Thangammah was their agent. Thangammah says that the land Silaikaddaithoddam in respect of which this action has been brought was given by her as dowry to her daughter the second plaintiff, but the deed of gift has not been produced and her oral testimony is not legal evidence of that fact.

There is a further obstacle to this action to which the learned Commissioner makes no reference at all. It is the fact that the second defendant, who is the wife of the first, claims as a co-owner of the land to occupy it as of right. An action for use and occupation cannot be maintained against a defendant who claims to occupy the land as of right. *Nemo potest esse tenens et dominus* [1].

For the foregoing reasons the appeal is allowed with costs and the action of the plaintiffs is dismissed with costs.

Appeal allowed.

1949 *Present :* **Basnayake J.**

RANASINGHE, Appellant, *and* JUSTIN, Respondent

S. C. 82—M. C. Colombo, 45,360

Criminal Procedure Code—Charge of retaining stolen property—Accused acquitted—Property returned to complainant—Right of appeal—Sections 413 and 335.

Accused was charged with dishonestly retaining a stolen wireless set belonging to the complainant. Accused was acquitted but the Magistrate being satisfied that the wireless set had been stolen from the house of the complainant ordered its return to him.

Held, that the accused had no right of appeal from that order.

Held, further, that the order was correctly made under section 413 of the Criminal Procedure Code.

Silva v. Hamid (1918) 20 N. L. R. 414 followed.

APPEAL from a judgment of the Magistrate, Colombo.

N. M. de Silva, for accused appellant.

M. M. Kumarakulasingham, for complainant respondent.

March 1, 1949. BASNAYAKE J.—

The appellant was charged with the offence of dishonestly retaining a stolen G. E. C. wireless set bearing No. 816,081 and two loud-speakers

[1] *Perera v. Thelenis Peries, 5 S. C. C. 133.*

hereinafter referred to as the stolen wireless set), property of Pathirage Don Justin of Etul Kotte, knowing them to be stolen property, and thereby committing an offence punishable under section 394 of the Penal Code. It appears from the evidence of the Assistant Superintendent of Police that a stolen wireless set was found in the boutique of the appellant. His explanation is that it was sent to his brother by one G. Wijesinghe, a repairer of radio sets, in place of his own wireless set which had been given to Wijesinghe for repairs. He said that he did not know that the stolen wireless set was stolen property. On that evidence the learned Magistrate acquitted the appellant and ordered that the stolen wireless set be returned to the complainant. The learned Magistrate is satisfied that the wireless set is the property of the complainant, and that it had been stolen from his house when it was burgled. The identifying marks which the complainant mentioned to the Police were found on the stolen wireless set which the appellant had in his possession. The present appeal is from the order directing that the stolen wireless set be returned to the complainant.

In my view the appellant has no right of appeal from that order. He does not claim the stolen wireless set. He was able to secure his acquittal by disclaiming all knowledge that it was stolen. He cannot bring himself within the ambit of section 335 because the order he is appealing from does not fall within any of the appealable orders specified therein. Nor has he a right to come under section 338 which gives a person " who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court or District Court in a criminal case or matter to which he is a party ". The order in question has not been made in a criminal case or matter to which the appellant is a party, for an order under section 413 can be made only when an inquiry or trial in any criminal court is concluded. The appellant was undoubtedly a party to the criminal case which terminated with his acquittal. But the decision which he now canvasses was made after the conclusion of that case and the appellant can in no sense of the term be said to be a party to what took place after his acquittal. In the instant case the appellant was able to secure his acquittal by disclaiming any knowledge that the stolen wireless set was stolen property. In his evidence he conceded that it was the property of the repairer Wijesinghe and made no claim to it. However, as I heard the arguments of learned counsel for the respondent and the appellant on the question whether the learned Magistrate's order is correct I shall dispose of this matter by way of revision under section 357 of the Criminal Procedure Code.

Section 413 (1) of the Criminal Procedure Code empowers a criminal court to make such order as it thinks fit for the disposal of property produced before it, regarding which any offence appears to have been committed. In the instant case the prosecution rests on the allegation that the stolen wireless set was stolen property and that in regard to it the offence of theft had been committed. The evidence establishes that the stolen wireless set was stolen property and in my view the learned Magistrate acted correctly in making an order under section 413.

My view of that section gains support from the following observations of Bertram C.J. in *Silva v. Hamid* [1]; :

" Where property has been stolen, and the charge is made against the person for receiving the property so stolen, even though the Magistrate acquits the person charged with so receiving it, he may, if he comes to the conclusion that the property actually was stolen, order it to be delivered to the person from whom it was taken, and disregard the possession of the receiver. "

The order of the learned Magistrate is affirmed.

Appeal dismissed.

1949 *Present :* **Gratiaen J.**

PALASAMY NADAR *et al.*, Petitioners, *and* LANKTREE (Principal Collector of Customs), Respondent

S. C. 402—IN THE MATTER OF AN APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF MANDAMUS UNDER SECTION 42 OF THE COURTS ORDINANCE (CAP. 6)

Writ of mandamus—*Customs Ordinance—Seizure and forfeiture of goods—Claim by person from whom they were seized—Computation of time prescribed for giving notice of claim and tendering security—Detention of goods for examination—Does not amount to seizure—Sections 46, 123, 146.*

Where there is a claim to seized goods under section 146 of the Customs Ordinance the period of one month within which notice of the claim should be given to the Collector should be reckoned from the date when the goods were seized with the intention that " ultimate loss " by forfeiture and condemnation would result from the seizure.

The power of seizure conferred by section 123 of the Customs Ordinance includes by implication the power, for the purpose of examination, to detain for a reasonable period any goods which a Customs officer suspects to be liable to be seized as forfeited goods.

APPLICATION for a Writ of *Mandamus* on the Principal Collector of Customs directing him to accept a notice of claim tendered to him by the petitioners under section 146 of the Customs Ordinance.

H. V. Perera, K.C., with *C. Suntheralingam*, for petitioners.

R. R. Crossette-Thambiah, Solicitor-General, with *H. W. R. Weerasooriya*, Crown Counsel, and *B. C. F. Jayaratne*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 1, 1949. GRATIAEN J.—

Certain facts relating to these proceedings are not in dispute. On May 11, 1949, the petitioners obtained from the Controller of Exports

[1] *(1918) 20 N. L. R. 414.*