1931

*Present :* **Drieberg J.**

KING *v.* CORNELIUS.

103—*D. C. (Crim.), Colombo,* 9,363.

*Notaries Ordinance—Having permitted or suffered party to execute document with used stamps—Proof of guilty knowledge —Ordinance No. 1 of* 1907, *s.* 29 (6) *—Stamps Ordinance, No.* 22 *of* 1909, *s.* 58 (1) (b).

Where a notary public was charged under section 29 (6) of the Notaries Ordinance with having permitted or suffered parties to two deeds to execute them when they were insufficiently stamped, viz., with used stamps,—

*Held,* the prosecution must prove that the appearance of the stamps at the time of their use was such that the notary must have known that they had been previously used or that his lack of knowledge was due to gross negligence or to wilful abstinence of knowledge.

Where, on the same facts, the notary was charged under section 58 (1) of the Stamps Ordinance with having executed or signed, otherwise than as a witness, a deed chargeable with duty, without the same being duly stamped,—

*Held,* that he was not liable under the section because, as notary, he was only a witness to the execution of the deed.

APPEAL from a conviction by the District Judge of Colombo. The accused, who is a notary public, was charged with offences, in respect of two deeds attested by him, under section 29 (6) of the Notaries Ordinance, No. 1 of 1907, in that he permitted or suffered the parties to execute them, when they were insufficiently stamped, viz., with treated stamps. He was also charged under section 255 of the Penal Code with fraudulently using for the payment of stamp duty stamps which, he knew, had been used before.

He was further charged under section 58 (1) of the Stamps Ordinance, No. 22 of 1909. He was convicted on all the counts.

*Hayley, K.C.* (with him *Deraniyagala*), for accused, appellant.—The evidence fails to establish the charges and the accused is entitled to an acquittal. The fourth count of the indictment cannot be maintained. It charges the accused with "executing" a deed without the same being duly stamped. A notary is not the executant of a deed. He is the chief witness to the due execution of the deed. The investigation of the case has not been conducted with any appreciation of the true points involved. There is no evidence as to the probable condition and appearance of these alleged "cleaned" stamps at the time of their being bought and affixed to the deeds in question. The accused cannot be made responsible for the condition of the stamps at the time of their examination by the experts. The opinions of the experts are based on examinations made with a lens and by ultraviolet light. Is it suggested that these should form part of the equipment of every notary public practising his profession ? There is no evidence of the proper care and custody of these deeds in the office of the Registrar-General. Nor has evidence been led as to how the business of selling stamps in the District Court of Colombo or in the Post Offices is conducted. It is not enough to prove

negligence. The words "permit" and "suffer" connote an exercise of the conscious will—what is known in law as a guilty mind or guilty knowledge. Counsel cited *Cundy v. Le Cocq*[1]; *Somerset v. Wade*[2].

*Crossette Thambiah, C.C.*, for the Crown.—It must be conceded that count 4 of the indictment cannot stand. With reference to the remaining counts, the view point of approach as regards counts 1 and 2 should be different to that as regards count 3. Count 3 presupposes a fraudulent or dishonest intent. Counts 1 and 2 do not. Note the absence of such words as "wilfully" or "knowingly" or "fraudulently" or "dishonestly". The prohibition is absolute. It is the old distinction between *mala quia prohibita* and *mala per se*. If a notary has "suffered" a deed attested by him to be insufficiently stamped he is in default, quite apart from any question of negligence or knowledge or intent. "Suffer" is equivalent to "allow to happen". It is part of the responsibility attached to the important office of a notary public that he should not allow it to happen that his deeds are insufficiently stamped. Counsel cited *Collman v. Mills*[3]; *Bosley v. Davis*[4]; *Bond v. Evans*[5]; *Hobson v. Middleton*[6]; *Roffey v. Bent*[7]; 2 *N. L. R.* 249; 7 *N. L. R.* 193; 15 *N. L. R.* 385; 19 *N. L. R.* 218; 4 *Thambiah* 24.

[DRIEBERG J.—These cases proceed on the principle that a licensee must be held responsible for the acts of those to whom he delegates authority and control.]

