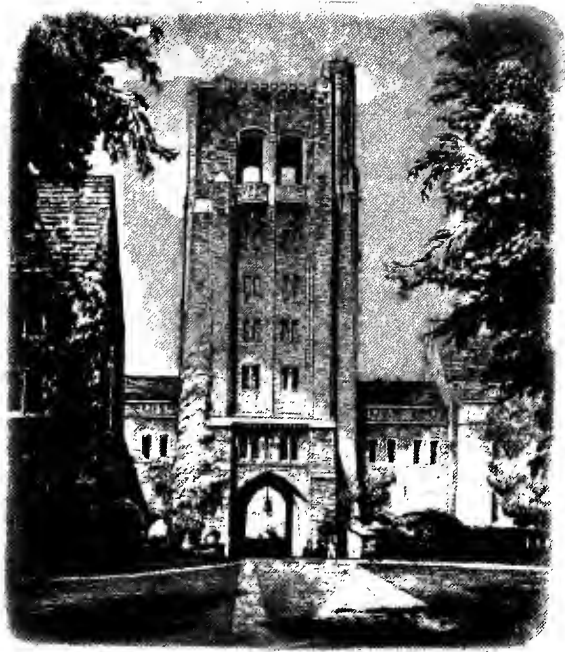


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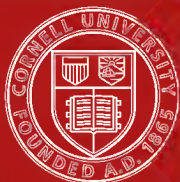
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MASTER AND SERVANT ORDINANCE,

(No. II OF 1865.)

NOTES OF DECIDED CASES,

BY

J. P. LEWIS, M. A.,

*CEYLON CIVIL SERVICE,*

AND

M. S. CRAWFORD, B. A.,

*CEYLON CIVIL SERVICE,*

---

**Colombo :**

A. M. & J. FERGUSON.

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1883.

MA 7360



## P R E F A C E .

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WHERE, as in most of the offences under the Ordinance No. 11 of 1865, "the criminality of the charge, by whichever party made, involves nothing that is *malum in se*, but is the pure creature of the Ordinance, limited to the object of furnishing a ready means for enforcing the contractual rights between the parties, it need hardly be remarked, for it seems obvious, that it is especially incumbent on the criminal court, before which such a case comes, to take care that the complainant who seeks the aid of the criminal law for his own advantage, should by his plaint pledge himself to a precisely stated charge falling within the terms of the Ordinance, and should clearly establish that charge by his evidence. It is in no degree the duty of the court to go out of its way to help the prosecutor. .... The prosecutor is in the position of a plaintiff in a civil action; he must stand or fall by the case, to which he pledges himself by his pleadings." (Phear, C. J., -16,854 Panw., 2 Circ. 72).

The following pages are intended to remove some of the difficulties which are met with, in framing charges and conducting prosecutions under this Ordinance.

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NOTE.—Words in the *Plaints* printed in italics, to which a note is not appended, may be replaced by words of similar import, to suit the particular circumstances of the case; but where they are followed by a reference, the only admissible alternatives are the words printed in italics in the notes, unless the contrary is stated.

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## LIST OF ABBREVIATIONS.



*Police Court cases are referred to by the number of the case and the name of the District ; e. g., Police Court case No. 9190, Matara, is quoted as 9190 Mát.*

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Avis.	Avisáwélla.
Bad.	Badulla.
Bala.	Balapitiya.
Batt.	Batticaloa.
Bel.	- Beling and Vanderstraaten's Handy Book of Police Courts, 1846-1868. 2 vols.
Cháva	Chávakachchéri.
Circ.	Supreme Court Circular, 1878-1882. 5 vols.
Col.	Colombo.
C. R.	Court of Requests.
Crow.	Crowther's Reports, 1863.
Dik.	Dikoya.
Dimb.	Dimbula.
D. C.	District Court.
Fern.	Fernando's Reports, Kandy, 1878.
Gala.	Galagedera.
Gamp.	Gampola.
Gren.	Grenier's Reports, 1872-1874. 3 vols.
Hald.	Haldummulla.
Haris.	Harispattu.
J. & B.	Joseph and Beven's Reports, 1859.

