1958 *Present :* **Sinnetamby, J.**

S. J. FERNANDO, Appellant, *and* E. G. HOLLOWAY, Respondent

S. C. 1138—M. C. Kalutara, 32,575

Criminal trespass—Penal Code, s. 427—"Occupation".

A charge of criminal trespass cannot be maintained against an accused where the criminal element alleged consists of an intention to annoy the person in occupation and where the person alleged to be in occupation is not in Ceylon at the time of the alleged offence.

APPEAL from a judgment of the Magistrate's Court, Kalutara.

Frederick W. Obeyesekere, for the accused-appellant.

M. M. Kumarakulasingham, for the complainant-respondent.

Cur. adv. vult.

July 4, 1958. SINNETAMBY, J.—

The main question that arises for decision in this case is whether a charge of criminal trespass can be maintained against an accused where the criminal element alleged consists of an intention to annoy the person in occupation and where the person alleged to be in occupation is not in the island at the time of the alleged offence.

It would appear according to the findings of the learned Magistrate that the accused had encroached upon property belonging to Enswella Estate of which one E. G. Wyke Holloway was the Superintendent. There had been some previous disputes between the parties in regard to the boundary but the learned Magistrate has found, and with that finding one cannot disagree, that the property encroached upon belongs to the estate and that the accused was fully aware of this when he deliberately entered upon it and erected a barb wire fence. This occurred on or about the 22nd November, 1956. It is also in evidence that Mr. Holloway had gone on furlough to England in May 1956 and returned to Ceylon only on the 10th December, 1956, and that there was a gentleman acting for him as Superintendent during this period. Although complaint of the accused's conduct was made to the acting Superintendent by the kanakapulle of the estate no action was taken till the return of

Mr. Holloway. The plaint was in fact filed on the 28th February, 1957. The accused was in due course charged with entering upon Enswella Estate with the intention of annoying Mr. Holloway. In defence of the accused it was contended that Mr. Holloway was not in occupation of the estate on the date of the alleged offence and that, therefore, the charge must fail. The learned Magistrate held against this contention and convicted the accused. This appeal is against the conviction.

In order to constitute the offence of criminal trespass as defined by section 427 of the Penal Code it is incumbent on the prosecution to prove *inter alia*

(*a*) that the entry was upon property in the occupation of another, and that

(*b*) the offender intended either to commit an offence or to intimidate, insult or annoy any person in occupation.

In the present case the learned Magistrate found that the accused was unaware of the fact that Mr. Holloway was not resident on the estate or in Ceylon at the relevant time: indeed, the accused admitted as much in his evidence. It was contended that, having regard to the previous disputes between the parties, the accused intended to annoy Mr. Holloway and that he must be presumed to intend the natural and probable consequences of his act, which would be to cause that annoyance. It is conceded that in order to establish the charge the prosecution must further establish that Mr. Holloway was in *occupation of the property*. While, in regard to the first of these two requirements, I am prepared to agree that upon the established facts as found by the Magistrate one may fairly and reasonably infer that the intention of the accused was to annoy the complainant, in my view the second ingredient has not been established.

Whether a person is in occupation of any particular premises is a question of fact and depends on the circumstances of each particular case. In *The King v. Selvanayagam* [1] the Privy Council took the view that the occupation must be a physical occupation. It is difficult, nay, impossible to lay down any hard and fast rules by which the question can be decided. Each case must be decided on the facts and circumstances established. I very much doubt, in view of the Privy Council judgment, that constructive occupation of the kind contemplated by Wood Renton, J. in *Rawther v. Mohideen* [2] would be sufficient to establish a charge of criminal trespass. Wood Renton, J. referred to a case of occupation by an owner or tenant through a caretaker. How, for instance, can it be contended that an accused person who knew very well that the owner or tenant is and was never physically present in the premises trespassed upon, intended by his entry to insult or intimidate such an absent owner or tenant? Would it not be more correct to assume that the entry was intended to insult or intimidate the caretaker who was in actual physical occupation. There may, however, be cases in which both the principal and the servant or agent are in occupation of the premises when different considerations would apply. In *Abraham v. Hume* [3] the Supreme Court took the view that while a labourer on an

[1] *(1950) 51 N. L. R. 470.* [2] *(1911) 1 Bal. Notes 2.*
[3] *(1951) 52 N. L. R. 449.*

estate is in occupation of his line room the Superintendent who resides on the estate is in occupation of the entire estate including the line room and premises within the estate on which a temple stands. In *Nallan Chetty v. Mustapha* [1] Sampayo, J. observed that the occupation contemplated by section 427 of the Penal Code implied " actual physical possession by oneself or an agent ".

In the present case the Superintendent, Holloway, had been away in Europe for about six months prior to the entry, it was not a temporary absence of short duration to a quickly accessible place close by ; there was an acting Superintendent who functioned in his stead and who certainly was not in a position analogous to that of an agent. A Superintendent is the agent of the owner : likewise an acting Superintendent too would be the agent of the owner and not the agent of the permanent Superintendent. In the circumstances of this case it seems to me it would be most unreasonable to hold that the estate was in the occupation of the permanent Superintendent who at the time was several thousand miles away. On the contrary the only reasonable inference would be that it was the acting Superintendent who was in occupation.

In my view the charge against the accused fails. I would accordingly set aside the conviction and sentence and acquit the accused.

Appeal allowed.