The position here is stronger. In the cases cited the accused were convicted for the acts and omissions of others. In the present case the accused is on trial in respect of his own conduct and not that of an agent or servant. These cases establish the principle that, in a certain class of statutory offences, an accused may be convicted, despite the lack of guilty knowledge on his part. With regard to count 3, the evidence supports the trial judge's findings. Once it is established that the stamps used are "cleaned" stamps, the onus is on the accused to prove that he acted prudently and with due care and circumspection. The total evidence justifies the inference of an intention to defraud the revenue.

[1] (1884) 13 *Q. B. D.* 207.
[2] (1894) 1 *Q. B. D.* 574.
[3] (1897) 1 *Q. B. D.* 396.
[4] 1 *Q. B. D.* 84.
[5] 21 *Q. B. D.* 249.
[6] 6 *B. & C.* 303.
[7] *L. R.* 3 *Eq.* 759.

March 3, 1931. DRIEBERG J.—

The appellant, who is a notary, was charged with offences committed regarding two deeds attested by him, deeds Nos. 382 of December 7, 1926 (P2), and 393 of August 8, 1927 (P1). All the stamps on P2 and two out of the three stamps on P1 are what are called in this case "cleaned stamps"; they are stamps which have been previously used and cancelled but the writing on them has been removed by some chemical process and they have been used again for these deeds.

In the first and second counts of the indictment the appellant was charged in respect of both these deeds of an offence under section 29 (6) of the Notaries Ordinance, No. 1 of 1907, in that he permitted or suffered the parties to execute them when they were insufficiently stamped.

In the third count of the indictment he was charged with fraudulently and with intent to cause loss to the Government using for the payment of stamp duty on P1 stamps issued by the Government which he knew had been used before, an offence punishable under section 255 of the Penal Code.

In the fourth count he was charged in respect of P1 under section 58 (1) (*b*) of the Stamps Ordinance, No. 22 of 1909. This section makes it an offence for a person to execute or sign other than as a witness a deed chargeable with duty without the same being duly stamped. It is clear that the appellant cannot be

convicted under this section, for as a notary he signed the deed as a witness—a witness to its due execution.

He was found guilty on all these counts.

As regards the first and second counts it was contended that if the appellant was not aware that the stamps were bad and even if his ignorance was not due to his want of reasonable care he could still be said to have suffered the execution of the deeds when they were insufficiently stamped. This would depend on whether the prohibition is an absolute one.

In *Cundy v. Le Cocq*[1] the accused was charged under section 13 of the Licensing Act, 1872, which enacted that "if any licensed person permits drunkenness or any violent, quarrelsome or riotous conduct to take place on his premises or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty".

It was held that as regards selling this was an absolute prohibition and was not confined to cases where the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk.

In *Somerset v. Wade*[2] the charge under consideration was one under the same provision against the licensed person but for the offence of permitting drunkenness upon his licensed premises. It was there held that this offence was distinguishable from the offence of selling to a drunken person. There the express words of the section defined the offence which was complete when there was a sale to a drunken person ; nothing further was needed. But the licensed person could not be said to permit drunkenness on his premises if he did not know of it. In dealing with the words "suffer" used in similar provisions, Mathew J. said, "'suffering' is not to my mind distinguishable from 'permitting'. He does not permit drunkenness if he does not know of its existence or connives at it or wilfully shuts his eyes to it".

To "permit" is to expressly allow, and to "suffer" means to permit the doing of a thing by not objecting, that is to say, by tacit consent.

Mr. Crossette Thambiah referred me to the case of *Bond v. Evans*[1] where the licensed person was charged with having suffered gaming to be carried on in his premises ; it was found that this was not done with his knowledge or connivance, but was known to his servant who was in charge of the premises. It was held that the licensed person was rightly convicted. There are many other such cases in the English and in our own reports ; they proceed on the principle that the licensed person must be held responsible for the acts of those to whom he delegates authority and control. But even in such cases a conviction cannot be based on the mere circumstance of the improper use. In *Bosley v. Davies*,[2] which was a prosecution under the Licensing Act, 1872, against the managing director of an hotel for suffering gaming to be carried on in his licensed premises, it appeared that a party of gentlemen played cards for money in a room and were noticed by a policeman who was outside. The manager knew nothing about it and no waiter entered the room while they were playing. It was held that unless the want of knowledge of what was going on was due to gross negligence or wilful ignorance on the part of the persons who had authority to prevent the gaming, the accused could not be convicted. Cockburn C.J. said that the Magistrate could only convict in such a case if there was "gross absence of care or wilful abstinence from knowledge on the part of the persons managing the hotel," and Mellor J. said that "a constructive knowledge on the part of the managers might justify a conviction, but in our opinion this case as it stands does not establish such a constructive knowledge".