Kal.	-	-	Kalutara.
Kalp.	-	-	Kalpitiya.
Keg.	-	-	Kegalla.
Kuru.			Kurunegala.
Lor.	-	-	Lorenz's Reports, 1856-1859. 3 vols.
L. M.		-	Legal Miscellany.
Mal.	-	-	Mallagam.
Man.	-	-	Mannar.
Manley Smith	-		Manley Smith's Law of Master and Servant, 3rd edition.
Mát.	-	-	Mátara.
Mullai.		-	Mullaitivu.
M. C.		-	Municipal Court.
Murray			Murray's Reports, 1846.
Náwal.	-		Náwalapitiya.
Neg.	-	-	Negombo.
Nuw. El.			Nuwara Eliya.
Pána.	-		Pánadúré.
Panw.	-	-	Panwíla.
Point P.		-	Point Pedro.
Pussel.	-	-	Pusselláwa.
Putt.		-	Puttalam.
Rak.	-		Rakwáné.
R. & O.	-	-	Rules and Orders for Police Courts. contained in Schedule A of the Ordinance No. 18 of 1861.
Rat.			Ratnapura.
R.-N.			Ráma-Náthan's Reports, 4 vols. viz:— 1820-1833. 1860-1862. 1863-1868. 1877.
S. C.	-	-	Supreme Court.
Trinco.	-	-	Trincomalee.
Vand.	-		Vanderstraaten's Reports, 1869-1871.

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## ADDENDA ET CORRIGENDA.



- Page 10, note (r).—After “18 of 1871” insert “cl. 2.”  
,, 19, line 6.—Omit comma after “Complainant.”  
,, 19, line 12.—Omit comma after “something.”  
,, 19.—Read note (u) as “3222 Mal., 1 Bel. 31.”  
,, 24. Add to note (o).—“Any suitable form of expression, averring contract between Defendant and the person whose service he is charged with quitting, may be used.”  
,, 28, line 4 from foot of page.—For “then he” read “he then.”  
,, 28, note (g).—For 38 read 48.  
,, 30, note (i).—For “*infra*” read “*intra*.”  
,, 40, line 1.—For “recission” read “rescission.”  
,, 55, line 8.—For “(z)” read “(w).”





## INTRODUCTION.

**I**N any country, in which slavery is illegal, the relations between master and servant must necessarily exist by virtue of some agreement, either express or implied between the parties (*a*)—in other words, they are created by contract. The remedy for breach of contract is ordinarily by civil action. The experience however of different countries has shown that, so far as regards this class of contracts, the remedies afforded by the Civil Courts are inadequate for the due protection of either master or servant (*b*). In Holland various provisions were made against the misconduct of servants by the local ordinances of most towns (*c*).

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(*a*). Manley Smith. Intro. p. xlvii.

(*b*). cf. the Preamble to the Indian Act No. 13 of 1859: "Whereas much loss and inconvenience are sustained by manufacturers .....from fraudulent breach of contract on the part of artificers, workmen and labourers, who have received money in advance on account of work, which they have contracted to perform; and whereas the remedy afforded by suit in the Civil Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment," etc.

In the words of Sir C. Marshall "a criminal prosecution is the only remedy in very many cases, which from the relative situation of the parties, and from the circumstances of most servants, can be made available to their employer.....It is because the circumstances of most servants would incapacitate them from paying damages, that the breach of their civil contracts of service are thus punishable criminally. In other words, the fear of punishment, operating on the mind of the servant, is given to the master as a protection against misconduct, in the room of a pecuniary indemnity, which, if awarded by a decree, could seldom be actually recovered." 910 D. C. COL. 1835. Judgments pp. 490, 500.

(*c*). Van der Linden, 241. cf. Van Leeuwen iv. xxii. 11. Hinc apud nos plerumque Jure Municipali cautum, ne Domini ultra modum in suos famulos saeviant, eosve durius habeant, sub poena ut si ob justam causam aufugerint, integra illis merces debeatur, rursus si famuli famulaeve aufugerint operasve suos sine justa causa dereliquerint, sub poena amissionis mercedis debitae, ulteriorisque correctionis arbitrio judicis commissae, utque insuper nemini eos easve in suum ministerium coadaptare sit permissum.

There is no record of any legislation of this kind under Dutch rule in Ceylon; and, owing probably to the existence during that period of a system of slavery in the island, the necessity for such legislation was not felt.

The first step in this direction, under British rule, was taken in cl. 17. of the Ordinance, No. 3 of 1834, to provide for an improved system of police in Colombo. That clause made the servants, to whom it referred, liable to forfeiture of wages, and further punishment for neglect of duty, desertion of service, or other misconduct. Servants were entitled to 15 days' notice of discharge, and to 15 days' additional wages, if discharged without such notice.

