1938 *Present :* **Hearne and Keuneman JJ. and Wijeyewardene A.J.**

MUTTUCARPEN CHETTIAR *et al.* *v.* VELUPILLAI

61—D. C. Kegalla, 97.

Public Servants' (Liabilities) Ordinance—Promissory note given by an unregistered overseer in Public Works Department—Public servant at the time note was given—Public Servants' (Liabilities) Ordinance, 1899, s. 3 (3).

An unregistered sub-overseer employed in the Public Works Department is a public servant within the meaning of the Public Servants' (Liabilities) Ordinance.

Weerasinghe v. Wanigasinghe (*34 N. L. R. 185*) followed.

Held, further (KEUNEMAN J. *dissentiente*), the words of section 3, subsection (3), that it "does not apply to a liability contracted by a person prior to the date when he became a public servant" mean a liability contracted by a person at a time when he was not a public servant.

THIS was an action against the defendant on a promissory note made by him in April, 1930. The defendant was employed as an unregistered sub-overseer in the Public Works Department from 1926 to 1933 when he was discontinued owing to the policy of retrenchment. He was re-employed in June, 1935, and continued to be so employed at the time of this action. The case was referred to a Bench of three Judges on the following questions :—

(1) Is an unregistered sub-overseer a public servant within the meaning of the Public Servants' (Liabilities) Ordinance ?

(2) Is the defendant debarred from claiming the benefit of the Ordinance by reason of the fact that he was not a public servant from 1933 to 1935 ?

N. Nadarajah (with him *D. W. Fernando* and *H. W. Thambiah*), for plaintiffs, appellants.—The first question to be considered is whether an unregistered overseer, employed temporarily and paid daily, is a public servant. Section 2 of Ordinance No. 2 of 1899 defines the expression "public servant". Section 3 enumerates the various forms of contract in respect of which no action can be maintained against a public servant. The present action comes under section 3 (1) (c). It is necessary to examine section 3 (2). It speaks of a "fixed appointment". The evidence of the District Engineer refers to the terms of employment of the defendant.

[KEUNEMAN J.—Is not there any official document ?]

Unfortunately, no, but the evidence of the District Engineer is clear.

A similar case came up for consideration in *Weerasinghe v. Wanigasinghe* [1].

[KEUNEMAN J.—This decision takes away the point about "fixed appointment". Section 2 is wide. According to it, a public servant means a person employed in the service of the Government.]

[HEARNE J.—That is the point—service is sufficient. Conditions and incidents will not matter much.]

It has been held, however, that a person, employed as a tide-waiter at the Customs, is not a public servant—*Palaniappa Chetty v. Fernando et al.* [2] Wood Renton J. held in *Grigoris v. The Locomotive Superintendent* [3] that a mechanic employed on daily wages in the Government Railway is not a public servant.

Wood Renton J. has emphasised the requirement of a fixed appointment in *Perera v. Perera et al.* [4] It is essential that a person should have a fixed appointment, although he may not receive a regular salary. Further, there is the case of *Jayasinghe v. Jayatileke* [5], where Dalton J. held that a registrar of births, deaths and marriages is not a public servant. If the tests of permanence of employment and continuity of work, which Dalton J. emphasised, are applied, the defendant must fail. The position of an unregistered overseer would seem to rest on job-work. *Thirunayake v. Thirunayake* [6] is another case in point.

To interpret section 2, apart from opinions expressed in decided cases, section 3 (2) sets out clearly the requisites, viz., salary and fixed appointment.

[1] *34 N. L. R. 185.*
[2] *(1905) 1 A. C. R. 27.*
[3] *(1912) 15 N. L. R. 117.*
[4] *(1910) 13 N. L. R. 257.*
[5] *(1933) 35 N. L. R. 369.*
[6] *(1937) 39 N. L. R. 35.*

[KEUNEMAN J.—Would not an officer on probation be protected? Why should he be not regarded as employed in the public service?]

