In regard to the case law on the subject it may be noted that our opinion is affirmed by two Judges of this Court in *Chaduvula Munuswami Naidu* v. *Emperor*(1), *Yerneni Satyanarayana, In re*(2); and also in *Surendra Nath Jana* v. *Kumeda Charan Misra*(3). The ruling in *Namberumal Chetti* v. *Nainiappa Mudali*(4) was based on the special wording of the order then in question. The learned Judges there observed that the order was very detailed and comprehensive.

K.N.G.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Stone and Mr. Justice Burn.

IN RE M. MOUNAGURUSWAMI AND FIFTEEN OTHERS (ACCUSED), PETITIONERS.*

1932, November 24.

Criminal trial—Counter cases—Proper procedure.

No hard and fast rule can be laid down with regard to the procedure to be adopted in the trial of counter cases by Criminal Courts. There is nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. It is necessary (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered and (2) that the conclusions in each case must be founded on, and only on, the evidence in each case.

If the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

Krishna Pannadi v. *Emperor*, (1929) M.W.N. 883; (1929) 58 M.L.J. 352, explained. *Krishtamma* v. *Emperor*, (1929)

(1) A.I.R. 1928 Mad. 783. (2) (1928) 28 L.W. 774.
(3) (1930) 51 C.L.J. 208. (4) (1930) I.L.R. 54 Mad. 331.
* Criminal Miscellaneous Petition No. 1014 of 1932.

MOUNA-GURUSWAMI, *In re.*

M.W.N. 881, and *Kandregula Jaggu Naidu* v. *Emperor*, (1932) M.W.N. 692, considered.

PETITION praying that the High Court may be pleased to issue an order directing the transfer of Sessions Case No. 100 of 1932 from the file of the Court of Session, Madura Division, to the file of any other Court of Session.

Nugent Grant (*amicus curiae*) for petitioner.

Public Prosecutor (*L. H. Bewes*) [*amicus curiae*] for the Crown.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This transfer petition was directed by me to be placed before this Full Bench not because of any difficulty which arises in the petition which is not opposed but because it is a favourable opportunity for resolving difficulties with regard to procedure which have arisen on account of conflicting opinions expressed by this High Court.

One of these is *Krishna Pannadi* v. *Emperor*(1), a decision of JACKSON J., and another is *Kandregula Jaggu Naidu* v. *Emperor*(2), a decision of REILLY and KRISHNAN PANDALAI JJ. Some difficulty has probably been created also by *Krishtamma* v. *Emperor*(3), a decision of WALLER and CORNISH JJ. These cases lay down the procedure to be adopted at the trial of cases and counter cases, the two former by Sessions Judges and the latter by Magistrates. In *Krishna Pannadi* v. *Emperor*(1) JACKSON J. stated:

"There is no clear law as regards the procedure in counter cases, a defect which the Legislature ought to remedy. It is a generally recognized rule that such cases should be tried

(1) (1929) M.W.N. 883; (1929) 58 M.L.J. 352.
(2) (1932) M.W.N. 692.
(3) (1929) M.W.N. 881.

in quick succession by the same Judge who should not pronounce judgment till the hearing of both cases is finished. This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts."

JACKSON J. then points out that there is obvious difficulty in the adoption of this rule as it seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record. He then proceeds to state his view that the only way in which such a procedure can be justified is by setting up a fiction that the case and the counter case are really one and suggests that this fiction should be made a reality by statute. This judgment has been severely criticised in *Kandregula Jaggu Naidu* v. *Emperor*(1) but I am bound to say that I think that most of the criticism is due to a misunderstanding of JACKSON J.'s judgment because on page 696 REILLY J. says:

"I understand JACKSON J.'s opinion to have been that not only should the same Assistant Sessions Judge have heard both cases to the end and have had the evidence of both of them in his mind before he pronounced judgment in either but also that he should have tried both cases with the aid of the same assessors. * * * * That is how the learned Sessions Judge of Vizagapatam has understood Jackson J.'s directions and it is that procedure he has followed."

I do not understand JACKSON J. to have meant that both cases should be tried with the aid of the same assessors. What he does say is that both cases should be tried in quick succession by the same Judge who should not pronounce judgment until the hearing of both cases is finished. If that is what JACKSON J. meant then there is really no difference between the procedure JACKSON J. has in mind and that indicated by REILLY

(1) (1932) M.W.N. 692.

MOUNA-GURUSWAMI, *In re.*

BEASLEY C.J.

and KRISHNAN PANDALAI JJ. It seems to me that all the three are agreed upon the desirability of the Judge withholding judgment until he has heard both the case and the counter case but, since JACKSON J. states that this procedure may allow the facts in the one case to impress or influence the Judge in the other case, it is as well to observe that if the Judge withholds his judgment until he has heard both cases for the purpose of considering the cases as if they were one case, then that would be an irregular procedure; and the suggestion made by JACKSON J. that a fiction should be set up that the case and the counter case are really one and should be made a reality by statute seems to me to be one which it would be very difficult to adopt. WALLER and CORNISH JJ., who were dealing with the procedure in the magistrates' Courts, are of the opinion that "no Court can grasp the real facts unless it tries both cases." If by that it is meant that the fundamental principle that the Court must not have regard in one case to the facts in another is not to be observed then that view cannot be supported. Possibly if the Judge reserves judgment in both cases in order that he may consider both for the purpose of arriving at the truth, he is likely to reach a more satisfactory result than by trying each case without reference to any of the facts in the other. But since this procedure is irregular, it cannot receive our support. No hard and fast rule can be laid down. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. Should the Judge, however, feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter case to the file of

another Sessions Judge. What must be made clear is: (1) that the trial must be separate, i.e., before different assessors and separate judgments delivered, (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment.

We are much obliged to Mr. Nugent Grant and Mr. Bewes for their great assistance to us as *amici curiae*.

STONE J.—I agree.

BURN J.—I agree.

K.N.G.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Cornish.

B. CHENCHURAM NAIDU (PLAINTIFF), APPELLANT,

1932, April 26.

v.

MUHAMED BAHAVUDDIN SAHIB (DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXIII, r. 1—Landlord against tenant—Ejectment suit by—Withdrawal without leave of Court owing to absence of notice to quit—Subsequent suit after giving requisite notice—Maintainability of—"Subject-matter"—Meaning of.

Where an ejectment suit by a landlord against a tenant was, owing to the absence of the requisite notice to quit, withdrawn without obtaining leave of the Court to institute a fresh suit in respect of the subject-matter of the said suit and a

* City Civil Court Appeal No. 14 of 1929.