1957 *Present :* **H. N. G. Fernando, J.**

W. A. NANDOHAMY, *et al.*, Appellants, *and* M. WALLOOPILLAI, Respondent

S. C. 1385–1387—M. C. Balangoda, 56934

Criminal trespass—Ingredients of offence—Penal Code, ss. 427, 433.

The provisions of the Penal Code as to criminal trespass cannot be availed of as a means of obtaining a determination upon what is purely a civil dispute.

The object of section 427 of the Penal Code is to penalise conduct likely to lead to a breach of the peace.

APPEALS from a judgment of the Magistrate's Court, Balangoda.

N. E. Weerasooria, Q.C., with *B. S. C. Ratwatte*, for the accused-appellants.

H. W. Jayewardene, Q.C., with *N. Kumarasingham* and *P. Ranasinghe*, for the complainant-respondent.

Cur. adv. vult.

March 21, 1957. H. N. G. FERNANDO, J.—

The three appellants have been convicted of committing criminal trespass by entering upon a certain land with a view to causing annoyance to the complainant who is the Superintendent of Nethimale Estate belonging to his father. According to the evidence for the prosecution, the alleged act of trespass was the construction overnight of a hut on a land called Ella Uda Hena stated to be " in the possession of the estate ". The proprietor said that he purchased Ella Uda Hena in 1945 from one Haramanis " so that he could go over it to the Estate ", and that a road was constructed thereon about 1953 ; on that occasion coconut trees had to be cut down but no claims for compensation by these appellants or any other persons were made. On 2nd August 1956, however, the Superintendent had received a message from one Carolis to the effect that these accused had constructed a hut on Ella Uda Hena the previous night, and when the Superintendent went to the spot he saw the 2nd and 3rd accused in the act of constructing a hut ; at the time of the trial the accused were living in the hut. Neither the Superintendent nor the proprietor stated that Ella Uda Hena was fenced

or that the land was actually in the occupation of the proprietor of the Estate, but the Headman said that there was a fence " between the two lands on the West of the land in dispute ", evidence which would seem to imply that there is no fence between Ella Uda Hena and the land immediately to the West of it.

The case for the defence was a claim of title to Ella Uda Hena, and the 2nd accused produced in evidence a deed of 1910 purporting to transfer to her brother an undivided half share of land called Ella Uda Hena. This accused claimed that the rights under that deed had been exercised by plucking coconuts from trees on the land in dispute. A witness Podiappuhamy who lives in a house near the disputed land stated that his residing land is called Ella Uda Hena ; that his residing land and the land in dispute are one land ; that Haramanis who sold to the proprietor was only entitled to a 1/6 share, and that the accused also had a share. According to this witness the 2nd and 3rd accused had lived in a house of his and when that house came down the witness had told the accused to put up the hut which is the cause of the present prosecution. Although the proprietor claimed title as sole owner of Ella Uda Hena and referred to the transfer of 1945 from the previous owner this document was not produced at the trial so that the conflicting claim of the accused based upon the deed of 1910 in favour of the brother could not have been rejected on the score that the estate proprietor was the sole owner ; on the contrary the failure of a person in the position of the proprietor to produce the deed in support of his claim at least raises a doubt as to the validity of that claim. All that was done to resist the deed of 1910 was to produce another deed which purports to be a revocation of the one of 1910, and the Magistrate does not appear to have realised that he could not properly have held the alleged revocation to be effective without investigating the question whether the earlier deed could legally have been revoked. There is nothing in the judgment to indicate that the Magistrate directed his mind to the question whether the entry of the accused upon the land was made in purported exercise of a *bona fide* claim of right, and the absence of any comment or discussion concerning this matter constitutes a failure to consider the defence which had been put forward.

The Superintendent did state in his evidence that he was annoyed at the conduct of the accused, but there is no finding that the entry was made with an intention to annoy ; here again there has been a failure to appreciate that the intention to annoy is an essential ingredient of the offence with which the accused were charged. Moreover the Privy Council in *K. v. Selvanayagam* [1] has pointed out that the object of the section was to penalise conduct likely to lead to a breach of the peace, but the conduct complained of in this case was not, in my opinion, conduct of the nature referred to in the judgment of the Privy Council. The land was not occupied as a part of the Estate in the sense that it was fenced off and thereby incorporated within the boundaries of the Estate, and, although the prosecuting witnesses stated that they were

[1] *(1950) 51 N. L. R. 470.*

" in possession " of the land, there was no evidence to indicate that the proprietor of the Estate or his agents were in actual occupation or enjoyment of that part of the land which had not been utilised for the purposes of the road. Counsel who appeared for the prosecution at the appeal relied on the case of *Samuel v. Senathirajah* [1] where it was held that an entry " with the sole object of molesting the possessor in order to drive him to take legal proceedings " constituted criminal trespass. But in that case it is quite clear that the accused admitted that his occupation of the complainant's land was made with that very object. In the present case, however, there is no such admission nor is there any evidence which would have justified a finding that the object of the accused was to force the complainant to take civil proceedings. The case is one, in my opinion, which falls within the principle recognised by the Privy Council and by this Court that the provisions of the Penal Code as to criminal trespass cannot be availed of as a means of obtaining a determination upon what is purely a civil dispute. The accused has set up a claim of title which could not, on the evidence, have been rejected as *mala fide,* nor can it be said on the evidence that their dominant intention was anything other than to erect a hut on a land in which they thought they held an undivided share. While it is clear that they failed to assert their claim by demanding compensation when the complainant cut down trees, I cannot think that this failure establishes beyond reasonable doubt that they have no faith in the title which their deed purports to convey. For these reasons the convictions are set aside and the accused are acquitted.

Appeals allowed.