In 1837 a general Ordinance (*d*) was passed, having for its object "the better regulation of Servants, Labourers, and Journeymen Artificers under contracts for hire and service." It was however disallowed by the Home Government; but most of its provisions subsequently became law as the Ordinance No. 16 of 1840. That Ordinance attached the same incidents to verbal contracts, and defined those offences, which are constituted of breach of contract and misconduct on the part of servants, in substantially the same terms as the present Ordinance. But it made no provision for the punishment of employers guilty of breach of contract, and, apparently for this reason, it was in little more than a year replaced by the Ordinance No. 5 of 1841; which was simply a re-enactment of the former Ordinance, with the addition of a clause (*e*) making penal certain breaches of contract on the part of employers.

One of the provisions of this Ordinance was that no "contract or agreement in writing for the hire or service of any menial or domestic Servant, Labourer, or Artificer" should be valid under the Ordinance, if made for a longer period than one year. This restriction was soon found to cause "great inconvenience in certain Public Departments." In consequence an Ordinance (*f*) was passed in 1845, empowering the heads of those departments to enter into written contracts for the hire of pioneers and other labourers for any period not exceeding three years. (*g*)

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(*d*). No. 4 of 1837.

(*e*). Reproduced as cl. 14 of Ord. No. 11 of 1865.

(*f*). No. 14 of 1845.

(*g*). Extended by Ord. No. 15 of 1863 to five years; a limit which has been retained in the present Ordinance.

What is chiefly noteworthy about this Ordinance is that it was the first legislation in Ceylon, which recognized the principle that, besides the parties to the contract of service, other persons might be guilty of misconduct relating to the contract, of a kind that called for criminal punishment (*h*). The Ordinance made it an offence to seduce from service, to employ, or harbour, persons bound by written contract to another.

But the increasing employment of immigrant labourers upon coffee plantations, and on public works, rendered further legislation necessary. In 1858 (*i*) a short Ordinance was passed, enacting that "in reading and interpreting this Ordinance (No. 5 of 1841), the word "labourer shall be taken to mean, include, and apply to every overseer of labourers, commonly known as and designated Cangany or Kangany" (*k*). In 1859 an Ordinance (*l*) was passed "to promote and regulate the employment of Indian Labourers on lengthened terms of service." It proposed to repeal the provisions of Ordinance No. 5 of 1841, relating to the mode of determining a written contract of service, and fixing the maximum period for such contract at one year. Contracts, entered into in India with certain specified formalities were to be legalised, if made for periods not exceeding three years. This Ordinance was however disallowed; but the Ordinance No. 20 of 1861, which became law, although it made no provision for the legalizing of contracts entered into in India, adopted the extension to three years, in so far as it concerned "contracts for the hire of persons to be employed in agricultural labour." For the rest, this Ordinance contained provisions relating to agricultural labourers, almost exactly similar to those of the Ordinance No. 14 of 1845 with respect to pioneers, *z. e.*

(1). The maximum period, was extended from one to three years;

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(*h*). Cf. "The Labour Question" by Mr. Nell, (1863) p. 19. The author has however lost sight of Ordinance No. 14 of 1845; he attributes the first provision of this kind to No. 15 of 1859.

(*i*). No. 13 of 1858.

(*k*). With the commencement of Railway construction a few years later, it was found necessary to enact that the provisions of the Ordinance No. 5 of 1841 should apply to labourers upon that work (Ord. No. 16 of 1863.).

(*l*). No. 15 of 1859.

(2). Provision was made for the due execution and determination of contracts under the Ordinance ; and

(3). For the punishment of labourers bound by such contracts ; and

(4). Of persons guilty of seducing, employing, or harbouring them, while so bound.

The Ordinance No. 5 of 1841 had now been supplemented and amended five times ; and it was deemed expedient to consolidate the existing Ordinances on the subject of master and servant. The result was the Ordinance of No. 11 of 1865. It repealed the six Ordinances then in force, and substantially re-enacted Ordinances No. 5 of 1841, No. 14 of 1845, and No. 20 of 1861, with some amplifications and additions, which may here be indicated ;

I. A very extensive meaning is given to the word "servant;" the regulations with regard to the execution of written contracts were made more stringent, and provision is made for the due execution of contracts entered into in India for service in Ceylon; the period of notice is raised from one week to one month.