The sections should be interpreted as narrowly as possible, for they curtail the normal rights of creditors. This notion of fixed appointment is also endorsed by Sampayo J. in *Saibo v. Punchirala* [1]. I go the length of submitting that there should be salary also.

Assuming that the defendant is a public servant, the requirement of section 3 (3) has to be satisfied. It has been held that the Ordinance does not extend to a person who, having once been a public servant, has ceased to fill that character—*Narayanan Chetty v. Samarasinghe* [2].

[WIJEYEWARDENE A.J.—Has not the defendant to prove just two facts, viz., (1) at the time of the loan he was a public servant, and (2) at the time of the institution of the action, he is a public servant?]

No, he must be the same public servant. See section 3 (3). The ruling in *Narayanan Chetty v. Samarasinghe* has been adopted also in *Nagamuttu v. Kathiramen et al.* [3] The office referred to in section 3 (3) must be the same as that referred to in section 3 (1).

The vital date is the date of the institution of the action—*Parangodun v. Raman et al.* [4].

S. Nadesan (with him *C. Ranganathan*), for defendant, respondent.—In deciding the question as to whether an unregistered overseer is a public servant, the distinction between (1) a contract of service, and (2) a contract to do a piece of work should be remembered. The former is what is contemplated in section 2. The test which should be applied to find out whether a person is a public servant within the meaning of section 2 is whether there is an obligation on his part to render continued service. According to the evidence, the defendant (1) has to *take leave* whenever he wishes to absent himself, (2) is entitled to a gratuity after 15 years' service, and (3) is entitled to 7 days' leave *with pay* after service for 2 years. See the observations of Drieberg J. in *Weerasinghe v. Wanigasinghe* (*supra*). The obligation of an employee to render continued service does not depend on the period of service. The mode of payment of salary is also not a test. The decision in *Perera v. Perera et al.* (*supra*) helps the defendant on this point. See also *Parangodan v. Raman et al.* (*supra*) and *Saibo v. Punchirala* (*supra*). In *Thirunayake v. Thirunayake* (*supra*) the position of a public servant is distinguished from that of a public officer.

Section 3 (2) should not be read in such a manner as to stress the words "fixed appointment". The stress should rather be on "salary". The observations of Dalton J. in *Jayasinghe v. Jayatileke* (*supra*), are in conflict with the ruling in *Saravanamuttu v. Sittampalam* [5], and with the other decisions where the provisions of section 2 have been considered.

The purpose of Ordinance No. 2 of 1899 is to protect the public and not the particular public servant—*Narayanan Chetty v. Samarasinghe* (*supra*) and *Nagamuttu v. Kathiramen et al.* (*supra*). Section 3 (3) must be construed, therefore, with due regard to this purpose. It cannot

[1] (1915) 18 N. L. R. 249.
[2] (1907) 3 Bal. Rep. 243.
[3] (1907) 2 A. C. R. 165.
[4] (1936) 39 N. L. R. 47.
[5] (1934) 37 N. L. R. 98.

control the plain words of section 3 (1). As long as a person was a public servant when he made a promissory note, he cannot be sued if, at the time of the institution of the action, he is a public servant.

[KEUNEMAN J.—When did the defendant become a public servant, for the purpose of this case ?]

On the first date, *i. e.*, 1926. Section 3 (3) has to be construed restrictively as it is a proviso.

N. Nadarajah, in reply.—It is a rule of construction to give the same meaning to the same words occurring in different parts of a statute—*Beale on Cardinal Rules of Legal Interpretation, p. 358 (3rd ed.)* ; *Courtauld v. Leigh*[1]. It is important that the word "date" in sub-section (3) is preceded by "the" and not by "a" or "any".

Cur. adv. vult.

September 14, 1938. HEARNE J.—

This appeal which was originally before a Bench of two Judges has been referred to one of three Judges.

The defendant was employed by the Public Works Department in the capacity of an unregistered sub-overseer from 1926 to 1933, during which period, viz., in 1930, he executed a promissory note in favour of the plaintiffs. In 1933 he was retrenched and was re-engaged in the same capacity in June, 1935, and it is agreed that the defendant had rejoined the Public Works Department when the action was instituted.

