

(October 6, 1952)

1. ANTONIS ANASTASSI,
2. ANDREAS ARISTODEMOU, *Appellants,*

v.

THE POLICE, *Respondents.*

(Case Stated No. 79.)

Theft of property after severance from realty—Proviso to section 1 of the Larceny Act, 1916—Deliberately omitted from section 249 of the Criminal Code.

The appellants were convicted of stealing pine trees. Section 249 (3) of the Criminal Code provides that "everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen". This section reproduces verbatim section 1 of subsection 3 of the Larceny Act, 1916, but a proviso to section 1 (3) of that Act requires that the person who severs property from realty must have abandoned possession thereof before it is capable of being stolen. This proviso is declaratory of the Common Law.

Held: In the circumstances it must be assumed that the omission of the proviso in the English Act from our section 249 (3) was deliberate. "Other provision" has been made which excludes the Common Law. The appellants, therefore, were rightly convicted.

Observations on the manner in which cases should be stated.

Appeal by accused from the judgment of the District Court of Larnaca (Case No. 1560/52).

A. Demetriou for the appellants.

M. Triantafyllides for the respondents.

The judgment of the Court was delivered by:

HALLINAN, C.J. : In this Case Stated both appellants were convicted of stealing pine trees the property of the Government. Certain questions of fact were raised on the application for the Case Stated but, having regard to the findings of fact by the learned District Judge in stating a case, we are unable to consider them in this Court. The sole question of law which, in our opinion, falls to be determined is whether the trees, the subject-matter of the charge, were larcenable in law. It is clear on the facts that the trees were severed from the realty and thereby were removed from the place which they occupied. Therefore, there was a severance and carrying away within the meaning of those expressions in the section which defines stealing, that is to say, section 249 of the Criminal Code. In section 1 (3) of the Larceny Act, 1916, it is provided "Everything which has value and is the property of any person, and if adhering to the realty then after severance

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therefrom, shall be capable of being stolen." Now these words are reproduced verbatim in our section 249 (3) but there is in the English Act a proviso which is not reproduced in our law, namely,

"Provided that: (a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof;"

Now this proviso is declaratory of the Common Law and counsel for the appellants has argued that since Common Law is in force in this Colony this proviso is law in this Colony. But the provision in our Law which applies the Common Law in this Colony is contained in section 28 (1) (c) of the Courts of Justice Law (Cap. 11) and there it is provided *inter alia* that the Common Law is applicable "save in so far as other provision has been or shall be made by any Law of the Colony."

It has been held recently in this Court that this Court will only hold that other provision has been made if it is very clear from the enactment which is being relied on that it is the intention of the legislative authority to exclude the Common Law. (*The Universal Advertising Agency & others v. Panayiotis A. Vouros*, Civil Appeal 3901, decided on 2nd April, 1952).* Now in the present case it is clear that the legislative authority has made "other provision" which excludes the Common Law upon which counsel for the appellant relies because our section 249 (3) follows verbatim section 1 (3) of the English Act of 1916 but omits the proviso contained in the English Act. In the circumstances it must be assumed that this omission was deliberate, and that the legislative authority intended to modify the English Law. For these reasons this Court is of the opinion that once the trees were severed from the realty and ceased to occupy the upright position of a growing tree, the timber so cut down was capable of being stolen. Since, therefore, in our opinion the determination of this case by the District Judge was correct in law the conviction must be affirmed.

I would like to add that it is most desirable that judicial officers, when stating cases, should consult with counsel on both sides so that if possible an agreement can be reached by the parties and the Court below as to the facts to be contained in the Case Stated. Where counsel of either party feel aggrieved by the manner in which the case has been stated the proper course is to apply to this Court to have the case sent back for amendment.

* See page 87 of this volume.