II. The position of servants is improved. They are now entitled, upon discharge without notice, to one month's wages additional, instead of, as before, to 15 days'. Their employers are bound to supply them, when unable from sickness to work, with lodging, food, and medical attendance ; the old Ordinance merely provided that no abatement should be made by the Court from their wages for neglect of service, which might be owing to this cause. Unless certain conditions have been fulfilled with respect to the payment of their wages, servants are not liable to punishment for certain offences ; nor is the Court always bound on conviction to inflict punishment ; it may in certain cases, simply direct the offender to return to his employment.

III. Several new offences are created ; it is made penal to seduce from service, to employ, or to harbour "any servant bound by any contract to serve any other person," instead of those offences being confined, as before, to the case of agricultural labourers bound by written contract, and of pioneers in the service of Government. The offence is added of unlawfully retaining in service a servant bound to another.

IV. The penalties are generally more severe than under the old Ordinance ; where the latter prescribed fine,

and imprisonment only in default of payment, an offender is now liable to either, or to both, at the discretion of the Court.

V! Special regulations with regard to the civil liability of employers and employed—more particularly of those connected with estates—are introduced into the present Ordinance.

In the words of Sir Edward Creasy, the present Ordinance is “a very salutary enactment, and was framed with great care and consideration” (*m*). It has not, so far, been found necessary to amend it; and it may therefore be hoped that this branch of the Statutory Law, which, as we have seen, has been characterized by frequent change, has now been definitely settled.

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(*m*). 2125 Hald. 2 Gren. 40.

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## POLICE COURT PROCEDURE.

*The Parties.*—The Parties to a prosecution in the Police Court are called the Complainant and the Defendant. Any person may complain to a Police Court of any crime or offence cognizable by such Court (*n*); that is, a criminal complaint can be preferred by any one, and not by the injured party only (*o*). But it is irregular for one person to prefer a complaint, which is expressly to be on behalf of another (*p*). Different parties, charged with totally distinct offences, should not be joined as Defendants in one Plaint (*q*); but it has been usual to try several Defendants in the Police Court together, where they have, by the same transaction, and acting in concert with each other, broken duties of the same kind, the breach of which is criminally punishable; even though the duty as to each offender originated in something personal to himself (*r*). Accordingly, where the number of persons tried together on a charge of this nature is small (*s*), and the Defendants are not shewn to have been in any way prejudiced, such joinder will not be treated as a misjoinder (*t*). But it is otherwise where

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(*n*). R. & O. 1.

(*o*). 9949 Gamp. 1 Bel. 138. 519 Kandy, Fern. 11. In charges for desertion against estate coolies, the kangany, and not the employer, is frequently the Complainant. In 98813 Kandy, Morgan, C. J., observed that "as a rule this should be discouraged, for the superintendent is really the Complainant." 3 Gren. 56. It does not appear how the practice is to be discouraged; perhaps Morgan, C. J., meant to say that, if the coolies are not the servants of the kangany, they cannot be convicted on a charge of quitting his service.

(*p*). 1882 Jaff. 1 Bel. 178. 2 R. N. 180.

(*q*). 11385 Kandy, 1 Circ. 18.

(*r*). 71470 Mát. 2 Gren. 28. By the English law as to Indictments, where several commit a joint act, which act is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally, and not jointly, they must be indicted separately. 2 Hawk c. 25. s. 89 cited by Archbold p. 73 (19th ed.)

(*s*). Creasy, C. J., in 71470 Mát. laid down the rule that more than ten should seldom, and more than twenty should never, be tried together.

(*t*). 71470 Mát. *supra*. 14847 Panw. 3 Gren. 23. 5090 Dik. 4 Circ. 103.

50 or 60 persons are tried together. Such a joinder must necessarily prejudice the Defendants; no effective discrimination into the merits of each individual's case can be exercised, and the Defendants lose the advantage of each other's evidence (*u*).

*The Plaintiff.*—The proceedings in the Police Court commence with a Plaintiff. A Plaintiff is necessary in every prosecution (*v*), whether the charge be originally instituted in the Court itself, or referred to it by a Justice of the Peace (*w*); and where no Plaintiff has been entered, even a plea of *guilty* will not waive the irregularity (*x*). The fact that an affidavit has been filed, applying for a warrant for the apprehension of the Defendants, does not dispense with the necessity for a Plaintiff; the affidavit being merely supplementary for obtaining a warrant in certain cases (*y*).

