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Present: Wood Renton J. and Grenier J.

PERIASAMY *v.* THE ANGLO-AMERICAN DIRECT TEA TRADING CO., LTD., *et al.*

69—*D. C. Kalutara,* 4,348.

Custom—Tundu—Employer is not bound to give tundu if the coolies refuse to go with the kangany.

There is no obligation on the employer to grant a tundu on the discharge of a head kangany for both himself and his coolies where the latter refuse to go with the head kangany or to be paid off from the estate.

THE facts are set out in the judgment of Wood Renton J.

Sampayo, K.C. (with him *Schneider*), for the appellants.—The first and second defendants are sued together for breach of contract. The second defendant was only an agent of the first defendant company ; he could not be sued with the principal for the breach of this contract. The plaintiff entered the service of the defendant company before the second defendant was appointed superintendent.

No custom has been proved by the plaintiff which would make it binding on the defendants to give the kangany and his gang a tundu when the coolies are unwilling to leave the estate, or to pay in the alternative the debts owing to the kangany from the coolies.

An employer who gives a tundu warrants that the coolies are willing to enter the service of another employer. It is clear therefore, that no custom can possibly compel an employer to give a tundu when the coolies are unwilling to go with the kangany. Counsel cited *Walker v. Cooke,*[1] *The Bambrakelle Estates Tea Co., Ltd., v. The Dimbula Valley Tea Co., Ltd.,*[2] 211—D. C. Kandy, 18,580.[3]

Bawa (with him *A. St. V. Jayewardene* and *Sansoni*), for the respondent.—It is a well-established custom obtaining in the planting districts to treat the kangany and the coolies as one body. When an employer of a labour force dismisses a kangany, he is bound to give the kangany a tundu. If the employer does not give a tundu, he ought to pay over to the kangany the amount of the indebtedness of the coolies. All the law prevailing in the planting districts is not contained in the Labour Ordinances.

[1] *(1910) 14 N. L. R. 161.* [2] *(1909) 2 Cur. L. R. 12.*

[3] *S. C. Min., May 18, 1911, reported in this Volume.*

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Many customs have acquired the force of law in the planting districts. Th evidence in this case establishes the customs which the plaintiff seeks to prove.

The usage or custom which the plaintiff seeks to prove is not contrary to law ; on the other hand, the Courts would appear to have recognized the custom to some extent in several reported cases. See *Newman v. Vetanayagam Kangany,*[1] *Imray v. Palawasan,*[2] *Whitham v. Pitchche Muttu Kangany,*[3] *Muttiah v. Ramasamy,*[4] *Baine v. Nallatamby,*[5] *Browne's Labour Laws, p.* 53. It is not necessary that the usage should have antiquity to support it. The usage may still be in the course of growth. It will be upheld if it appears to be well known and acquiesced, in so that it may reasonably be presumed to have been tacitly imported by the parties into their contract. See *Kumarappa Chetty v. The Ceylon Wharfage Co., Ltd.*[6] Custom may be proved even in the case of written contracts. Evidence Ordinance, section 92 (5). Counsel also referred to the Evidence Ordinance, sections 13 and 48 ; *Ameer Ali's Law of Evidence, pp.* 640 *to* 644 ; 2 *Walter Pereira's Laws of Ceylon, p.* 28.

Walker v. Cooke[7] does not appear to have been rightly decided. A planter giving a tundu can only place the coolies in a position to enter other people's service.

The claim against the first defendant is based on a contract ; the second defendant is liable in tort.

Cur. adv. vult.

July 24, 1911. WOOD RENTON J.—

In the view that I take of this case it is necessary to follow the course of the pleadings carefully. The plaintiff-respondent, Periasamy, formerly head kangany on Meddegedera estate, Alutgama, within the jurisdiction of the District Court of Kalutara, sues the Anglo-American Direct Tea Trading Co., Ltd., the proprietors, and Mr. N. F. Macrae, the superintendent, of the estate, under circumstances which are thus set out in the plaint. He alleges that about fourteen years ago it was agreed between the appellants and him that the former should employ him as head kangany, and the coolies whom he might bring along with him as labourers, on Meddegedera estate. He says (paragraph 3) that " the usual terms of such employment were well known and understood, and there was no express agreement in respect thereof." Paragraph 4 of the plaint is material :—

By a well-established custom obtaining in all the planting districts of Ceylon, a kangany is, when notice is given for the determination of

[1] *(1885) 7 S. C. C. 40.*
[2] *(1900) 4 N. L. R. 113.*
[3] *(1900 and 1902) 6 N. L. R. 289.*
[4] *(1903) 6 N. L. R. 323.*
[5] *(1905) 8 N. L. R. 258.*
[6] *(1905) 2 Bal. 180.*
[7] *(1910) 14 N. L. R. 161.*

his contract of service, or such determination is otherwise decided upon, entitled to receive from his employer a tundu setting out the total amount of the liability of himself and his coolies, and stating that on receipt of such amount the kangany and his coolies will be discharged from the employer's estate, and the kangany is entitled on payment of such amount to have his coolies discharged from the employer's estate.

