After I wrote the above judgment my attention was drawn by my brother Basnayake to *Rees v. Registrar of Deeds et. al*[1]. and *Ex parte Bosch*[2]. The reasoning in these cases appears to support the view expressed above.

BASNAYAKE J.—I agree.

Order set aside.

[IN THE PRIVY COUNCIL]

1950 *Present*: **Lord Normand, Lord Oaksey, Lord Reid, Sir John Beaumont and The Chief Justice of Canada (The Right Hon. T. Rinfret)**

THE KING *v.* SELVANAYAGAM

Privy Council Appeal No. 38 of 1947

S. C. 941—M. C. Kegalla, 12,301

Criminal trespass—Ingredients of offence—Meaning of "occupation"—Different from "possession"—Unlawful entry—Does not become criminal merely because a foreseen consequence of such entry is annoyance to occupant—Nature of relevant intention—Penal Code, ss. 427, 433.

R, the superintendent of an estate which had been recently purchased by the Crown, was instructed by the Assistant Government Agent to give notice to quit to all the labourers on the estate. In accordance with these instructions R gave due notice to the accused terminating his employment as from 31st May, 1946. On that date the accused declined to leave the two rooms of which he was in occupation in the lines on the estate. He claimed that he and his ancestors had been in occupation of the rooms for 70 years and for that reason he declined to quit, since he had no other house to live in. He claimed the right to stay on the estate since for generations he and his family had lived there. He was convicted under section 433 of the Penal Code with having committed criminal trespass by unlawfully remaining in the two rooms of the estate with intent to annoy R. The Magistrate found that R was at the material time in occupation of the whole of the estate and all the buildings thereon; that the accused had occupied the two line-rooms not as a tenant but as a servant and that when his employment ended by notice to quit his subsequent remaining on the estate was unlawful; and that the facts proved warranted the conclusion that the intention of the accused by remaining on the estate was to cause annoyance to R since that would be the natural consequence of his action.

Held, (i) that section 427 of the Penal Code deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

[1] *S. A. L. R. (1938) C. P. D., 459.*
[2] *S. A. L. R. (1943) C. P. D., 369.*

(ii) that the only person in physical occupation of the two rooms at the material dates was the accused.

(iii) that there was no proof that the relationship between R and the accused was that of master and servant.

(iv) that, assuming that intention to annoy R was relevant, the dominant intention of the accused was to remain on the estate where he and his family had lived for generations and not to find himself homeless. Entry upon land made under a *bona fide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent.

Suppaiya v. Ponniah (1909) 14 N. L. R. 475 overruled.

(v) that section 427 of the Penal Code does not make every trespass a criminal offence. The class of trespass which it contemplates is one calculated to cause a breach of the peace. The section was not intended to provide a cheap and expeditious method for enforcing a civil right.

APPEAL, by special leave, from a judgment of the Supreme Court. The judgment of the Supreme Court is reported in (*1946*) *47 N. L. R. 337.*

J. D. Casswell, K.C., with *Ralph Millner* and *Rex Hermon*, for the accused appellant.

Sir David Maxwell Fyfe, K.C., with *J. G. Le Quesne*, for the Crown.

In the application for special leave to appeal—

D. N. Pritt, K.C., with *R. K. Handoo* and *C. E. L. Wickremesinghe*, for the petitioner.

Frank Gahan, for the Crown.

Cur. adv. vult.

July 26, 1950. [*Delivered by* SIR JOHN BEAUMONT]—

This is an appeal by special leave from a judgment of the Supreme Court of Ceylon dated the 30th August, 1946, which dismissed the appellant's appeal against his conviction in the Magistrate's Court of Kegalla on a charge of criminal trespass punishable under section 433 of the Penal Code.

The facts on which the charge was based can be stated shortly. On the 23rd April, 1945, the Government of Ceylon duly gave notice of its intention to take possession of certain private lands, including the Knavesmire estate, for village expansion pursuant to the Land Acquisition Ordinance (Legislative Enactments of Ceylon, 1936, Chapter 203). On the 26th November, 1945, the executive committee of the local administration directed the land officer of Knavesmire to take possession of the estate for and on behalf of His Majesty pursuant to section 12

of the Ordinance, and on the 6th December, 1945, the land officer certified that he had that day taken possession of the said estate on behalf of His Majesty. It is not disputed that thereupon the estate vested absolutely in His Majesty free from all encumbrances.