Two questions require to be answered : (1) Is an unregistered sub-overseer a public servant for the purposes of the Public Servants' (Liabilities) Ordinance, 1899 ; (2) If so, did the defendant within the meaning of sub-section (3) of section 3 execute the promissory note sued upon prior to the date when he became a public servant ?

In regard to the second question, assuming that an unregistered sub-overseer is a public servant, it is clear that in relation to the period subsequent to the defendant's re-engagement (1935) the execution of the promissory note was before he became a public servant, and that in relation to the period 1926-1933 the execution of the promissory note was after he became a public servant. In construing sub-section (3) of section 3, I assume that the Legislature was aware of the fact that there are persons who become public servants, cease to be public servants and later become public servants again. Bearing this in mind and noting that there is no differentiation in the Ordinance between such a person and one who has been continuously in Government service, that is to say with no broken periods of service, I would interpret the phrase "a liability contracted by a person prior to the time when he became a public servant" to mean "a liability contracted by a person at a time when he was not a public servant", and in this view the defendant did not execute the promissory note at a time prior to the date when he became a public servant.

It may at first sight appear anomalous that the plaintiffs between 1933 and June, 1935, could sue the defendant and that after the latter date they could not do so, but I think the apparent anomaly vanishes when one considers the purpose of the Ordinance which is the protection, not of the individual, but the public.

[1] *(1869) L. R. 4 Exch. at p. 130.*

The next question is whether an unregistered overseer is employed in the service of the Government. He is given work when work is available and is paid only for the days on which he works. The provision of work only when available and the payment for such work at a daily rate do not in my opinion determine the question. The tests that have been applied by this Court are continuity of service and obligation to work. An unregistered overseer is under an obligation to present himself from day to day, for he cannot absent himself without leave ; he is liable, while he is an unregistered overseer in the books of the Public Works Department to be called upon to perform work at any time at the option of that Department, and he is bound to discharge the work he is called upon to do. The conditions of his employment, in my opinion, satisfy the tests both of continuity of service and of obligation to work.

The District Judge found in favour of the defendant and dismissed the plaintiffs' action. I would, therefore, dismiss the appeal with costs.

WIJEYEWARDENE A.J.—

The plaintiffs-appellants sued the defendant-respondent for the recovery of an amount due on a promissory note made by him in April, 1930.

The defendant was employed as an unregistered sub-overseer in the Public Works Department from 1926 to 1933, when his services were dispensed with, owing to the policy of retrenchment then adopted in the Government Departments. He was re-employed in June, 1935, as an unregistered sub-overseer and continues to be so employed up to date. The present action was instituted after the defendant's re-employment in June, 1935.

This case has come before a Bench of three Judges for the determination of the following questions of law :—

(1) Is an unregistered sub-overseer in the Public Works Department a public servant within the meaning of "The Public Servants' (Liabilities) Ordinance of 1899 ?"

(2) Is the defendant debarred from claiming the benefit of the Public Servants' (Liabilities) Ordinance, 1899, by reason of the fact that he was not a public servant from 1933 to June, 1935 ?"

The first question of law is covered by authority. In *Weerasinghe v. Wanigasinghe*[1], it was held by Drieberg and Akbar JJ. that an unregistered sub-overseer in the Public Works Department was entitled to claim the benefit of the Ordinance as a "Public Servant" within the meaning of the Ordinance. If I may say so, I agree with the learned Judges who gave the decision in that case and answer the first question in the affirmative.

The argument of the appellant's Counsel on the second question of law turns on the construction of section 3 (3) of the Ordinance. This sub-section provides that the protection afforded by the Ordinance does not extend to a "liability contracted by a person prior to the date when he became a Public Servant". It was argued for the appellant that the note in question was made before June, 1935, when the defendant became

[1] *(1932) 34 N. L. R. 185.*

a "Public Servant" on his re-employment, and the defendant was not, therefore, entitled to claim the benefit of the Ordinance, as "the date" mentioned in the sub-section could refer only to the date of re-employment and not to the date of the earlier employment.