The respondent proceeded to allege that, in pursuance of the aforesaid agreement, he and his coolies served the appellants on Meddegedera estate till July 13, 1910, when the appellants informed the respondent that they would not retain him in their service after August 13, 1910, and expressly refused to give a tundu to himself and his coolies, 330 in number, the names of whose sub-kanganies appear in a schedule annexed to his plaint. He goes on to say that from and after August 13, the appellants did not allow him to serve on the estate, and, although requested to do so, refused and neglected to grant him a tundu in respect of himself and his coolies, and that in consequence of such wrongful conduct on the part of the appellants, and by reason of the latter inciting and persuading the respondent's coolies to remain on the estate, in breach of an agreement between him and them, to which I will revert in a moment, he had lost all benefits and advantages derivable through the said coolies, was prevented from recovering from them their debts due to him, aggregating according to the particulars given in the schedule to the plaint to Rs. 23,024·12, although the amount is stated in the plaint itself to be Rs. 23,034·12, and had been greatly prejudiced in his chances of obtaining employment as a kangany. The alleged agreement between the respondent and his coolies is stated thus in paragraph 7 of the plaint :—

Each of the said coolies had, in consideration of certain advances made to him by the plaintiff and of the promise of certain other advances promised and agreed to and with the plaintiff that he would accept employment and work only on such estate or estates as the plaintiff might from time to time arrange so long as any portion of the said advances should remain due to the plaintiff, and that the amount of all such advances should be liquidated by the plaintiff receiving the amount thereof from the estate on which such coolies might be employed as aforesaid out of the wages due to such cooly for work done on the said estate in such proportion or instalments as such cooly would from time to time prescribe.

The respondent further alleged that he was entitled to receive from the appellants, as head money and commission in respect of work done by his coolies, a certain sum of money, which he was unable to estimate by reason of the appellants not having permitted him to work with his coolies, or to have access to the accounts kept on the estate, and also a sum of Rs. 464 which he had advanced to one Velu Kangany at the appellants' request,

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The various heads of his claim may be summarised as follows:— To the Rs. 23,034·12, the alleged indebtedness of his coolies to him, he added a claim for Rs. 2,000 damages, and also the advance of Rs. 464 to Velu. These figures yield a total of Rs. 25,518·12. In respect of the head money and commission, he prayed that the appellants be called upon to file a true and correct statement of the amount due to him as head money and commission, and that in default of their doing this they should be condemned to pay a sum of Rs. 1,000.

The appellants in their answer denied the custom stated by the respondent in paragraph 4 of his plaint, alleging that they had terminated the respondent's engagement as head kangany for lawful reasons and after due notice as from August 13, 1910. They admitted that the second defendant-appellant, Mr. Macrae, had as superintendent refused to grant a tundu to the respondent, on the grounds that the coolies belonging to his gang, not only had made no request therefore, but had refused to be paid off from the estate. The appellants further denied that the respondent had by any act on their part been prevented from recovering from the coolies any debts alleged to be due to the respondent from them. They pleaded also that the respondent could not maintain the action against the second defendant-appellant, who was only the agent of the first defendant company, and who, in fact, was not on the estate at the time when the respondent came there as head kangany. The appellants said that the accounts between the plaintiff and the coolies in his gang in connection with the estate had been looked into and stated monthly; that the respondent had at all reasonable times had access to the accounts, particulars of which were filed with the answer; that the total indebtedness of the respondent on August 13, 1910, was Rs. 9,810·44; that a sum of Rs. 8,225·51 was admitted by the coolies to be due by them; and that deducting that sum there was a balance of Rs. 1,584·93 due from the respondent to the first defendant company, which claim, however, was waived.

On these pleadings the following interminable array of issues were framed:—

1. Can plaintiff maintain this action against the second defendant, who is admittedly the agent of the first defendant?

2. Was it agreed fourteen years ago between plaintiff and defendants that the plaintiff and the coolies in his gang should serve the defendants on Meddegedera estate?

3. Was there an agreement as set out in paragraph 7 of the plaint between plaintiff and the coolies?

4. How many coolies had plaintiff in his gang on July 31, 1910?

5. Is there such a custom in the planting districts in Ceylon as set out in paragraph 4 of the plaint?

6. Even if there is such a custom, were plaintiff and the coolies in his gang employed on the footing of such custom?

7. Were the defendants justified in refusing to give a tundu for himself and the gang of coolies under him in August, 1910 ?

8. Was plaintiff, by reason of the refusal of the defendants to issue a tundu for himself and the coolies in his gang, prevented from securing employment elsewhere ?

9. Were the defendants justified in refusing to allow the plaintiff to work on the said estate after August 13, 1910 ?

10. Did the defendants incite and persuade the coolies in the plaintiff's gang to remain on the said estate in breach of any agreement between the plaintiff and his coolies ?

11. If so, did the plaintiff in consequence thereof lose all benefits and advantages derivable by him from the coolies in his gang, and was he thereby prevented from recovering the debts, if any, due from those coolies to him ?

12. What was the amount of the debts due from those coolies to the plaintiff ?

13. If issues 10 and 11 be answered in the affirmative, is plaintiff thereby entitled to recover from the defendants the sum of Rs. 23,034·12 or any other sum ?

14. Did the defendants, at the request of the coolies in the plaintiff's gang, transfer the said coolies into the charge of other kanganies ?

15. If so, had the defendants the right to do so without the consent of the plaintiff ?

16. What damages, if any, is plaintiff entitled to claim for the wrongful acts complained of against the defendants ?

17. What sum is due to the plaintiff for head money and commission in respect of work done by coolies in his gang ?

18. Is the plaintiff entitled to head money and commission after August 13, 1910 ?

19. Did the plaintiff at defendants' request advance Rs. 464·10 to Velu Kangany's gang ?

The case went to trial on these issues. The learned District Judge found on all material points in the respondent's favour, and, after making various deductions from his claim and setting off his indebtedness to the estate, gave judgment for the respondent for Rs. 11,500 with legal interest from the date of the institution of the action till payment, and with costs. From that judgment the present appeal is brought.