The Government continued for the time being to employ the labour force then on the estate, the appellant being a member of such force. On the 30th January, 1946, D. R. M. Rajapakse was appointed by the Governor to the post of superintendent of the Knavesmire estate, the terms of appointment being stated in a letter dated the 26th June, 1946, addressed to him by the Chief Secretary (Exhibit P. 9). According to the evidence of Mr. Henderson, assistant government agent of Kegalla, given at the hearing of this matter, the appointment was made on his recommendation.

The object of the Government in acquiring the Knavesmire estate was to place in possession of it selected landless residents from certain villages who would work the estate on co-operative lines. According to the evidence of Mr. Henderson he selected 243 such tenants, and with a view to providing them with work on the estate he instructed Mr. Rajapakse, the superintendent, to give notice to all the labourers on the estate as from the end of May, 1946. In accordance with these instructions Mr. Rajapakse on the 29th April, 1946, gave notice to the appellant (Exhibit D. 1), terminating his employment as from 31st May, 1946, and directing him to hand over to Rajapakse the house which he occupied and to leave the estate on or before the 31st May, 1946. On that date the appellant accepted his wages, but refused to accept a discharge ticket tendered to him, and declined to leave the premises in his occupation.

According to the evidence of the appellant given at the hearing, when the estate was taken over by the Crown he and his wife and mother occupied two rooms in the lines on the estate. His father and grandfather had occupied the rooms before him. His father had planted trees in the garden plots in front and in rear of the rooms and the appellant and his parents had enjoyed the produce of the trees. The appellant claimed that he and his ancestors had been in occupation of the rooms for 70 years and for that reason he declined to quit, since he had no other house to live in. He claimed the right to stay on the estate since for generations he and his family had lived there.

On the 5th June, Mr. Henderson, the assistant government agent, made a report to the Magistrate's court of Kegalla that the appellant had committed criminal trespass by unlawfully continuing to remain on the Knavesmire estate property of the Crown in the occupation of D. R. M. Rajapakse, superintendent of the said estate, with intent thereby to annoy the said Rajapakse, and thereby committed an offence punishable under section 433 of the Penal Code, and on the same day a summons was issued to the appellant to answer to the said complaint.

The offence of criminal trespass is defined by section 427 of the Penal Code in the following terms :—

> "Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult or annoy any

person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'."

At the trial the learned magistrate found that Rajapakse was at the material time in actual and physical occupation of the whole of the Knavesmire estate and all the buildings thereon; that the appellant had occupied two line rooms not as a tenant but as a servant and that when his employment ended by notice to quit duly served on him his subsequent remaining on the estate was unlawful; and that the facts proved warranted the conclusion that the intention of the accused by remaining on the estate was to cause annoyance to Rajapakse since that would be the natural consequence of his action. The accused was accordingly, on the 28th of June, 1946, convicted and sentenced to two months' rigorous imprisonment.

An appeal against the conviction was lodged in the Supreme Court and was heard on the 30th August, 1946, by Mr. Justice Jayetileke, who agreed with the conclusions of the learned magistrate and dismissed the appeal.

In order to establish the criminal trespass charged the Crown must show :—

(1) that the occupation by the appellant of his two rooms after the expiration on the 31st May, 1946, of the notice to quit was unlawful;

(2) that Rajapakse was at the date of the expiration of the notice to quit in occupation of the Knavesmire estate including the rooms in which the appellant and his family lived; and

(3) that the intention of the appellant in refusing to surrender his two rooms was to annoy Rajapakse, there being no suggestion of an intention to commit an offence or to intimidate or insult.

The evidence on record does not establish clearly the nature of the appellant's occupation of his two rooms, since there is no evidence as to the origin of such occupation, but their Lordships are in agreement with the view expressed by Mr. Justice Jayetileke in the Supreme Court that the effect of acquisition by the Crown of the Knavesmire estate under the Land Acquisition Ordinance, assuming the proceedings under the Ordinance to have been in order, was to wipe out any interest which the appellant may have had in any part of the estate. Their Lordships will therefore assume that the occupation of the appellant was unlawful after the 31st May, 1946, and they will determine on that basis the two remaining questions whether Rajapakse was in occupation of the rooms in which the appellant lived, and, if so, whether the refusal of the appellant to give up such rooms was with intent to annoy Rajapakse.