[1] (1884) 13 *Q.B.D.* 207. [2] (1894) 1 *Q.B.D.* 574.

[1] (1888) 21 *Q.B.D.* 249. [2] (1875) 1 *Q.B.D.* 84.

A similar case showing the principle constructive knowledge is *Redgate v. Hays* [1]. But there is here no question of liability for the act of a person to whom control is delegated or of constructive knowledge. The act is that of the notary himself and it appears to me that it is not possible to regard this section as a simple and absolute provision that if a deed is signed by the executing party before it is sufficiently stamped the notary shall be guilty of an offence. The appellant, therefore, cannot be convicted unless it can be shown that he had actual knowledge of the defect in the stamps or that his lack of knowledge was due to gross negligence or wilful abstinence of knowledge. I shall deal with the question whether this can be attributed to him after dealing with the facts.

Besides P1 and P2 fifteen deeds bearing cleaned stamps attested by the appellant were put in evidence. These extend from P9 of November 1, 1924, to P5 of August 21, 1928. These were not marked or listed in chronological order. The following is a list of these deeds in order of their date :—

| | | | |
|---|---|---|---|
| 1 .. | P9 .. | 327 .. | November 1, 1924 |
| 2 .. | P3 .. | 372 .. | July 12, 1926 |
| 3 .. | P2 .. | 382 .. | December 7, 1926 |
| 4 .. | P15:.. | 383 .. | December 14, 1926 |
| 5 .. | P6 .. | 384 .. | February 1, 1927 |
| 6 .. | P7 .. | 385 .. | April 9, 1927 |
| 7 .. | P16:.. | 386 .. | June 23, 1927 |
| 8 .. | P4 .. | 388 .. | July 18, 1927 |
| 9 .. | P17:.. | 389 .. | July 18, 1927 |
| 10 .. | P10:.. | 390 .. | August 1, 1927 |
| 11 .. | P11:.. | 391 .. | August 1, 1927 |
| 12 .. | P1 .. | 393 .. | August 8, 1927 |
| 13 .. | P12:.. | 396 .. | September 2, 1927 |
| 14 .. | P13:.. | 398 .. | September 19, 1927 |
| 15 .. | P8 .. | 403 .. | December 19, 1927 |
| 16 .. | P14:.. | 404 .. | February 1, 1928 |
| 17 .. | P5 .. | 413 .. | August 21, 1928 |

There was a circular letter P18 sent out by the Registrar-General to all notaries, informing them that there had been several cases where stamps affixed to duplicates of deeds showed distinct marks of having been previously used and the cancellation marks defaced before use on the deeds ; that the cancellation marks were removed, presumably by some chemical means, to make them " practically invisible to the naked eye " and that there was a regular trade being carried on in these cleaned stamps. The notaries were informed that the use of such stamps was an offence under the Penal Code and were cautioned against buying stamps from unauthorized vendors.

The appellant denies having received this circular which it is said was issued to him on May 17, 1926. He says that he was not aware of the existence of cleaned stamps until he was written to by the Registrar-General on June 21, 1927, about P3.

P 19, which is described as the outward register of letters, has an entry that on May 17, 1926, the circular P18 was sent to all notaries in the Colombo District. P20 is said to be the Post Book ; the printed headings, however, show it to be a register of letters sent by messengers and it appears to be used for letters to notaries in Colombo only. The appellant says that at this time he was practising as a proctor in Gampaha but doing notarial work in Colombo and that his official address given to the Registrar-General was Gampaha.

