1939 *Present :* **Soertsz A.C.J., de Kretser and Wijeyewardene JJ.**

COLOMBO MUNICIPAL COUNCIL *v.* J. A. PERERA.

16—M. M. C. Colombo, 17,047.

Motor car—Charge against a registered owner—Possession or use of a car without a licence—Burden of proof—User on highway essential—Statutory possession of registered owner—How it may be displaced—Ordinance No. 20 of 1927, s. 31 (1) (vol. IV., ch. 156).

Where a person is charged, as the registered owner of a motor car, under section 31 (1) of the Motor Car Ordinance with possessing or using a car for which a motor licence is not in force, the burden is on the prosecution to prove not only that the registered owner possessed the car at some time during the material period but also that during that period it was used on a highway.

Once these elements are proved that statutory possession imputed to the registered owner can be displaced only in the manner expressely provided by the Ordinance.

THE accused in this case was charged under section 31 (1) of the Motor Car Ordinance, with possessing or using a motor car for which a licence was not in force. The name of the accused appeared on the Register as that of the owner of a motor car. In 1937 he took out a licence but he omitted to obtain one for the year, 1938. The defence set up by the accused was that in October, 1937, he sold the car to a purchaser, who informed him that he was going to dismantle it. The Magistrate convicted the accused.

E. B. Wickremanayake (with him *J. A. T. Perera* and *S. de Zoysa*), for accused, appellant.—The appeal concerns the interpretation of section 31 (1) of Chapter 156. It is admitted that the accused's name appears on the Register as that of the owner of the car and that he has not given notice of the sale in 1937. But the question is whether merely because his name is on the Register he can be charged even though he had sold the car. According to section 2, the Ordinance applies to a motor car only when on a highway, unless otherwise provided. There are cases where it has been held that actual possession or user must be proved before the registered owner can be convicted under section 31 (1)—*Hodson v. Madugalle* [1]; *Government Agent, Western Province v. Bilinda* [2]; *Government Agent, Northern Province v. Sepamalai* [3]. A different view was taken in *Government Agent, Central Province v. Beeman* [4] and *Government Agent, Province of Sabaragamuwa v. Peries* [5]. The latest case is *Hodson v. Cassim* [6] where all the previous cases are reviewed. It is in appellant's favour, for it lays down that the presumption of possession can be rebutted by independent evidence.

Ownership and possession are not convertible terms, as the Magistrate seems to think. Ordinarily no doubt, ownership presumes possession. The only question is whether the presumption can be rebutted. If it can be rebutled, on the evidence in this case, the accused is entitled to an acquittal.

[1] *(1935) 5 C. L. W. 22.*
[2] *3 Cr. App. R. (Ceylon) 38.*
[3] *(1936) 1 Cey. Law Journal 42.*
[4] *(1932) 33 N. L. R. 343.*
[5] *(1934) 36 N. L. R. 291.*
[6] *(1938) 40 N. L. R. 83.*

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for complainant, respondent.—Section 2 should be given a limited interpretation and would be applicable only in a case of *user*. Drieberg J. in *The Government Agent, Province of Sabaragamuwa v. Peries* (*supra*) effectively deals with it. It is obscure and, indeed, in the original publication of the Ordinance, it is given the place of a sub-section, viz., section 2, sub-section (2).

Section 2 was not discussed in the previous reported cases. The production of the certificate of registration would be *prima facie* evidence of possession, if possession is in question.

In regard to section 31 (1), it is observed by Drieberg J. that the Motor Car Ordinance is a taxing Ordinance and should be strictly construed. The charging section is really section 33 (2). Section 31 (1) is only a machinery section for sub-section (3). We are, therefore, really concerned with a machinery section. When one deals with a machinery section, it must be construed liberally.

The words "owner" and "possessor" are used in a technical sense and not in the ordinary sense. Garvin J. was not right in interpreting possession as actual possession. The Magistrate was right in holding that ownership and possession are convertible terms. Section 19 indicates that the person who is duly registered as the owner is the person who is entitled to the possession of the car. The person entitled to possession must be deemed, according to the Ordinance, to be in possession. This is made clear by a consideration of section 23 dealing with change of possession. The accused has not availed himself of the provisions of section 23. That "possession" has a technical meaning was held in *de Silva v. Rosen*[1].