It appears to me that the construction sought to be placed by the appellants' Counsel necessitates the reading of the sub-section as if, in place of the words, "when he became a Public Servant", the Legislature has used the words, "when he became *such* Public Servant".

It was, then, argued that, if it was possible for the sub-section to be so interpreted as to make the "date" refer to the date of the first employment, such an interpretation would result in giving protection to the defendant even in respect of a promissory note made by him during the period of unemployment between 1933 and June, 1935, as such a document would then be a document executed subsequent to the date when he became a "Public Servant". This was however effectively met by the respondent's Counsel who submitted that, in whatever way sub-section (3) was construed, sub-section (1) made it clear that a "Public Servant" could claim a benefit under the Ordinance only in respect of liabilities incurred by him when he was a "Public Servant", and therefore the defendant would, in no case, be protected from liability on a promissory note made by him between 1933 and June, 1935.

I think that the interpretation of this sub-section should be considered in the light of the other provisions of the Ordinance. The Ordinance seeks to protect public servants from certain liabilities enumerated in section 3 (1). The other sub-sections of section 3 are in the nature of exceptions engrafted to the general enactment which has been passed to prevent the Public Service from being obstructed as a result of legal proceedings against public servants. These sub-sections should not therefore be given an extensive interpretation tending to defeat the purpose of the Ordinance. A study of the provisions of the whole Ordinance shows that the Ordinance does not invalidate any document made by a "Public Servant". The object of the Ordinance is only to prohibit an action being instituted against a "Public Servant" in certain circumstances, and this is brought out clearly by section 4 which penalizes the person who brings an action in contravention of the Ordinance by providing that the document in respect of which the action was brought would become void as a result of the institution of the action.

In *Narayanan Chetty v. Samarasinghe*[1], it was held that the Ordinance did not prevent a person who had ceased to be a "Public Servant" from being sued on a note made by him when he was a "Public Servant".

In *Samsudeen Bhai v. Goonewardene*[2], it was held that a "Public Servant" who, when sued, failed to plead the benefit of the Ordinance was not debarred from raising the plea in execution proceedings against him in the same action, even though he had ceased to be a "Public Servant" at that stage.

The combined effect of these decisions is that the Ordinance prohibits proceedings against persons who are "Public Servants" at the time of the institution of such proceedings and if the proceedings are for the

[1] *(1907) 3 Bal. Rep. 243.*

[2] *(1935) 37 N. L. R. 367.*

enforcement of certain liabilities enumerated in the Ordinance, provided that such liabilities were incurred by a "Public Servant" at a time when he was a "Public Servant".

I am, therefore, of opinion that section 3 (3) does not exempt the note in question from the operation of the Ordinance, as the note was in fact, made after the defendant first became a "Public Servant" in 1926. If the note had been made during the intervening period of unemployment, an action could have been brought on the note, as the provisions of section 3 (1) which is the main section dealing with actions against public servants do not apply to such an action.

I answer the second question in the negative and hold that the appeal should be dismissed with costs.

KEUNEMAN J.—(*Dissentiente*).

This is an action on a promissory note brought by plaintiffs against defendant. A number of issues were framed, among them the following:—

(4) Is the defendant a public servant ?
(5) If so, is the action maintainable against him ?
(4) (*a*) Was the defendant a public servant at the date of the execution of the promissory note filed of record ?
(5) (*a*) If not, is he entitled to plead the Public Servants' (Liabilities) Ordinance ?

On the application of both Counsel, the issues (4) and (5) and (4*a*) and (4*b*) were tried first, and the learned District Judge held on these issues in favour of the defendant and dismissed the action with costs.

The defendant in this case is an unregistered overseer, employed by the Public Works Department. He was first employed in 1926. His employment was terminated in June, 1933, but he was re-employed in June, 1935, before the date of the present action. The promissory note was executed by him in April, 1930, during his first period of employment.

