1907.
September 10.

Present: Mr. Justice Middleton.

OGILVY *v.* CARUPPEN.

P. C., Kandy, 10,369.

Cooly, desertion by—Non-payment of wages—Set-off against advances—Express consent—Implied assent—Ordinance No. 13 of 1889, ss. 2, 6, sub-sec. (3).

Where the non-payment of a cooly's wages is sought to be excused on the ground that such wages have been appropriated in payment of a debt due by the cooly not falling under sub-section (3) of section 6 of Ordinance No. 13 of 1889, it must be clearly proved that the cooly consented to such appropriation.

Quære.—Whether implied assent is sufficient to justify such appropriation.

Scovell v. Mootammah [1] referred to and distinguished.

MIDDLETON J.—In my opinion, in every case where any appropriation of wages is made either specifically with consent or as of right under sub-section (3) of section 6, the individual cooly should, as a matter of equity and fair dealing, be made personally acquainted with the specific proposals of the superintendent, and have his opportunity of assenting or objecting.

THE accused was a cooly employed in agricultural labour on Nilamba estate, and was charged with quitting the service of the complainant on June 2, 1907, without leave, notice, or reasonable excuse. The Police Magistrate (T. B. Russell, Esq.) convicted the accused, and sentenced him to undergo one month's rigorous imprisonment. The facts are set out in the judgment of the Magistrate, which was as follows:—"The facts of the case are not disputed. Accused is an Indian cooly on Nilamba estate. It is the custom of that estate to pay two months' wages, and then with the coolies' consent set-off one month's against the advance account. Any objectors are paid their wages. In this instance it is in evidence that the accused was present at muster on April 3, 5, and 8, when the coolies were collectively told that their pay for March would be set-off against advances, and that if any one objected to this he should come up and give his name and get his pay. Some coolies did object and got their pay, but the accused did not do so, and he must, I think, be taken to have acquiesced in the appropriation; as I have said, I think this acquiescence is sufficient in law to prevent accused subsequently claiming the wages. Accused is about nineteen or twenty years of age, and his proctor urged that, being a minor, he could not contract a debt, and could not consent to an appropriation which was

[1] *(1906) 9 N. L. R. 83.*

prejudicial to him. I could not accept this argument. If accused has the power to sue for his wages, it seems to me only right to suppose that he has the power to consent to an appropriation of these wages."

The accused appealed.

H. Jayewardene, for accused, appellant.

Van Langenberg, for the complainant, respondent.

Cur. adv. vult.

September 10, 1907. MIDDLETON J.—

This was an appeal from a conviction for desertion under section 2 of Ordinance No. 16 of 1905, for quitting service without leave or reasonable cause by a cooly. The defence set up was that he had reasonable cause to leave the prosecutor's service, inasmuch as his wages were sixty days overdue. The defendant left the service on June 3, and his wages for March had not then been paid; but it was alleged by the complainant that with defendant's consent his wages for that month had been appropriated to the part payment of a debt alleged to be due by the defendant to the head kangany, and that by such agreed appropriation his wages for March must be considered as paid.

In the case of *Scovell v. Mootammah*[1] my brother Wood Renton held that the cooly who claimed reasonable cause for quitting service on the ground that 60 cents of her wages were overdue and unpaid for upwards of sixty days was not justified in so doing, inasmuch as she had impliedly assented to the adjustment of her indebtedness to the kangany by the superintendent's appropriating her wages to the payment of his debt, and that she accepted subsequent payments without demur, and left the estate without making any claim for the balance due to her, and did not come forward at the trial to give her version of the matter. There the appropriation was made in virtue of sub-section (3) of section 6 of Ordinance No. 13 of 1889, which imperatively ordains the debit to be made. I think also it was clear there that the defence was a mere specious one.

Now I have no doubt that an Indian cooly, like any other human being not under disability, may consent to his wages or pay being appropriated to the payment of any debt he likes, or even given away if he wishes. Under section 6, sub-section (3), of Ordinance No. 13 of 1889 the employer has power to debit the cooly without his consent with the amount of all advances of money made to him, and with the value of all goods, clothes, or other articles supplied to him during the period of service for which the wages are computed, and which the employer is not liable at law to supply at his own expense, when computing the amount of wages due to him for any period of service.

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MIDDLETON J.

Now, in the present case, I understood it was admitted that the debt against which the defendant's wages were appropriated did not fall under the amounts specified in sub-section (3), and therefore it could only be appropriated with the cooly's consent. It was certainly not proved that it was a debt which came within the terms of that sub-section.

The question, I think, is whether, in the present case, the cooly's consent appears to have been so clearly obtained to this specific appropriation that he cannot now deny that he was well aware that his wages for the month of March had thereby been paid, and consequently that he had no reasonable cause for quitting service without leave, and was therefore criminally liable.

The evidence as to the defendant's consent to this appropriation was that of Mr. Ogilvy, who stated that it was the custom of the estate to pay two months' wages and then take one month into advance account.

The coolies were asked on April 3 by the teamaker and on April 5 and 8 by the kanakapulle in the presence of Mr. Ogilvy, who understands Tamil, whether they wanted their pay. The accused, who was present, did not give in his name. Consequently his wages for March were taken to advance account. There is no evidence to show that the defendant consented to the specific appropriation now relied on, or that anything was done to stamp that fact as an accomplished agreement on the mind of the cooly, which he could not afterwards deny. The man was not called up, nor spoken to personally about the appropriation, nor asked if he consented, nor was he subsequently told that such a specific appropriation had been made and entered in the estate accounts. As a matter of fact, it should not be done, I think, until the man's consent is clearly obtained. I think also it would be extremely dangerous to carry the doctrine of implied assent to the extent demanded in this case. It seems to me, therefore, that the defendant had no sufficient reason to suppose that with his consent his wages had been specifically appropriated by his employer to the head kangany's debt. If he had no sufficient reason to think this, in my opinion he cannot be held criminally liable for quitting service without reasonable cause. It may be said that he had, at any rate, reason to suppose that his wages would be and were set-off against advances, but in my opinion, until the man personally and individually was called upon and acquainted with the proposals of the superintendent, he has reason for saying that he did not consent to the appropriation in question, where such consent is required.

In my opinion, in every case where any appropriation of wages is made either specifically with consent or as of right under sub-section (3) of section 6, the individual cooly should, as a matter of equity and fair dealing, be made personally acquainted with the specific proposals of the superintendent, and have his opportunity of

assenting or objecting. Proof of this indubitable consent in a case like the present is in my judgment indispensable, and should be provided for accordingly. The defendant here was not called as a witness to give his version, but I do not think the evidence given by Mr. Ogilvy required him to do so.

In my opinion this conviction must be set aside, and the defendant discharged on the ground that it is not proved that he consented to the specific appropriation of his wages for March so as to preclude him from setting up the defence that he had no sufficient reason to believe his wages for that month were paid, and therefore that he was entitled to quit service without leave. It is not necessary under the circumstances to consider the question of the defendant's minority.

Appeal allowed.