J. W. R. Ilangakoon, K.C., Attorney-General (with him *M. F. S. Pulle, C.C.*) as *amicus curiae*.—The point of view taken in *Hodson v. Cassim* (*supra*) seems to be the correct one. The registered owner is presumed to be in possession of the car. If there is no evidence that he had given notice of the change of possession or that the car was no longer in existence, he should be regarded as owner. The fact that he did not comply with the provisions of section 23 only makes him liable for an offence. But it does not prevent him from showing in a case like the present one that the ownership has changed hands.

The provision for rebate in section 33 (3) shows that ownership and possession need not go together.

The nature of proof required in a prosecution of this type should be as laid down in *Hodson v. Cassim* (*supra*).

Cur. adv. vult.

July 10, 1939. SOERTSZ A.C.J.—

It is not with any desire to play upon words, but only to state a fact, to which our Law Reports bear eloquent witness, that I permit myself the observation that the Motor Car Ordinance is not an enactment that those who run may read. On the very question that now arises for consideration there is a great variety of judicial opinion, and in view of its not infrequent

[1] (1932) 2 *C. L. W.* 98.

recurrence in our Courts, it seemed desirable to have a definite decision which would afford us "the sure anchorage of a dependable rule". Hence this Divisional Bench.

The question, stated briefly, is this: What is the liability imposed by section 31 (1) of the Ordinance when it requires that "no person shall possess or use a motor car for which a motor car licence is not in force"? That question arises in this case in these circumstances. The name of the accused appears on the Register as that of the owner of Motor Car No. C7576. In 1937, he took out a licence for it, but he omitted to obtain one for the year 1938, and in consequence, this prosecution was launched against him. The plea he sets up in defence is that in October, 1937, he sold the car to a purchaser who said he was going to dismantle it, and he knows nothing of the car thereafter. These facts the prosecutor is unable to contradict and for the purpose of this case, they may be regarded as established. But, it is contended, that the accused is bound to provide himself with a licence year after year, so long as his name continues on the Register.

We have had the advantage of a full argument by Counsel appearing on the two sides, and also the asistance of the Attorney-General who appeared as *amicus curiae,* and I have come to a very clear view upon the question, although that view differs from those taken in earlier cases.

I will now refer to those cases in order to indicate how the law stood in regard to this point when I referred it to a Divisional Bench. In *Government Agent, Western Province v. Bilinda*[1], Garvin J. held that for the purpose of a conviction under this section it is not sufficient to prove that the accused man's name appears on the Register as the owner of the car and that no licence has been taken out by him for the material period, but that "the prosecution must also prove that during that period the motor car was *in the possession* of the accused *or* that he *did use it*". He acquitted the accused because his evidence to the effect that although he bought this car, it always lay in the garage in which it was at the time he purchased it, was not opposed. The implication of this ruling is that if it had been shown that the accused was in *actual possession* of the car at any material time, he would be liable whether or not he used it.

In *Hodson v. Madugalle*[2], Koch J. adopted this ruling and said, "it is necessary for the prosecution to prove that the accused did *possess or use* the motor car in question during some period in 1935".

In *Government Agent, Northern Province v. Sepamalai*[3] Dalton J. too followed the ruling in *Bilinda's case* and acquitted the accused because although her name appeared as that of the registered owner, there was no evidence that "the accused *either possessed or used* the motor car at the time set out in the charge". Here again, the implication is that in order to sustain a charge under this section it is sufficient to show that the registered owner *either possessed or used the car.*

In *Government Agent, Central Province v. Beeman*[4] Drieberg J. took a different view. He held that where a registered owner of an omnibus on being prosecuted under this section, set up the plea that during the period

[1] *3 Cr. App. R. (Ceylon) 38.*
[2] *(1935) 5 Cey. Law Weekly 22.*
[3] *(1936) 1 Cey. Law Journal 42.*
[4] *(1933) 33 N. L. R. 343.*

in question the omnibus "was in pieces at a garage", he was properly convicted because that plea does not amount to a statement that "he is not in possession of the bus. If the bus was left for repairs or storage at V's garage, it was still for the purposes of this section in the possession of the appellant. What the appellant says in effect is that he is not in possession of a car "which is capable of being used, but if this is so, he should have satisfied the Registrar . . . . and had the registration of it cancelled," Drieberg J. added that "if as has been proved, the appellant was in possession of the bus he was liable to take out a licence for it and *it does not matter whether he used it or not*".