The appellants' counsel contends that, even if the District Judge is right in holding the appellants liable to the respondent, further deductions ought to have been made from the amount of the claim in respect of other coolies who had died or left the estate.

So far as can be gathered from the pleadings, both the first and the second defendants-appellants are sued for breach of contract. It is admitted, however, that the second defendant-appellant was not a party to the contract, and the evidence shows that, even if he had been, he was acting throughout as the agent of the first

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defendant-appellant. Under these circumstances, I do not think that the action can be maintained on the basis of breach of contract against him. It was argued, however, on behalf of the respondent, that if he had unlawfully induced the respondent's coolies to break their contract with him he would be liable in tort, and that under the Civil Procedure Code of this Colony there is nothing to prevent those two causes of action from being combined. I do not think that it is necessary to decide this point, which was not fully argued before us as regards the local law, for, in my opinion, the appeal must be allowed on all the other material issues.

There can be no doubt but that under the law of this Colony the relations between employers and their head kanganies on the one hand, and head kanganies and their coolies on the other, are regulated to a very considerable extent by custom. Where, however, a litigant seeks, as the plaintiff-respondent does in this case, to make his adversary liable for breach of an implied term added to a contract by custom, he must prove the existence, not only of a binding custom, but of one applicable to the particular situation disclosed by the evidence. The substance of the respondent's case here may be expressed thus. There is a well-established custom in all the planting districts in Ceylon by which, when notice is given to a head kangany for the determination of his contract of service, he is entitled to receive from his employer a tundu setting out the total amount of the liability of himself and his coolies. That is the custom, and, as regards this appeal, the only relevant custom, alleged in the plaint, for if the agreement set out in paragraph 7 is to be regarded as an alleged custom at all, it is one directly affecting the relations of the head kangany to his coolies, and not those of the head kangany to his employer. Even as between the head kangany and his gang, it has neither been alleged in the pleadings, nor shown by the evidence, to have any application to such a state of facts as existed in the present case. The appellants in their answer asserted by clear implication that there is no obligation on the employer to grant a tundu on the discharge of a head kangany for both himself and his collies where the latter refuse to go with the head kangany or to be paid off from the estate. It was incumbent, therefore, on the respondent to prove a custom obliging an employer to grant to a head kangany a tundu for himself and his coolies against the coolies' wish, if the evidence established the allegation of fact of the appellants on that point. It thus becomes necessary to ascertain what facts have been proved in the present case.

His Lordship discussed the evidence at great length, and continued :—

The position of the facts, as disclosed by the evidence, I take to be this. Through Periasamy's own absence and default his gang of labourers became disorganised. They were not willing to serve

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him any longer, and at the date when he left Meddegedara estate they would not have accompanied him, even if Mr. Macrae had given him a tundu for his labour force as well as for himself. Under these circumstances, was Mr. Macrae bound either by law, or by custom or usage having the force of law, to grant him such a tundu as he desired ? Admittedly, apart from alleged custom or usage, Mr. Macrae was under on legal obligation to grant such a tundu. I do not propose to examine in detail the so-called evidence of custom or usage which forms so considerable a part of the evidence in this case as well as of the judgment of the learned District Judge. As I have already said, there is no doubt that to a great extent the relations of employers and employees under the Labour Ordinances (No. 11 of 1865, No. 13 of 1889, and No. 9 of 1909) are governed by arrangements of convenience not to be found in any of these enactments, and that some of those arrangements may be entitled to be regarded as customs or usages having the force of law. So far back as the case of *Newman v. Vetanayagam Kangany,*[1] it was pointed out by Lawrie J. that coolies seldom contracted as individuals, but are members of a gang bound to kanganies, with whom the master contracts. In the case of *Imray v. Palawasan,*[2] Bonser C.J., stated the practice as follows :—

It is usual for the gang of coolies (for there is generally a gang under the headship of one kangany) to produce to the person with whom they wish to take service what is called a tundu, which is a written memorandum by the former employer to the effect that he is willing to discharge them from his service upon being paid a certain sum stated in the tundu, being the amount of their debts ; and it was proved to be the practice that the kangany should give to the new employer a promissory note for that amount after the new employer has paid it to the former employer. It was stated in the evidence in this case, and, in my opinion, proved, that these promissory notes are given by the kangany as security that the coolies would pay that amount by working it off.

It was held by the learned Chief Justice and Moncreiff J. that so long as the coolies worked on the estate the liability of the kangany on the note did not arise, although if the coolies ran away or died the employer could sue the kangany. In *Whitham v. Pitchche Muttu Kangany,*[3] Layard C.J. and Moncreiff J. took special cognizance of the same custom, and held that so long as there was no severance of the connection between the kangany's coolies and the estate the note could not be put in suit. Moncreiff J. said (*ubi supra, p.* 298) :—

But the moment it becomes impossible to reach the coolies and induce them to pay or work off the arrears, the kangany's liability becomes actual. Here the superintendent took the coolies out of the

[1] *(1885) 7 S. C. C. 40.* [2] *(1900) 4 N. L. R. 113, 116.*
[3] *(1900 and 1902) 6 N. L. R. 289.*

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defendant's hands and cut away the grounds of his responsibility. He exercised the right which he had never lost of dealing directly with the coolies, and put them under another kangany, from whom he exacted a note for the amount of the defendant's note. By so doing he not only changed the defendant's position, but discharged him from liability.