But even if he did not receive this circular he was aware before he attested P1 of August 8, 1927, of the danger of " cleaned stamps " ; on June 21, 1927, the Registrar-General made an inquiry from him regarding P3 of July 12, 1926. This letter has not been produced. It was written after the Registrar-General had obtained the report P29 of June 13, 1927, by the Acting Government Analyst, Mr. Collins, that the stamps on it had been previously used.

It must be taken therefore that when he came to attest P1 and thereafter he had to use such precautions as were possible to avoid this danger. The trial Judge has held that he did not buy stamps from authorized sources but knowingly bought cheap, from elsewhere, cleaned stamps.

[1] (1876) 1 *Q. B. D.* 89.

In P23, his reply to the Registrar-General's inquiry regarding P3, he stated that the two stamps in question " were purchased by me either from the Colombo Courts Post Office or the District Court of Colombo, where I usually purchase stamps for deeds and legal purposes ".

At the trial he said that he had the services of K. A. Perera and Francis Perera, two clerks of Mr. Amaratunga, a proctor and notary, whose office he shared and that when stamps were needed at Colombo he instructed them to buy them from the Courts Post Office or the District Court ; he could not remember who had bought for him the stamps on P1 and P2 but he was sure that he had not bought stamps himself at either of these places. He also stated that he could say that in every case of a deed he got his " clerk or someone else to buy stamps " and that after the letter from the Registrar-General he employed clerks to buy stamps.

The trial Judge regards this as a dishonest attempt to escape from the consequences of his statement in P23, which he regarded as an admission that it was his practice to buy the stamps himself from the Courts Post Office or the District Court seller. I am not at all sure that his letter necessarily implies this and it may well be that he mentioned these as the places where the stamps were bought and did not intend to suggest that he bought them himself. That the appellant employed Mr. Amaratunga's clerks even after the dissolution of their partnership in 1924 is a fact. Mr. Amaratunga admitted that his clerks used to assist the appellant, who kept no clerk of his own in the Colombo office. Francis Perera denies that he bought stamps for the appellant after 1924, and in particular that he had bought the stamps for P1 and P2, but the trial Judge observes that too much value should not be attached to this disclaimer which might be prompted by the instinct of self-preservation.

Mr. Amaratunga employs these clerks to buy stamps for him and so far as is known they have not given him cleaned stamps. There is no evidence of an examination of his deeds, but he has never been called upon for an explanation regarding them. The trial Judge concludes from this that the appellant could not have employed these clerks, for if he did he would not have been given cleaned stamps. This is not an unreasonable inference, but though it throws much suspicion on the appellant it is not a necessary inference. The appellant was not the regular employer of these clerks ; he had comparatively little work, for between November 1, 1924, and February 1, 1928, his average was about two deeds a month. It does not follow that the clerks had the same sense of obligation to the appellant as they had to Mr. Amaratunga.

The trial Judge rules out as a practical impossibility the sale of cleaned stamps by the Post Office or the District Court vendor. There is no evidence how the sale at the District Court is effected and who has charge of it, nor is there evidence of how the sale of stamps at the Post Office is controlled. The evidence shows that there was some method in the sale of such stamps for it is said that they have been sold to well known notaries, which I understand to mean notaries whose honesty and carefulness in work could not be doubted. I do not think I can, in the circumstances, put out of consideration as practically impossible the use of these places for issuing these stamps.

So far as the conduct of the appellant in the matter of the purchase of these stamps is concerned I cannot draw from it a necessary inference that he knew them to be used stamps or, if he did not, that there was on his part gross negligence or wilful abstinence from knowledge. It remains to be considered whether the appellant could have known from their appearance that they were cleaned stamps.

The stamps on P3, a deed of July 12, 1926, were first examined and reported on in June, 1927. The report P29 merely states that in the opinion of the Analyst the Rs. 100 and Rs. 20 stamps on it had been used before.

On December 6, 1928, the Analyst reported on P1 and P2 and P7, P9, P10, P11, P12, P13, P14, P15, and P16, all of which he said had cleaned stamps.

Mr. Symons who examined and reported on all the deeds except P3 said that he was not able to discover whether any of the stamps were cleaned, in the condition in which they were submitted to him, without the use of the lens, but that many of them were suspicious and he would not have purchased them. It is not clear whether this observation applied to the stamps on P1 and P2 or to those on all the other deeds he examined.