There is a distinction in the Public Works Department between a registered and an unregistered overseer. The unregistered overseer is appointed with the approval of the Provincial Engineer, and his services can be terminated with the consent of the Provincial Engineer. He is paid on the basis of a daily paid servant and gets payment only for the days he works. He is entitled after continued service for 2 years to sick leave with pay for about 7 days. He is entitled to casual leave and compulsory leave. He is not entitled to pension, but he is entitled to a gratuity after 15 years' service. He is not entitled to holiday warrants. He cannot keep away from work without the permission of the District Engineer. He can be discontinued when there is no work for him. There is no obligation on the part of Government to find him work. He is not on the permanent establishment of Government.

The registered overseer on the other hand derives his appointment from the Director of Public Works and cannot be dismissed without the approval of the Director. He can obtain leave with pay. He is entitled to holiday warrants, and to a pension. He is paid by the month.

Both classes of overseers are in charge of stores, *i.e.*, tools and other material, and according to the defendant, even an unregistered overseer has to provide security in a sum of Rs. 150 in respect of the stores, this sum being made up by contributions to Government of 4½ per cent. of his pay.

The defendant is now in the position of an unregistered overseer, paid at the rate of Re. 1.75 a day.

Two questions have been referred to us for decision,

(1) Is an unregistered overseer in the position of the defendant a public servant within the meaning of Ordinance No. 2 of 1899 ?

(2) If (1) is answered in the affirmative, does the fact that defendant was a public servant at the time he executed the promissory note and at the time he was sued enable him to plead Ordinance No. 2 of 1899, in spite of the fact that there has been a break in his service between those dates ?

As regards the first question, there is a direct authority in *Weerasinghe v. Wanigasinghe* [1], which the learned District Judge followed. In that case Drieberg and Akbar JJ. held that an unregistered overseer is a public servant under Ordinance No. 2 of 1899. We have to consider whether this case was rightly decided.

Section 2 of Ordinance No. 2 of 1899, defines "Public Servant" as "a person employed in the service of the Government of the Colony . . ." This is a very wide definition and makes no reference to permanency or fixity of service, or to receipt of salary or remuneration. The section does, however, imply that there must be a contract of service.

In *Palaniappa Chetty v. Fernando* [2], Grenier A.P.J. held that a tide-waiter was not a public servant, on the ground that he held no fixed appointment, but was a person who did job-work for which he was paid a daily wage getting 37½ cents a day when he worked, and if he chose not to work he could stay away. The fact that he was paid out of Government funds did not make him a public servant.

In *Perera v. Perera* [3], Wood Renton J. in a case where the defendant was paid by the day and was fined if he absented himself without leave, held that the defendant was a public servant, and apparently that he held a fixed appointment.

In *Saibo v. Punchirala* [4], de Sampayo A.J. held that a person holding the office of Arachchi and Police Headman was a public servant, although he was not in receipt of a salary. He added : "The servant, in order to be entitled to the benefit of the Ordinance must no doubt have a fixed appointment, but the appointment need not have a salary attached to it".

I have already pointed out that the words "fixed appointment" do not occur in section 2. Those words however are to be found in section 3 (2), which excludes from the operation of section 3 (1) a public servant "who at the time the liability sought to be enforced is contracted is in receipt of a salary in regard to his fixed appointment of more than Rs. 300 a month".

[1] *34 N. L. R. 185.*
[2] *1 A. C. R. 27.*
[3] *13 N. L. R. 257.*
[4] *18 N. L. R. 249.*

I am not clear why the words "fixed appointment" have been singled out for emphasis, nor why these words have been imported into the definition of the term "public servant". It is however possible that in view of the nature of this Ordinance which interferes with the right of contract between individuals, as strict a definiion as possible should be given to the words "employed in the service of Government". In considering what amounts to "service", I think we are justified in excluding service which is merely casual, and does not imply an obligation to perform the service on the part of the servant.