The law was laid down in similar terms in regard to promissory notes given by kanganies to head kanganies in *Muttiah v. Ramasamy*.[1] I may point out in passing that, under the decisions above referred to, the operation of such promissory notes is suspended so long only as the relationship between the coolies and their kanganies on the one hand, and the kanganies and head kangany on the other, is not served, and that immediately on such severance, unless it was produced by the act or the default of the superintendent, his rights against the coolies themselves and the head kangany would become enforceable. For the reasons that I have given above, I think that the disorganisation of Periasamy's gang in the present case was due to his own conduct, and that Mr. Macrae cannot be held responsible for the severance of the relationship between him and his gang. The cases above mentioned, therefore, will not help the present respondent. On the contrary, so far as they go, they indicate that where the relationship between the head kangany and his labour force is broken off through no fault of his employer, the employer is at liberty to protect himself as best he can by the use of his ordinary legal remedies against the coolies, his principal debtors, and the kangany who is their surety.

In this connection reference may be made to the evidence of Mr. Macrae :—

In issuing a tundu for a kangany and his coolies, it would be for the amount shown in my books as due to the estate from the kangany and his coolies. In this particular case, too, the debt was regarded by me as the debt of plaintiff and his coolies. The invariable custom is to regard such debts as due from the kangany and his gang. The head kangany is surety for the debt. So long as the coolies remain on the estate, I cannot sue the head kangany for the whole amount shown in the promissory note, but only for the sum admitted by the coolies as due from them. Invariably the promissory note is regarded as a security which cannot be sued on, unless the sum is irrecoverable from the coolies.

Mr. Bawa, the respondent's counsel on the appeal, admitted that the custom set out in paragraph 4 of the plaint is one that has not in this Colony received express judicial recognition. It is not supported by any of the evidence adduced at the trial. Mr. Bawa conceded that it was incumbent upon him to establish a custom applicable to the situation in which Mr. Macrae found himself. That situation,

[1] *(1903) 6 N. L. R. 323.*

according to the evidence, as I interpret it, was one in which he had to deal with a labour gang completely disorganised owing to the fault of Periasamy himself, refusing to work under Periasamy any longer, and insisting that they should be allowed to remain on the estate. There is not in the record a scrap of evidence showing that, by any custom or usage having the force of law, it was Mr. Macrae's duty under such circumstances to give Periasamy a tundu applicable both to himself and to his gang. It results from the evidence that the custom is for the head kangany to provide the labour force; that he signs a promissory note in favour of the estate for the amount of the advance; that, similarly, each of the sub-kanganies gives to the head kangany a promissory note for the amount of the indebtedness of his own group of coolies to himself; that the estate deals ordinarily with the head kangany alone; and that so long as his coolies are working on the estate, his promissory note in favour of the estate is not enforced. It was of these general customary relations alone that Mr. Macrae was speaking in the earlier portion of his evidence. "I have so far," he says, "been explaining the general relation of the estate to the head kangany, but without specific reference to the present case." I am not, of course, concerned at present with the changes introduced into the labour laws of Ceylon by Ordinance No. 9 of 1909. I am speaking only of the custom apart from that Ordinance. The weight of the evidence recorded in the present case shows that a tundu is not given for the total amount of the kanganies' indebtedness to the head kangany where the amount of that indebtedness is in dispute. The evidence of Mr. Macrae, as quoted by the District Judge himself, is to this effect:—

> The amount must be agreed upon, otherwise I would refuse a tundu. Unless a cooly admits the amount stated by the kangany, I would not ordinarily give him a tundu.

Mr. Ash says on that point that if the sub-kanganies did not own up to the figures as supplied by the head kangany, he would in exceptional cases allow them to leave. Periasamy does not himself allege that the custom was different. His evidence is as follows:—

> The coolies I engage cannot leave without paying my claim. That is the custom, and my coolies understand that .... If I were leaving an estate with my gang, and ten people declined to go with me, and the superintendent were willing to retain them, he must pay their debt to me.

> A cooly wishing to leave must get his account from me, and get a tundu from the superintendent for the amount as given by me. If he brings the money the man can go. That money is credited to the advance. If the cooly does not admit my claim, the accounts will be gone over again.

Again :—

If I and my coolies want to leave, we get a tundu for the amount due to the estate. The superintendent would not give us a tundu for a larger sum than the actual debt.

If coolies desiring to leave do not admit my claim, we will go to the superintendent and produce our documents and settle the matter. That is the custom on some estates, not on others. It was not the custom on this estate. On our estate the matter would be discussed and referred to the oath. If we cannot settle the matter, we will have to go to Court. That is, to find out the correct amount. In such a case no tundu will be issued. If the matter is not settled, the cooly will not bolt. But the dishonest man will give notice. Coolies do bolt. The dishonest do. If he leave with notice, I can only sue him to recover the debt.

The only evidence to the contrary was given by Naiaken, one of the appellants' witnesses, and by Suppaiyah Kangany, a witness for Periasamy. Naiaken says :—

As a matter of fact, I cannot leave without paying the debt. The superintendent will not give a tundu for less than the head kangany claims.

Suppaiyah's evidence is this :—

They cannot leave the estate without paying off my debt. They cannot be transferred to another head kangany without my consent. if they want to go to another estate and leave me, the accounts must be looked into with the coolies. That is taken to the superintendent, and he will give a tundu for that amount. If there is a dispute between the cooly and me, the superintendent will take the word of the head kangany. If the matter is not settled like that, the tundu will not be given.

