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.*

provided that when evidence was discovered after committal, but before trial, it was open to the Magistrate to summon such witnesses, and it was also open to the Attorney-General to add the names of the new witnesses to the back of the indictment, provided a copy of the amended indictment was served on the accused. When the Magistrate recorded the fresh evidence it was not necessary for the accused to be present, but notice of such examination had to be given to the accused. Section 161, however, has now been repealed ; and it has not been reproduced in the amended *Chapter XVI* of the Criminal Procedure Code.

Therefore, the only provisions of the law which could govern this case are the group of sections 172 to 176 relating to amendments of charges and indictments.

I take it that the addition of the name of a new witness to the back of the indictment amounts to "an alteration" of the indictment. The power to amend a charge or indictment during trial is vested in the Court alone—*Rex v. Singho Appu*[1]. The Court may act either *ex mero motu*, or upon an application made by either side. When an application for an amendment is made, it is the duty of the Court to consider the merits of the application at once. It is irregular for the Court to adjourn the matter—*Rex v. Vajiram*[2]. As a rule, an amendment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent ; but an application to amend should not be allowed if it would cause substantial injustice or prejudice to the accused.

The question, therefore, which I must now decide is whether in allowing this application, any substantial injustice or prejudice will be caused to the accused. No prejudice can possibly be caused to anybody by allowing the truth to be made manifest. Therefore, if there is a witness who should have been called in the Magistrate's Court but who, owing to his absence, could not be so examined, it cannot cause injustice to the accused, provided they have every opportunity of testing the evidence of the witness by cross-examination on oath. It is admitted that the Crown has given notice to the learned defending counsel of its intention to call this evidence at the trial ; and Crown Counsel informs me that the gist of the evidence which that witness is going to give has been supplied to each of the accused in this case. Therefore, one must presume that the proctor for the defence and learned counsel Mr. Ian de Zoysa are both aware of the nature of the evidence the witness is expected to give. I understand that the defence have had about a month in which to make enquiries so as to be ready to cross-examine the witness. In the circumstances, therefore, although with some reluctance, I allow the application. I trust that applications of this kind will be more the exception than the rule. The desirability of amending the Criminal Procedure Code to bring into operation a section similar to the repealed section 161 is of course obvious and, no doubt, will not escape the attention of those responsible.

Application to amend indictment allowed.

[1] *(1883) 7 S. C. C. 51*

[2] *16 Bombay 414.*