In *Weerasinghe v. Wanigasinghe* [1], one test which has been applied by Drieberg J. is continuity of service. He states: "The conclusion to be drawn from the evidence is that an unregistered overseer would ordinarily continue in the service of Government just as a registered overseer would. His services could be discontinued, if that be necessary, for such a reason as retrenchment, but so can the services of any public officer, but otherwise he would look to continuing service, and Government would not terminate his services so long as he was satisfactory".

This test of continuity of work also applied to *Jayasinghe v. Jayesinghe* [2], to the case of a registrar of births, deaths and marriages, and Dalton A.C.J. thought that such a person failed to satisfy the test. See also *Saravanamuttu v. Saravanamuttu* [3], where applying this test of continuing service Akbar J. held that a pay-agent under the Medical Department was a public servant.

I take it that a person who is employed by Government for a fixed term of continuous service would fall within the definition of a "public servant". The fact that the service is for an indefinite period would I think, make no difference, provided the service is continuous and that there is an obligation on the part of the person employed to render continuous service.

Applying this test, I hold that the defendant as unregistered overseer is a "public servant".

The second question referred to us depends on an interpretation of section 3 (1) and section 3 (3).

Section 3 (1) states, "No action shall be brought against a public servant . . . ." This certainly requires that the person sued should be a public servant at the time the action is brought. It does not extend to a person who once having been a public servant, has ceased to fill that character—*Narayanan Chetty v. Samarasinghe* [4]. It has been argued before us that under section 3 (*a*), (*b*) and (*c*) the person must have been a public servant at the time the liability was incurred, but I cannot read such a construction into these clauses. I am of opinion that section 3 (1) merely requires that the person sued should be a public servant at the date of action.

Section 3 (3) says, "This section shall not appply to a liability contracted by a person prior to the date when he became a public servant".

[1] *34 N. L. R. 185.*
[2] *35 N. L. R. 369.*
[3] *37 N. L. R. 98.*
[4] *3 Bal. Rep. 243.*

The question in the present case is whether that date is 1926 or June, 1935, for the purposes of the Ordinance, in other words the date of the first appointment or the subsequent appointment. The liability was contracted in 1930 between these two dates.

It was argued by Counsel for the appellant that the words "the date" in section 3 implied that the date referred to the date of appointment as such public servant. I think the use of the definite article may have some importance, but I prefer to rest my decision on another ground.

There have been in this case two dates on which defendant became a public servant. The plaintiff has established that the liability was incurred before the date when defendant became a public servant in June, 1935, and that is sufficient to give the plaintiff the right to claim that the case falls outside the Ordinance. With regard to an Ordinance like the present where the ordinary rights and liabilities under contracts are interfered with, I do not think we should strain the language of the Ordinance to secure immunity for the public servant. No doubt the immunity was created for the benefit of the public, but as the preamble of the Ordinance shows this immunity was "in respect of certain liabilities".

I do not think this interpretation is opposed to the spirit of the Ordinance. Clearly the defendant could have been sued at any time after he ceased to be a public servant and before June, 1935, and I do not think he should be allowed to escape a liability which was in existence at the time he became a public servant in June, 1935.

Further if we were to hold that the date mentioned in section 3 (3) was the date of the first appointment of the defendant, viz., 1926, the result would be that even liabilities contracted between June, 1933, and June, 1935, when defendant was not a public servant at all cannot be put in suit, as long as he remains a public servant. I do not think this is in accordance with the policy of the Ordinance.

It was contended that because defendant was a public servant in 1930, when the liability was contracted, and also was a public servant when he was sued, the Ordinance applies. I cannot see any language in section 3 (3) which warrants such an interpretation. If such had been the intention of the Ordinance, I think clear words would have been employed to express that intention. The difficulty in interpreting the Ordinance I think arises from the fact that the draftsman never contemplated more than one appointment, which continued from the date when the liability was contracted until the date of action.

I hold that the defendant is not entitled to avail himself of Ordinance No. 2 of 1899, and I accordingly set aside the order of dismissal of the action, and send the case back for trial of the other issues. The appellant is entitled to the cost of the inquiry in the Court below and of the appeal. All other costs will be costs in the cause.

Appeal dismissed.