Suppaiyah supplemented this evidence in cross-examination :—

If (the coolies) wish to leave, the accounts must be looked into and a tundu given. He must give a tundu. He cannot refuse. If he does, I do not know what will happen . . . . If the coolies dispute the amount of my claim and ask for a tundu for their amount, the tundu will be given for the actual amount due.

It is by no means clear to my mind that Naiaken intended to say anything more than that he was bound to pay the real debt due by him to the head kangany, whatever it was. The evidence of Suppaiyah is obviously inconclusive on the point. At one moment he speaks of the superintendent taking the head kangany's word. In the next he says that if that course is not adopted, the tundu will not be given. Then he does " not know what will happen." Finally, we are told that the tundu will be given for the actual amount due. Even if these two witnesses had given unequivocal

and positive evidence in support of the existence of such a custom, it could not outweigh the evidence of Mr. Macrae on the one hand and of Periasamy on the other, showing that a tundu is not given where the amount of the indebtedness of the head kangany is in dispute, and that the actual amount of the debt must first be ascertained, either to the satisfaction of both parties or by legal proceedings.

I may refer at this point for a moment to the strictures passed by the learned District Judge on the course taken, in the first instance by Mr. Macrae, and Mr. Pattle, and later on by Mr. Macrae and Mr. Ash, in accepting from the kanganies promissory notes for the amount of their indebtedness. It appears that, after Periasamy's return from jail, promissory notes were signed in a number of instances for the amount originally shown in Periasamy's books to have been due, but at first disupted by the coolies. The learned District Judge severely condemns the conduct of Mr. Macrae, Mr. Pattle, and Mr. Ash in having accepted from them at an earlier stage notes for less than the indebtedness ultimately admitted. " I consider," he says, " the second accounting by Ash nothing more or less than a large bribe to induce the plaintiff's gang to stay behind." Mr. Macrae's " tactics " he contrasts with those of the unjust steward, who, by a similar fraudulent device, made for himself friends with the mammon of unrighteousness. I do not intend to quote the District Judge's observations on this part of the case at length. They appear to me to be founded on an inaccurate and perverted view of the evidence. I have pointed out in an earlier part of this judgment that neither Mr. Macrae nor Mr. Pattle—and the same observation applies to Mr. Ash—was asked a single question in cross-examination which could lay any foundation for the District Judge's censures. Pachchi Muttu Kangany in cross-examination stated that Mr. Ash had declined to make out his note for the full amount that he admitted. Mr. Ash was not questioned as to this incident, and the District Judge says that he " refused to believe it." There is nothing in the evidence of any of the other witnesses to show that they were acting in bad faith, or with any desire except to deal with the difficult situation in which they found themselves fairly, honestly, and in the best interests of all parties concerned. I have referred to the question of the accounting here for the purpose of quoting an observation made by the learned District Judge in regard to the alleged custom above referred to. " Here was the superintendent," he says, " offering to take promissory notes from them " (the coolies) " at their own reckoning, in spite of the admitted custom that it is the head kangany whose word must prevail if no settlement can be arrived at." I may remark in passing that the evidence shows that it was Periasamy's gang, and not the superintendent, that took the initiative in the matter, and that every reasonable effort was made by Mr. Macrae and his assistants

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to get promissory notes for sums as nearly as possible identical with the actual debts. But that by the way. The point of importance is to note the District Judge's assertion that there is an " admitted custom " by which the head kangany's word must prevail if no settlement can be arrived at. The existence of any such custom is disproved by the evidence. Mr. Bawa strenuously argued that, even if he had not established the precise custom pleaded in paragraph 4 of the plaint, he was entitled to show, and had shown, the existence of a custom by which, if the superintendent of an estate declined to grant to a head kangany a tundu for himself and his coolies, he was bound if he allowed the coolies to remain on the estate, to pay over to the head kangany the whole amount of their indebtedness to him, even if it was in excess of the amount of the head kangany's indebtedness to the estate. No custom to this effect was pleaded, or formed the subject of an issue, at the trial, or is dealt with in the evidence, unless an allusion to it is to be found in the passage cited above from Periasamy's re-examination, in which he says that on his leaving the estate the superintendent must pay the debts due to him by any coolies who declined to go with him before continuing to employ them. It would be unfair to the appellants to allow a plea, the decision of which obviously must be entirely dependent on *vivâ voce* evidence, to be raised for the first time in appeal. The respondent must be restricted to the custom which he has set up in his plaint. I may add, however, that in 211 D. C. Kandy, 18,580,[1] the alleged alternative custom referred to by Mr. Bawa was dealt with by Lascelles C.J. and Middleton J., and was held not only not to have been proved, but to be manifestly unreasonable. " The proprietor," says Lascelles C.J., " has no control over the advances made by the head kangany to the sub-kanganies, and he could not equitably be held responsible when the amount of these advances exceeds the head kangany's debt to himself."

On the whole case I hold that no custom or general usage of the kind alleged in paragraph 4 of the plaint has been proved. Even if such a custom had been proved, it would, in my opinion, be an unreasonable one, in view of the state of the law in Ceylon as to what the grant of a tundu implies. In *Walker v. Cooke*[2] Sir Joseph Hutchinson C.J. and Middleton J. held that a planter who issues a tundu undertakes, not merely that he will discharge the indebtedness of the coolies to him and leave them free to go, but also that the coolies are willing to transfer their service to another employer. In the present case Mr. Macrae was not in a position to give any such undertaking, and it would be unreasonable that he should be compelled to incur what might be a heavy legal liability to a third party by giving it.

