under the impression that it was more advantageous to go to the Civil Court in the capacity of a defendant than of a plaintiff. I should like to pause here to say that this is an erroneous and mischievous notion which is entertained by some people in this country, and which is a fruitful source of crimes of violence. There was, perhaps, some excuse for it twenty-five years ago, but since then our laws of procedure and evidence have been so altered that it now makes practically no difference whether one enters at the open door of the Civil Court of his own accord as a plaintiff, or is obliged to do so as a defendant. This, I think, is a fact that should be widely known and appreciated in this country. The rigid rules as to pleadings of a quarter of a century ago have disappeared, and where the parties cannot agree, issues are framed after an oral examination, if necessary, of the parties, and it is made the duty of every Judge to brush aside legal quibbles and technicalities and to try to get at the actual facts, and give his decision accordingly. Then, in the field of the law of evidence many wholesome presumptions and many facilities for the proof of certain facts have been expressly provided for, and where facts are specially within the knowledge of a party, be he plaintiff or defendant, the burden of proving them is thrown on him. In this state of things it is absurd to say that a defendant in a civil action occupies a vantage ground any more than a plaintiff. But the accused in this case still entertained the old-world notion, and led himself to the commission of acts obnoxious to the provisions of the criminal law of the country. His defence, of course, is that he acted in the *bona fide* assertion of a right. Now, the *bona fide* assertion of a right is one thing, and the molestation of a person by acts not really necessary for the assertion of rights, with the only object of driving him into Court in order that he may take

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proceedings to enable the person molesting to obtain an adjudication on the right claimed by him, is another. Possession is vested with peculiar sanctity under the Roman-Dutch law. A person who has been in possession of property for a year and a day is not allowed to be disturbed, even by the rightful owner, without proper process of law. A person enters upon property in the *bona fide* assertion of a right when he enters with no object other than that of enjoying the benefits of the property to the extent of the right claimed by him, but in the present case the object of the entry, or rather of the remaining in the property after the entry, was, I might almost say, admittedly the molestation of the occupant in order to force his master into the Civil Court. I think that the accused is guilty of criminal trespass, but that, in the circumstances of the case, the ends of justice will be met by the imposition of a fine of Rs. 100.

I set aside the conviction and sentence under section 409 of the Penal Code. In view of the facts of the case, the order under section 418 of the Criminal Procedure Code and the order for security to keep the peace are, in my opinion, unnecessary, and I set them also aside. I vary the conviction under section 433 of the Penal Code to a conviction of the offence of unlawfully remaining in Dambawina estate (having lawfully entered into it) with intent to annoy its occupant Samuel, and commute the sentence to a fine of Rs. 100 (three weeks' simple imprisonment in default).

Varied.