Ceylon, was intended to serve. The categories of "labourer" in this context cannot in my opinion either be limited or enlarged in the light of what the term means in other Ordinances and for other purposes. Many anomalies would result if it were otherwise. A "journeyman artificer" might well be regarded, I think, as a "labourer" under section 218 (*j*) although he falls outside the definition of a "servant" under the Service Contracts Ordinance. Finally, it would be strange, indeed, if a "kangani" of an estate with over ten acres under cultivation were found to enjoy greater immunity than a person performing similar functions for a lower remuneration on a smaller estate which is excluded from the operation of the Estate Labour (Indian) Ordinance.

The conclusion at which I have arrived is that the defendant has not discharged the onus of establishing that he is a "labourer" within the meaning and the spirit of section 218 (*j*) of the Civil Procedure Code. He cannot claim any special advantage over other judgment-debtors in this connection by relying, *simpliciter*, on the fact that he is an estate "kangani". It is a matter of common knowledge today that the services performed by kanganies vary widely from estate to estate. The question whether any of these persons is a "labourer" entitled to claim exemption from attachment of his "wages" must in each case be considered as a question of fact.

In my opinion the appeal should be allowed, but as the majority of the Court have decided otherwise decree must, of course, be entered in terms of the judgment of my brother Dias.

Appeal dismissed.

1949 *Present :* **Nagalingam J. and Windham J.**

CAROLISAPPU, Appellant, *and* ANAGIHAMY *et al.*, Respondents

S. C. 456—D. C. Tangalla, 5,617

Prescription—Adverse possession—Continuity between an intestate and his heirs—Prescription Ordinance (Cap. 55), s. 3.

The period of possession of an intestate person can be tacked on to the possession of his heirs for the purpose of computing the period of ten years required to acquire prescriptive title under section 3 of the Prescription Ordinance.

APPEAL from a judgment of the District Court of Tangalla.

C. E. S. Perera, with *T. B. Dissanayake*, for plaintiff appellant.

G. W. Wijayaratne, for defendants respondents.

Cur. adv. vult.

November 30, 1949. NAGALINGAM J.—

This is an appeal from a judgment of the District Court of Tangalla dismissing the plaintiff's action for declaration of title to an allotment of land on the ground that though the plaintiff may have the documentary title to it the defendants have acquired a title by prescription to the allotment as against the plaintiff.

One A. M. A. Carolis who was the owner of the land under Crown grant P1 of 1914 hypothecated the allotment with the plaintiff who put the bond in suit and at the sale in execution one David Silva became the purchaser thereof in whose favour deed of conveyance P3 of 1935 was duly executed. David Silva died, and his widow and children conveyed the land to the plaintiff by deeds P5 of 1936 and P6 of 1941. That notwithstanding the execution sale of 1935 A. M. A. Carolis continued to possess the land up till the date of his death in 1937 is clear from the evidence. It is also equally clear that after A. M. A. Carolis's death his widow and children continued in possession up to the date of the institution of the action which was on May 23, 1947.

Learned Counsel for the appellant contends that the possession of A. M. A. Carolis between the years 1935 and 1937 cannot be tacked on to the possession of his widow and children for the purpose of computing the period of ten years required to acquire prescriptive title under the Ordinance. He amplified his argument by asserting that it had to be shown either that A. M. A. Carolis had himself possession for ten years subsequent to the date of the execution sale against him or that the widow and children had possession themselves for a complete period of ten years before advantage could be taken of section 3 of the Prescription Ordinance by the defendants, and that it was not permissible to aggregate the broken periods of possession of A. M. A. Carolis and of the wife and children which separately did not amount to over ten years in each case. Learned Counsel relied upon two judgments of this Court in support of the proposition he advanced. One is the case of *Fernando v. Podisinno* [1] and the other an unreported judgment [2].

In the former of the two cases the facts were that a co-owner who had possessed in lieu of his undivided share certain divided portions of the common land and acquired a prescriptive title to the divided portions in transferring his interests conveyed not the specific allotments to which he had acquired a prescriptive title but his undivided interest in the entirety of the land. On a contest as to the right of the transferee to the specific allotments to which the vendor had acquired a title by prescription it was held that the transferee was not entitled to take advantage of the possession of his vendor but that if he relied upon prescription for his title he had to show that his possession had been for the required prescriptive period. The reason underlying the judgment is easy to see. The vendor did not convey the specific portions of his land and it cannot be said that the transferee was a person who was claiming under the vendor in so far as the specific allotments which he claimed were concerned. This case, therefore, is authority for the proposition that a person who does not derive his right to the land from another cannot fall back on the possession of that other in order to establish a prescriptive title but that he would have to establish it by his possession for over the prescriptive period.