[1] *S. C. Min., May 18, 1911 (reported later).* [2] *(1910) 14 N. L. R. 161.*

Periasamy's claim for Rs. 464—his alleged advance to Velu's gang—relates to a debt due to him, not by the estate, but by the gang ; and in view of my interpretation of the facts of this case, and of the law applicable to it, I think that he is not now entitled to recover that sum. The same observation applies to any claim for head money or commission subsequent to August 13, 1910. I have carefully considered the question whether Periasamy ought to be credited with the amount of the head money admittedly withheld from him for the months of February and March, 1910. During the argument of the appeal we invited counsel on both sides to arrive at an agreement as to what the amount, if allowed, should be. The appellants' counsel has estimated it at Rs. 131.80, and this estimate has been accepted by counsel for the respondent as correct. Mr. Macrae's evidence, however, shows that while a head kangany in charge of several divisions of an estate is entitled to head money and commission in respect of the coolies working on all the divisions, even if he is himself actively supervising the work on only one of such divisions, he has no right to head money and commission where, as was the case with Periasamy, he was doing no real supervision at all. I would therefore disallow this claim also.

If I had come to the conclusion that the decision of the District Judge in this case as to the liability of the appellants to the respondent should be affirmed, the deductions that he has made from the total amount claimed by the respondent would have had, I think, to be increased. The learned District Judge deducts Rs. 2,500 in respect of kanganies who had either bolted from the estate, or whose claims had been settled. The names are as follows :—

	Rs.	c.
Sollamuttu, settled	437	10
Veerama Vetty, bolted	737	58
Malwan, settled	152	19
Vengadasalam, irrecoverable	917	47
Tambu, paid off	123	92
Tiruvengadam, bolted	218	25
Sainyel, paid off	91	63
	2,698	14

There is thus a slight increase to be made in the total as regards the kanganies whose claims are dealt with by the District Judge himself. Allowances also would have to be made in respect of Arumugam, who was sent to India by the respondent himself, and whose debt is Rs. 579.10 ; of Veerasamy, who is said in Mr. Pattle's letter (G S 24) to have died in 1896, and whose debt is Rs. 171.42 ; of Nallu, who bolted, according to the respondent himself, two years

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before the trial, and whose debt is Rs. 130.62 ; of Kanthan, who had been dead, according to Mr. Macrae, for a number of years, and whose debt is Rs. 140·10, of Mariappen, who had bolted according to Mr. Pattle (G S 24), and whose debt is Rs. 730.62 ; and of Kanthan, who is also dead, according to Mr. Pattle (G S 25), and whose debt is stated by the respondent in the schedule to his plaint at Rs. 572.56, although Mr. Pattle in G S 25 says that it is now only Rs. 538.46. Mr. Pattle's letters were put in and read at the trial as part of his evidence, and none of his statements as to the kanganies above mentioned were challenged, so far as I can see, in cross-examination. The same observation applies to Mr. Macrae's statement as to the death of Kanthan. We were urged by Mr. de Sampayo to make deductions also, if we should be adverse to him on the main issues raised by the appeal, in respect of Kengan, who is admitted by the respondent himself to have bolted, and whose debt is Rs. 454.41, and of Saibu, who is dead, and whose debt is Rs. 991.12. I should not, however, myself have been disposed to make these allowances, since the respondent stated in his evidence that, although Kengan had bolted, his gang was still on the estate, and that, although Saibu was dead, he was represented by Pambyan. It is unnecessary, however, to give any formal decision on the question of further deductions, as the respondent's action must, in my opinion, be dismissed with all costs here and in the Court below.

As we are allowing the appeal, I have thought it right to analyse the whole body of the evidence, and to examine every point made on behalf of the respondent in the District Court and at the argument before us. I cannot but feel, however, that if in the court of first instance the real questions in dispute between the parties had been raised, as they might have been, by a few simple issues, and if evidence irrelevant to those issues had been rigorously excluded, a great economy of valuable public time might have been effected both at the trial and on the hearing of the appeal.

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The main questions involved in this case are not many, although the trial in the Court below occupied eight days, and the argument in appeal, which was exhaustive, and in some parts interesting, nearly four days. There is a mass of evidence in the record which I have found very difficult to follow in connection with the nineteen issues which were agreed to. A great deal of the evidence appears to me irrelevant and pointless, but I have carefully thought out the whole case in all its bearings since the argument, and I shall try to put the matters really in issue between the parties as clearly as I can, and then state my conclusions.