In *de Silva v. Rosen*[1], Macdonell C.J. adopted this decision and stated that the effect of it was that "the accused not having divested himself of the possession in law of this car in the manner provided by section 22 or section 24 is still in law in possession of this car and is liable for the licensing duty". The defence in that case was that the accused had no car for three years. The prosecution was unable to contradict that.

In *Misso v. de Zoysa*[2], I followed these rulings that "once a person has been registered owner of a car on his declaration that he is entitled to possession of it, he must be regarded as the person in possession of it unless there has been a transfer of possession in the manner provided by the Ordinance or unless by the cancellation of the registration it ceases to be a car which can be the subject of possession for the purposes of this Ordinance".

In *Government Agent, Province of Sabaragamuwa v. Peries*[3], Drieberg J. held that in a charge laid under this section *no proof is necessary of its user* during the period when there is no licence in force.

Finally, in *Hodson v. Cassim*[4], Keuneman J. followed *Government Agent, Western Province v. Bilinda* and *Government Agent, Northern Province v. Sepamalai* (*supra*) and held that "the mere production of the register and proof that the accused's name appears there as the registered owner is not sufficient to prove that the accused possessed or used the vehicle in question. But where it has been proved that application has been made for registration . . . . in the name of the accused by the accused himself or at his instance . . . . it is possible in such circumstances to presume *prima facie* that the accused possessed the vehicle thereafter". Keuneman J. added that he did not agree with the ruling in *Government Agent, Central Province v. Beeman, de Silva v. Rosen* and *Misso v. de Zoysa*, and that he thought that "the presumption of possession" might be "rebutted by the accused *in any way he wishes*".

After a very careful examination of all these cases and of the Ordinance itself, I have, as I said, come to a very definite and clear conclusion that the correct view is that for the purpose of section 31, the prosecutor must prove not only that the registered owner possessed the motor car at some time during the material period, but also that it some time during that period, it was used on a highway. Once these elements have been established, it is not open to the accused to rebut possession "in any way he wishes", but only by bringing himself within the exemptions expressly given by the Ordinance.

[1] (1932) *2 Cey. Law Weekly 98.*
[2] (1935) *4 Cey. Law Weekly 81.*
[3] (1934) *36 N. L. R. 291.*
[4] (1938) *40 N. L. R. 83.*

To this view I have been led by a careful examination of section 2 of the Ordinance. In the course of the argument before us, that section was severely commented upon. I believe I joined in the attack. Mr. H. V. Perera went the length of saying that if the draftsman responsible for the Ordinance knew what he was doing when he framed that section, he would, or at least, ought to have hidden it away in some obscure corner. But the compiler of the New Edition of the Legislative Enactments had raised that provision from the humble dependence of a sub-section to the splendid isolation of a section all by itself. By a strange irony, however, it is this very section that, I think, provides the clue to what appeared to be an inextricable maze. It is the "open sesame" to the Ordinance.

Section 2 runs as follows: "unless otherwise provided, this Ordinance applies to a motor car *only when on a highway*". Drieberg J. in *Government Agent, Province of Sabaragamuwa v. Peries* (*supra*) interpreted this section 'in its reference to highways as dealing with so much of the Ordinance as regulates the *use* of cars". Obviously, this is a considerable restriction of the meaning of the words of the section. It can be justified only if upon any other hypothesis other provisions in the Ordinance are rendered nugatory. It is a cardinal rule of legal interpretation that every declaration in an enactment must be assumed to mean all that it says, and that every word must be given effect to if it is possible to do so. If the Legislature intended to limit the operation of section 2 to that part of the Ordinance that relates to the *use* of a motor car, and not to make it applicable to "*matters unconnected with the use of a car*", it could have made that intention manifest by the employment of an additional word or two. But, as it stands, section 2 is an invariable condition precedent, and to be assumed unless otherwise provided. Drieberg J. remarked that "it is not well worded". Perhaps, there is some justification for the remark, and perhaps, the idea meant to be conveyed by the use of the phrase "only when on a highway" might have been expressed better in other words. But the words used seem sufficient for the end in view.