The examination was made by subjecting them to ultraviolet rays ; but for the purposes of this case, it is necessary to know whether their condition could have been detected by such an examination as a notary would give a stamp, and what is most important, what their condition and appearance was at the time of their being bought and affixed.

As regards P3, Mr. Collins said that he would have been very suspicious if he had examined the stamps with the naked eye. His reason was that they " are poor in colour, the perforations are bad and the stamp of Rupees Twenty is particularly bad " ; discolouration, he said, would not have been caused by lapse of time and one reason he gave for this was a comparison of them with the good stamps on the same deed.

Now, it was urged by Mr. Hayley that the experts did not take into consideration that these stamps, having been subjected to chemical treatment, might not age as slowly or with the same appearance as untreated stamps. I understand that the experts do not know by what process or medium these stamps were cleaned. Mr. Symons tried his hand at cleaning stamps with chlorine ; but he says that though he was able to make the ink-marks disappear he was not able to do it so as to avoid detection by one used to handling stamps. Mr. Collins' opinion that discolouration could not be caused by lapse of time is in conflict with the directions in the official guide for the examination of stamps appearing in the booklet of stamps P24 ; it is there stated that points to be looked out for are (1) partial discolouration and (2) complete change of colour, which may be due to age, action of light, and normal action of moist air in Ceylon. The experts assume that such stamps would not alter in appearance in such time as has occurred in this case any more than good stamps, but I cannot accept this opinion when they speak of stamps treated by a process with which they are not acquainted. Mr. Collins' statement that these stamps are " poor in colour " proves nothing. I cannot understand his statement that " the perforations are bad, and the stamp of Rupees Twenty is particularly bad " ; there is no doubt that these stamps are genuine ; the trial Judge does not deal with this but goes on the ground that to the naked eye the other two stamps look brighter than the Rs. 100 and Rs. 20 stamps, and that to an experienced notary the dimness in the colour of these stamps would have been suggestive. It does not help in this decision to know that these stamps would have aroused the suspicions of the experts whose training and calling have no doubt developed in them a critical faculty. One has to know what was the appearance of the stamps when used, and would they have been regarded as suspicious by a notary who knew of the danger and would have taken such care as that circumstance required.

On the first point there is no evidence ; as regards the second, no evidence has been led of how these stamps even in their present condition would be regarded by the average notary. The question was

put to Francis Perera, Mr. Amaratunga's clerk. He said in cross-examination that the stamps on P1 were not so clear as other stamps but he could not say whether they were cleaned stamps, and similarly of P2 that he could not say whether they were cleaned stamps or not. Mr. Amaratunga was called by the Crown to prove that he got the circular P18 and to support the suggestion that the appellant who had the same office also got it, and further I think, to prove that although he employed the same men to buy stamps for him as the appellant says he did, he was not given use stamps by them. Mr. Amaratunga was not asked what he would have thought of these stamps.

Reference is made in the judgment to the ink running on the stamps on P8. The ink has spread badly on most of the stamps. Mr. Symons says this is a suspicious circumstance, but that if there is moisture or dampness on the surface of the stamp, whether it is good or cleaned the ink would run.

This deed P8 must in the ordinary course of business have been received at the Registrar-General's Office in January, 1928, when it would have been examined to see whether it was duly stamped. The appellant was one of those known to have previously used cleaned stamps—he had been written to on the subject in June, 1927. This deed was not sent for examination until November 17, 1928, see P27. It was in November or December, 1928, that all the deeds P1 to P17, with the exception of P3, were sent for examination. It can reasonably be inferred that on the usual inspection of stamps on duplicates made on receipt, the fact of the ink spreading did not excite suspicion.

In my opinion it has not been proved that the appearance of these stamps at the time of their use was such that the appellant must have known that they had been previously used or that his lack of knowledge was due to gross negligence or to wilful abstinence of knowledge.

The appellant therefore cannot be found guilty of the offences in the first, second, and third counts of the indictment. I have previously dealt with the fourth count.

The conviction is set aside, and the appellant acquitted.

*Set aside.*