The action is framed in contract, and not *in tort*. That is the first thing that strikes one on reading the plaint. The plaintiff is a head kangany—a term well understood in planting districts. The first defendant is the Anglo-American Direct Tea Trading Co., Ltd., and the second defendant is Mr. N. F. Macrae, the superintendent of Meddegedera estate. Stated briefly, the plaintiff's case was that about fourteen years ago it was agreed between him and the defendants that the defendants should employ the plaintiff on Meddegedera estate, and that the plaintiff should serve the defendants by himself as kangany and by his coolies as labourers. The terms of the employment are not stated in the plaint, but the plaintiff says they were well known and understood, although there was no express agreement in respect thereof. The absence of any specific averment embodying essential particulars as to the terms of the employment renders it extremely difficult, if not impossible to ascertain the real foundation upon which the plaintiff's case rests. If the terms were well known, I cannot understand why they should not have been stated. In the 4th paragraph of the plaint reference is made to the tundu system, for which the plaintiff claimed recognition on the ground of well-established custom ; and in the 5th paragraph the plaintiff alleged that he and his coolies served on the estate till July 13, 1910, when the defendants dismissed the plaintiff from their service as and from August 13, 1910, and refused to give a tundu to him and his coolies. The plaintiff's cause of action is stated in the 6th paragraph of the plaint as I understand it. He says that (1) because the defendants did not allow the plaintiff to serve on the estate, (2) because they refused and neglected to give him and his coolies a tundu, (3) because the defendants incited and persuaded the plaintiff's coolies to remain on the estate in breach of their agreement with the plaintiff as set out in the 7th paragraph, the plaintiff—I am quoting from the plaint—" has lost all benefits and advantages derivable through the said coolies, was prevented from recovering from the said coolies the debts due from them to him, aggregating according to the particulars given in the said schedule to a sum of Rs. 23,034.12, and has been greatly prejudiced in his chances of obtaining employment as a kangany." The 7th paragraph of the plaint refers to an agreement between the plaintiff and the coolies, which, *primâ facie*, cannot, in my opinion, affect the relations between the defendants and the plaintiff, whatever the object may have been with which the agreement was pleaded. It is not pleaded as founded upon any custom, nor is the slightest reference made to it as an agreement in any way binding on the defendants. The 8th paragraph of the plaint contains a claim for head money, and the 9th paragraph a claim for Rs. 464, which the plaintiff says he advanced to one Velu Kangany at defendant's request.

To this plaint the defendant's answer substantially was that on July 13, 1910, the defendants, for lawful reason, gave notice and

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determined the contract of service of the plaintiff as from August 13, 1910; that the second defendant as superintendent refused to grant a tundu to the plaintiff, as the coolies in plaintiff's gang made no request therefor, but refused to be paid off from the estate. The defendants denied that the plaintiff was prevented from recovering from the coolies any debts alleged to be due to the plaintiff. It is not necessary to go into other parts of the answer, as they do not seem to me to contain substantially anything more than I have stated above, except that the defendants have generously waived in favour of the plaintiff a sum of Rs. 1,584·93, to which they alleged they were entitled in reconvention.

Upon the pleadings, therefore, certain issues, simple in their character, arose for determination. The plaintiff's action was based on a contract of service made fourteen years ago, the terms of which were undisclosed, but stated to be well known and understood. The plaintiff complained that the defendants had illegally terminated that service, and had, by violating a well-established custom relating to the issue of tundus, and by inciting and persuading the coolies to remain on the estate, prevented the plaintiff from recovering from his coolies, who were in his debt, a sum of money aggregating Rs. 23,034·12. It is to me amazing, with my experience in courts of original jurisdiction, how from pleadings like those in this case nineteen issues could have been evolved. I note they were agreed to by counsel, but my amazement is not lessened on that account. It is not only the number of the issues which seems extraordinary, but the length of the trial, and the immense mass of useless evidence that was allowed to be placed before the Court on both sides. A satisfactory consideration of the evidence has been rendered difficult by the rambling nature of the examination and cross-examination of several of the witnesses, although I have spared no pains in trying to separate relevant from irrelevant matter and getting to the heart of the case.

The learned counsel for the respondent struck, I think, the keynote of the case, when he submitted that the plaintiff and his coolies should not be considered as separate and distinct individuals, but as constituting one single legal entity, possessed of a bundle of rights, which it always carried about in its occasional migrations, aided by a tundu, from one estate to another. These rights did not arise from any express contract with employers of labour, but were founded on well-established and inveterate custom (such as should be recognized as having the force of law), which was binding on such employers to the extent that they could not in any circumstances discharge a head kangany without paying the debts due by the coolies to him. This was a very intelligible presentation of the plaintiff's case, and it seems to me that unless the plaintiff succeeded in the Court below in proving such a custom, he was not entitled to judgment in this action. This was the foundation of the plaintiff's

present claim, giving the plaint the most favourable construction I can, and a simple issue could have been framed as regards the legal liability of the defendants to pay the kangany the debts due to him by his coolies. I shall take it, therefore, that this was the first question that arose for determination. The whole of the evidence was read to us at the argument, and my brother Wood Renton has carefully analysed it, but I can find absolutely nothing in proof of the alleged custom. Indeed, such a custom would serve to destroy the fundamental rights with which the law invests every cooly who has a legal status, and introduce him to a state of unmitigated slavery ; it would reduce him to the condition of a mere inanimate chattel, which could be carried about from one estate to another at the will and pleasure of the kangany. The alleged custom is one subversive of all claims on the part of the cooly to be treated as a freeborn citizen, and no modern sytsem of jurisprudence that I know of will countenance such a degradation even in his case. The labour laws in force in this Colony expressly recognize his right to enter into direct contractual relations with the proprietors of estates, and I would, therefore, unhesitatingly repel the contention founded upon custom, even though it could be supported by any evidence in the record. The cooly can sue his employer for wages due to him, the kangany can sue the cooly for any debt due by him on account of advances, and the proprietor can sue the kangany in respect of advances made to him. But to say that by custom which has the force of law the proprietor, when the kangany, who stands in the same contractual relation with the former as the cooly, is discharged upon proper notice, is bound to pay the cooly's debt is a proposition which has to be established by clear and conclusive evidence, and such evidence there is not in this case.

Then, it seems to me, that the next question if it was, necessary to entertain it, was whether there is a well-established custom in all the planting districts in Ceylon, that when notice is given to a kangany for the determination of his contract of service, or such determination is otherwise decided upon, he is entitled to a tundu setting out the total amount of the liability of himself and his coolies, and stating that on receipt of such amount his coolies will be discharged from the employer's estate, and the kangany is entitled on payment of such amount to have his coolies discharged from the employer's estate (see paragraph 4 of the plaint).