The scheme of the Legislature appears to be to regulate the construction and equipment of motor cars that are to appear on our highways; to provide for the mode and conditions of their use on highways consistently with the safety of traffic and with the preservation of the road; and to enable the authorities to collect licensing and other fees by way of reimbursing themselves for the expenditure incurred on account of the repair and maintenance of highways. In such a scheme, the Legislature is not all concerned with motor cars that do not come on highways at any time, or that do not come on highways during some relevant period. The purpose of section 2 is to make that fact clear and to declare that when any question of compliance or non-compliance with the requirements of the Ordinance, or of offence or no offence under it arises, that that question must be determined with reference to the prerequisite, whether or not at any material point of time or during any material period the motor car in question was on a highway. I cannot accept the *dicta* of Drieberg J. that "there can be no relevancy to the offence of non-observance of this provision where the car happens to be, whether on the road or in the

garage", and that "it is an offence for a person to possess a car for which no licence is in force and this is *not affected by the question of place of user or whether it is used at all*". Now it is clear that in the absence of section 2, the use anywhere in Colombo or outside Colombo whether on highways, *or on private lands*, of cars of certain dimensions, would constitute an offence. But, obviously the Legislature could not have so intended. So far as it is concerned, there is no purely ethical or moral desideratum in regard to the dimensions of cars. But their size assumes a primary importance when the question is whether they may, or may not be permitted on a highway consistently with other interests. Similarly, the Legislature is not concerned with the dimensions and relative position of trailers (section 5), or with the construction and equipment of cars (sections 10 (1), 11, 12, 13, 14, 15, 16, 17) when they are not on a highway. To my mind, it is an essential ingredient of the offence that the car was on a highway at some material point of time.

A scrutiny of the different chapters of the Ordinance makes this view inevitable. Chapter II. deals with the construction and equipment of cars. Section 4 provides for the dimensions of cars for use in Colombo and outside Colombo. Chapters IV., VI., VII., VIII., and IX. deal with "identification plates", "certificates of competence", "driving rules", "restriction of use on highways and speed limits", and "hiring cars and lorries" respectively, and as the very titles suggest, are intended to apply to "motor cars when on a highway". Likewise the supplementary chapter X. contemplates "motor cars when on a highway".

But it may be said that the chapters I have referred to relate to the *use* of a car and are within the scope of the interpretation given by Drieberg J. I will, therefore, examine the two chapters I have so far omitted, namely, chapters III. and V., which deal with *possession* of cars and in Drieberg J's phrase "with matters unconnected with the use of cars". These are the important chapters so far as this case is concerned. Chapter III. deals with the registration of Motor Cars. Section 19 (1) read with section 2 would have made possession or/and use of a motor car even for a limited purpose and by anyone at all an offence, if it was shown that it had been on a highway at some material time unless there was a registered owner of that car. That would have resulted in manufacturers and dealers of cars being involved in great hardship, and section 19 (2) is designed to free them from that hardship. It provides for possession and/or use by dealers of cars on a highway although there are no registered owners in respect of those cars. Section 19 lays down the first condition for the possession or use of a motor car on a highway so far as persons other than those indicated in its sub-section (2) are concerned. That condition is that there should be a registered owner. Section 31 in chapter V. supplements section 19 and provides the other condition namely that there should be a licence in force to cover both possession and use, at every point of time at which a motor car is used on a highway, and here again the dealer is exempted altogether from this requirement, and the owner of a motor car who has notified the licensing authority that the car will not be used for a stated period is exempted during that period from liability to conviction "*by reason only of* a person's *possession* of the motor car".

Emphasis is laid on the fact that *possession alone* will not inculpate him during that period. If, despite the notification there is user during the period notified the person using it will, of course, be liable under section 31 (1), and the notifying owner's possession during that period will also become culpable, for the condition for exemption from a licence will have been violated, namely the condition of non-user. In that event, the owner as the registered owner becomes liable under 31 (3) to a fine for the offence as well as to a fine to cover the amount payable for the licence; and the party who used the car during that period, if he is other than the owner, will himself be liable to punishment. Now, it is obvious that it is an easy matter to fix liability in the case of an offending " user " of the car. He is the person detected using it. But if the blamable owner is to be the owner as the Common law understands him, it will be necessary to pursue a changing and even elusive person. That of course would be a most unsatisfactory state of things from the point of view of the Legislature, and to obviate it, section 26 provides that " for the purposes of any proceeding under this Ordinance, the registered owner shall be deemed to be the owner ". The only exceptions to this rule are (*a*) where the absolute owner registered under section 19 (3) is shown to be in possession and (*b*) where the person who would have figured as " absolute owner " if he had complied with section 19 (3), seizes the car under section 23 (6) and the registered owner complied with the requirements of section 23 (6) (*a*) and (*b*). Any other change of possession does not result in the exemption of the registered owner from liability unless section 23 is obeyed. Upon such a change of possession, however, the person entitled to possession by virtue of that change is allowed to use the car for seven days although he has not yet conformed with section 19 (1), but during that period the liability of the registered owner continues despite the change of possession till the new owner is put upon the register and licensed. The result is thus attained that there is no interval during which a car "on the highway" exists without an imputable registered owner.