Section 427 does not make every trespass a criminal offence. It is confined to cases in which the trespass is committed with a particular intention and the intention specified indicates that the class of trespass to be brought within the criminal law is one calculated to cause a breach of the peace. Their Lordships are satisfied that the section was not

intended to provide a cheap and expeditious method for enforcing a civil right. It is to be noted that the section deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified, and the second paragraph applies when the entry is lawful but becomes unlawful, e.g., when the entry is made on the invitation of the occupier and there is a refusal to leave when the invitation is withdrawn. But in either case there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence). The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

In the present case according to the uncontradicted evidence the only person in physical occupation of the two rooms at the material dates was the appellant, who cannot have intended to annoy himself. This difficulty the respondent sought to overcome by alleging that the occupation by the appellant of his two rooms was that of a servant and was in law, therefore, the occupation of the master, that after the acquisition of the Knavesmire estate by the Crown and the re-employment of the appellant on the estate, the occupation of the appellant became that of the Crown, and that Rajapakse represented the Crown. Their Lordships have already indicated that in their view there is no satisfactory evidence as to the character of the appellant's occupation, but assuming it to have been that of a servant, their Lordships think it clear that Rajapakse was not the master. The terms of his appointment in Exhibit P. 9 do not define his duties, but as already pointed out it was Mr. Henderson who secured his appointment; it was Mr. Henderson who directed Rajapakse to serve the notices to quit; and it was Mr. Henderson who selected the new tenants for the land. There is no evidence that Rajapakse had any power to dismiss the appellant, or that he was under any obligation to pay the appellant's wages, or was in any sense his master, and in their Lordships' opinion the Crown failed to prove that Rajapakse was the man in occupation of the estate, including the two rooms, at the material time. If this be so an intention to annoy Rajapakse would be irrelevant, but in their Lordships' view the Crown also failed to prove the existence of such an intention. It was suggested in argument that there were concurrent findings of fact as to the appellant's intention, but intention, which is a state of mind, can never be proved as a fact; it can only be inferred from facts which are proved. It may well be that in doing a particular act a man may have more intentions than one, and Sir David Maxwell Fyfe for the respondent did not dispute that to bring a case within section 427 the intention specified in the section must be the dominant intention. The appellant when in the witness box was not asked whether he intended to annoy Rajapakse, nor were any questions put to him to suggest that he was on bad terms with Rajapakse, who was merely carrying out the orders of his superiors. The courts in Ceylon thought that an intention to annoy Rajapakse must be inferred because such annoyance would be the natural consequence of the appellant's refusal to quit, and that the appellant must

have appreciated this. Their Lordships are not prepared to hold that the appellant, in refusing to give up his two rooms, thereby no doubt increasing the difficulties of the superintendent, intended to induce, or contemplated that he would induce, in the mind of the superintendent an emotion so inappropriate to a Government officer and so unprofitable as annoyance ; but even if the appellant did anticipate that Rajapakse would be annoyed it is perfectly clear from his evidence that his dominant intention was to remain on the estate where he and his family had lived for generations and not to find himself homeless. Entry upon land, made under a *bona fide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent. Their Lordships are not in agreement with the contrary view which Mr. Justice Wood Renton seems to have entertained in *Suppaiya v. Ponniah* [1]. They prefer the view of Dalton A.C.J. in *Wijeymanne v. Kandiah* [2]. The case of *Forbes v. Rengasamy* [3] on which the courts in Ceylon relied is distinguishable because in that case the accused did not give evidence as to his real intention and the court thought that his conduct had been defiant.

The appellant asked for costs against the Crown on the ground that recourse to the criminal law was entirely unwarranted. It is very rare for their Lordships to allow costs in a criminal matter, and although they think that in this case recourse to a criminal court was not justified, the application found some support in previous decisions of the Supreme Court and was successful in two courts. In the circumstances their Lordships will adhere to their usual practice and make no order as to costs.

For the above reasons their Lordships will humbly advise His Majesty that this appeal be allowed and the conviction and sentence upon the accused passed by the magistrate of Kegalla on the 28th of June, 1946, be set aside.

Appeal allowed.

1950 *Present :* **Nagalingam J.**

FERNANDO *et al.*, Appellants, *and* CHANDRADASA *et al.*, Respondents

S. C. 506-508—M. C. Kurunegala, Nos. 472, 53,709 and 53,706

Omnibus—Carrying of passengers in excess of authorized number—No valid licence at date of alleged offence—Effect—Motor Car Ordinance, No. 45 of 1938, sections 111 (2) and 158.

The conductor of an omnibus cannot be convicted, under section 111 (2) of the Motor Car Ordinance, of carrying passengers in excess of the authorised number if, at the date of the alleged offence, the licence in respect of the omnibus had not been issued by the Motor Commissioner's Department.

[1] *(1909) 14 N. L. R. 475.* [2] *(1933) 35 N. L. R. 244.*
[3] *(1940) 41 N. L. R. 254.*