I am prepared to concede the existence of such a custom, but the question is whether it is of so absolute a character that in any circumstances and under any conditions it can be enforced and must be observed. The tundu system contemplates and provides for a state of things which allows of its easy application without in any way prejudicing the rights and obligations of cooly, kangany, and proprietor. It is a system apparently founded upon mutual

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concessions and an intelligent understanding of the liabilities of all the parties concerned. But may not there be present certain circumstances for the existence of which the kangany is responsible where it would be impossible to apply the system? Is the kangany entitled to ask for a tundu, where by his own conduct and course of action he has rendered its issue absolutely impracticable? In such a case it seems to me that the custom cannot be invoked, because it is incapable of observance. The facts show that the coolies had been deserted, although involuntarily, by the plaintiff for some time. He had been arrested on a civil writ, and had suffered incarceration for some considerable period. In consequence the labour force of defendant's estate was thoroughly disorganized, and required careful, generous, and discreet handling. All this the coolies received from the second defendant and his European assistants. When the plaintiff came out of jail, he appears to have been treated with much consideration by these gentlemen, who had in the meantime done their best to secure to the plaintiff the debts due to him by his coolies. Document G S 4, dated January 22, 1910, which was signed by the plaintiff, affords the strongest evidence possible of his relations, which were stated to be nominal, with the coolies in his gang, and his willingness to give the superintendent promissory notes in his favour signed by the coolies and sub-kanganies to cover the total amount of his indebtedness to Meddegedera estate. He admitted that the estate books contained a correct account of his indebtedness. I entirely disagree with the District Judge's finding, that when the plaintiff signed G S 4 he did not know what the contents of it were. To my mind the evidence is overwhelming, and of a perfectly unimpeachable character. The District Judge has employed much subtlety in dissecting the evidence, but I require a great deal more than the reasons he has given to convince me that Mr. Macrae, who is a Justice of the Peace and an Unofficial Police Magistrate for the district, has committed wilful perjury in respect of document G S 4, or any other document he has spoken to as having been written at his instance and signed by the plaintiff.

Next, we have document G S 5 signed by the coolies and sub-kanganies on Meddegedera estate, whereby they repudiated the plaintiff as their kangany, and begged to be allowed to work under the superintendent, either on estate account or in gangs, as might be arranged later on. I have not the slightest doubt that this document was signed by the persons whose names appear in it, that it was explained to them, and they understood the contents. Here, again, the District Judge's finding that the signatories did not know what the nature of the document was that they were signing is not justified by the evidence, and his suspicions that the document was either not correctly dated or was fraudulently antedated are purely imaginary.

We have, therefore, these two documents before us—there are others which it is not necessary to refer to for our present purpose—which unmistakably show that the situation brought about by the plaintiff with his coolies was such that it entirely precluded the issue of a tundu. The coolies had elected to take service under the superintendent. The plaintiff had in a manner disowned his coolies, who preferred to remain on the estates instead of going away with him, and in these circumstances, how was it possible for the plaintiff to insist on a tundu, and how was it possible for the superintendent to issue a tundu ? There was no custom alleged or proved to meet such a situation, and, indeed, I cannot conceive of any custom which would adequately deal with it without infringing on the personal rights and liberties of the coolies. They could not be bodily removed from the estate by the plaintiff, and they were free to exercise their own judgment and discretion as to whether they would remain on the estate or not. This is what Mr. Macrae says : " I told him (the plaintiff) to leave by August 13. He asked for a tundu for himself and his coolies. I refused a tundu, as his coolies had elected to leave him. I would have given a tundu for himself." I unhesitatingly believe Mr. Macrae's evidence on the point. The plaintiff's action, founded upon the tundu system, thus completely fails.

The third and last question, I take it, would be whether the defendants incited or persuaded the coolies to remain on the estate. Mr. Macrae swears that the coolies complained to him that they were swindled by the plaintiff. He also swears that the coolies did not remain on the estate on his instigation. It is to me incomprehensible how the District Judge came to answer this question in the affirmative. The weight of the evidence and all the probabilities of the case point to a free and voluntary election by the coolies to remain on the estate. It was to their interests to remain, instead of being any longer under the control of a man who, although he was, according to the District Judge's finding, a good Hindu and scorned intoxicating drinks and tobacco, was unscrupulous enough not to pay his debts, but to go into civil imprisonment.

These three questions that I have stated above fairly exhaust, I think, the whole of the plaintiff's case, and, in my opinion, he must fail in respect of every single one of them. The trial and the evidence might have been considerably curtailed with advantage to both sides I cannot help remarking that the letter of demand sent by the plaintiff's proctor was couched in such offensive language that it is not surprising that Mr. Macrae took umbrage at it and terminated plaintiff's service as he was entitled to do. The letter contains several misstatements, and in one portion of it refers to the accounts entered by Mr. Macrae in his pass book as being false. It was written by a proctor in Colombo, who does not appear to

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have taken any trouble to find out whether the plaintiff was making true or untrue charges against Mr. Macrae.

I have avoided referring to the evidence at length, as my brother Wood Renton has considered it very carefully and in detail. I have not particularly touched upon the subject of second defendant's liability, because, in my opinion, the plaintiff has entirely failed to show that he has any claim against either defendant founded upon any custom having the force of law which he has succeeded in proving.

The judgment of the Court below must be set aside, and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.