An examination of chapter III. and chapter V. of the Ordinance in this manner leads to the conclusion that it is a motor car on the highway that is in their contemplation as is clearly the case in the other chapters. In a word section two is the corner stone of the Ordinance.

It follows that the accused in this case is not liable to conviction under section 31 (1) because the uncontradicted evidence in the case is that this motor car was not on a highway in the year 1938 during which it is charged by the prosecution and admitted by the accused that there was no licence in force. There was no obligation imposed on him to obtain a licence in 1938, for a motor car that was not on a highway during that year. If, however, there was evidence to show that at any time during 1938, this car was on a highway, then in my opinion, it would not have availed the accused to prove that although he appeared as the registered owner, he was not the true owner because he had sold the car in October, 1937. I cannot agree with the view taken by Keuneman J. in *Hodson v. Cassim* (*supra*), that it is open to a registered owner to rebut " the presumption of possession " " *in any way he wishes* ". It is not, I submit, correct to

speak of "a presumption of possession" arising from registered ownership. It is much more than a presumption that arises. A statutory posession comes into being and overrides *de facto* possession and possession as it is understood in Common law. This possession imputed to the registered owner by the Ordinance, can in the view I take, be displaced only in the manner expressly provided by the Ordinance.

For these reasons, I set aside the conviction and acquit the accused.

In view of the observation made by my brother de Kretser on the question of the burden of proof in a case of this kind, I think I ought to add a few words to state as clearly as possible that my view on the point is that it is incumbent on the prosecutor to lead evidence, to show that at some time during the material period, the car was on a highway, and that it is only in that event, that occasion arises for the accused to enter upon a defence. In this case, I find the accued not guilty, because the prosecutor stated that he was not able to establish that essential fact. It is true that the accused was able to prove and did prove that he had not used the car during the year in question. He apparently attempted and accomplished that task because the prevailing view was that *prima facie* case against an accused was established once it was shown that he continued to be the registered owner of an unlicensed motor car and that it was in his possession. But my brothers agree with me that "no charge can be maintained under section 31 in respect of an unlicensed motor car *which has not been used on a highway* at some time during the material period". To my mind, the inescapable result of that finding is, that in order to establish a case against an accused, it is necessary for the prosecutor to show not only that he is the registered owner of an unlicensed motor car, *but also that the motor car was on a highway at some time during the material period,* for the Ordinance applies only to motor cars on a highway. Till such evidence has been adduced, there is no case for the accused to meet. He is entitled to maintain "a sullen silence" and to claim an acquittal. I am quite unable to subscribe to the propositions of my brother de Kretser that "in the final result the prosecutor will have to meet a defence of non-user", and that "in case of doubt . . . . the doubt should tell against the owner of the car". If I may say so, with respect, those propositions appear to me to be topsy-turvy. They are subversive of the fundamental principles of criminal law that the accuser must prove the guilt of the accused, not the accused his innocence ; and that the accused is always entitled to the benifit of the doubt.

I am aware that there are a few exceptional criminal cases in which the Legislature has imposed upon the prisoner the burden of proving that he is not guilty, but this is not such a case.

DE KRETSER J.—

I agree, and wish to add that I reserve my opinion regarding the *onus* of proof, a matter which was not argued before us nor discussed later.

In the final result the prosecutor will have to be in a position to meet a defence of non-user, but in a case of doubt the question of *onus* will be a matter of importance, and, as at present advised, I incline to the view that the doubt should tell against the owner of the car.

WIJEYEWARDENE J.—

I have had the advantage of reading the judgment of my Lord the Acting Chief Justice, and I agree that no charge can be maintained under section 31 of the Motor Car Ordinance (vol. IV., chapter 156) in respect of an unlicensed motor car which had not been used on a highway at some time during the material period.

In this case there is clear evidence that the car in question was not used on a highway during the year 1938. I would, therefore set aside the conviction and acquit the accused.

Set aside.