In the latter case, too, the principle enunciated was similar. There too for a number of years well over the prescriptive period certain

[1] *(1925) 6 C. L. Rec. 73.*
[2] *S. C. 90–91 D. C. Kandy, 48,783, S. C. Minutes 11.11.40.*

successive owners had been in possession of a large tract of land. When a conveyance was executed by the last of these owners to the plaintiff, a certain parcel of land was omitted from the deed of conveyance. Plaintiff himself had not been in possession for over ten years at the date of the institution of the action by him against a third party trespasser. It was held that as the vendor had not conveyed the parcel of land, the plaintiff could not rely upon the prescriptive title of his vendor or of the latter's predecessors in title, for he was not one who was claiming the parcel under his vendor.

In the present case, however, the question that arises for determination is one that is altogether different. Here the question is whether the possession of an intestate and of his heirs can be added together for the purpose of computing the period of ten years' adverse possession. Under the common law, that the tacking of broken periods of possession of an intestate and his heir was permitted is clear from Voet[1]. Nathan also refers to this passage of Voet[2]. The proposition is viewed by him from the point of interruption of possession, for where an intestate possesses the land and before completing the full term required to confer acquisitive title dies, it may be said that there is an interruption of his possession by his death and that when the heir continues in possession, it is a possession distinct and separate from that of the intestate. It was having regard to this aspect of the question that Nathan states :

> "There are some cases of actual interruption where the possession is by legal fiction regarded as continuous. This happens where a property passes from a deceased person to his heir, from a seller to a purchaser and in the case of similar universal or particular successors."

Grotius too enunciates the same principle[3]. "The periods of occupation of a seller and a purchaser were reckoned together." This, no doubt, is set out by Grotius as the Roman Law, but no modification of that principle was introduced in the Dutch Law. When our Prescription Ordinance was enacted the Legislature merely embodied the common law when it permitted proof of possession by a defendant *or by those under whom he claims.*

In the case of *Charles v. Nona Hamy*[4] the question that arose was whether a fideicommissarius could call to his aid the possession of the fiduciarius. That a fideicommissarius is not a successor in title to the fiduciarius is a proposition well understood and hence it was that the contention was put forward that the possession of the fiduciarius cannot be relied upon by the fideicommisssarius in asserting a prescriptive title. Jayewardene A.J. in the course of his discussion of the law said :—

> "Section 3 of the Ordinance does not enact any new law when it says that a party can tack to his possession the possession of the person under whom he claims. It merely declares a well known principle of our common law which seems to obtain for all the countries where title to immovable property can be acquired by adverse and continuous possession for the prescriptive period."

[1] *Voet 41.3.16 to 20.*
[2] *Nathan Vol. 1, sec. 581, p. 354.*
[3] *Maasdorp's Translation, 3rd ed., p. 65, sec. 272.*
[4] *(1923) 25 N. L. R. 233.*

The law on the point is correctly set out by Mr. Balasingham in his *Laws of Ceylon*[1] as follows :—

"For the purpose of computing this period of prescription the possession of a deceased person and his executor or heir and of a person and his particular successor whether legatee or purchaser will be reckoned together."

I am therefore of opinion that the learned District Judge was right in tacking the possession of A. M. A. Carolis to that of the defendants in considering the question whether the defendants had acquired a title by prescription. Doubtless if such tacking is permitted the defendants have established possession by themselves and by the deceased Carolis for a period of over ten years. The judgment appealed from is therefore right ; the appeal fails and is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.

[ASSIZE COURT]

1949 *Present :* **Dias J.**

THE KING *v.* ARON APPUHAMY *et al.*

S. C. 51—M. C. Negombo, 58,395

Amendment of indictment—Adding name of new witness discovered after committal but before trial—Criminal Procedure Code (Cap. 16), sections 161, 172.

The Magistrate committed the accused for trial without examining a material witness whose whereabouts could not be traced. After the indictment was signed, but before the trial, the missing witness was discovered. The Attorney-General gave notice both to the accused and their legal advisers that he intended to move the Court of trial to amend the indictment by adding the name of the new witness. The defence was also supplied with a précis of the evidence which the witness was expected to give.

Held, that in spite of the repeal of section 161 of the Criminal Procedure Code by Ordinance No. 13 of 1938, the Court of trial had a discretion to allow the indictment to be amended under section 172 of the Criminal Procedure Code and to allow such witness to be called, provided no prejudice was thereby caused to the accused.

As a rule, an amendment of a charge or indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent ; but it should not be allowed if it would cause substantial injustice or prejudice to the accused.

ORDER made in the course of a trial before a Judge and Jury in the Western Circuit.

A. A. Rajasingham, Crown Counsel, for the Attorney-General.

Ian de Zoysa, for the accused.

December 15, 1949. DIAS J.—

Under the Criminal Procedure Code, before it was amended by Ordinance No. 13 of 1938, section 161 provided for the situation which has arisen in the present case. Under the repealed section 161 it was

[1] *Bal. Vol. 3, Pt. II, p. 295.*