The person making complaint may either state the same orally to the Magistrate, who is required to enter it in a separate sheet of paper, or he may deliver to the Magistrate a Plaintiff, written on a separate sheet of paper and signed by himself (*z*). In the former case it is not necessary that the Plaintiff should be signed by the Com-

(*u*). 71470 *Mát. supra*. Where it is desired to call any of the Defendants as witnesses for the defence, a distinct application should be made to the Court to strike out names from the Plaintiff, so that specified Defendants may give evidence for specified other Defendants. Such application should be supported by affidavit. *ibid*.

If it appears to the Magistrate that an improper number of persons have been made Defendants for the purpose of shutting their mouths, it is competent for him to acquit, during the hearing, such of them as are not fixed by the evidence, when they will be available as witnesses. 41692 *Kandy*, 1 *Bel.* 126. 3 *Lor.* 160 *J. & B.* 10.

In 77768 *Mát.* 4 *R. N.* 113, the 1st Defendant was excluded from the charge at the instance of the 2nd Defendant, who had presented an affidavit stating that he wished to call the former as a witness. *Dias, J.*, observed that the 1st Defendant had been im<sub>o</sub>properly left out.

(*v*). 2587 *Mátalé.* 2 *Gren.* 67. 253 *Gamp.* 3 *R. N.* 185.

(*w*). 26752 *Col. Vand.* 148.

(*x*). 2587 *Mátalé. supra*.

(*y*). 253 *Gamp.* 2 *Bel.* 106. 3 *R. N.* 185.

(*z*) 18 of 1871. cl. 2. Where the Plaintiff was entitled in the name of the Queen as Complainant, and the charge purported to be preferred by the Queen's Advocate, the Plaintiff being signed by the Government Proctor, who produced a written authority from the Queen's Advocate to represent the Crown, *held* that the Plaintiff was sufficiently signed. 64711 *Kal.* 4 *Circ.* 111.

Clause 2 of 18 of 1871 does not require that the Plaintiff should

plaintant (a). In private prosecutions a stamp of 15 cents, to be supplied by the Complainant, must be affixed to the Plaint. (b).

The Plaint, which must be, as near as is material, in the subjoined form (c), and according to the precedents contained in the schedule of forms, annexed to the Ordinance No. 18 of 1861, "shall bear date of the day and year in which it is entered, and shall state the names and residences of the parties, complainant and defendant, the crime or offence complained of, and the time and place (d) of its commission, in such language, or by such description as will shew that it is punishable by law, and is within the jurisdiction of the court" (e).

Where a charge is not criminal at common law, but under an Ordinance only, the Plaint will be substantially bad, unless the Ordinance is cited in it (f). Both the clause and the number of the Ordinance should be stated (g); and it is not sufficient merely to cite the Ordinance infringed, but a distinct charge should be set out (h). The

be written out by the Complainant, but only that it should be delivered and signed by him. A Magistrate is not, therefore, justified in refusing to entertain a Plaint, drawn by an unlicensed petition drawer, but signed by the Complainant, if it discloses an offence cognizable by the Police Court. A. Jaff. 4 Circ. 36.

A Magistrate would be justified in refusing to entertain a Plaint on a printed form of Plaint under a repealed Ord. adapted to the charge in hand by erasures, 6754 Col., 4 R. N. 180.

(a). 70243 Mát. 1 Gren. 13.

(b). 18 of 1871 cl. 1.

(c). In the Police Court of

A. B. of Complainant.

No. Vs.

C. D. of Defendant.

(Date).

Plaint. That the Defendant (*did*) on the (*sixteenth*) day of (*Feb'y*) last, at (*Hill Street in Colombo*) [*Here state the matter complained of*]

(d). The Plaint must give the Defendant fair information of what he is to answer; the offence should therefore be described with definite time and place. 136 Man. 1 Bel 176. Not only the month, but the day, ought to be stated. 2238 Galle, 1 Bel. 3.

(e). R. & O. 3. The jurisdiction of inferior Courts must appear on the face of the Plaint, and if such jurisdiction be doubtful no intendment can be made in its favour. 13,727 Matale, 1 Bel. 128. J. & B. 16. 3 Lor. 216. 1 429 Batt. Murray 6. 1,720 Col. 4. Circ. 95.

(f). 14778 Gala. Vand. 76. 28826 Kandy, 1 Lor. 13. 1 Bel. 83.

(g). 76202 Mat. 4 R. N. 256. 8,281 Matale, 1 Lor. 2.

(h). 531 Matale, 1 Bel. 19.



Plaint should follow all the material and essential words of the Ordinance ; (i) but where the language of the Ordinance is alternative in form, the Complainant must pledge himself to one or other of the alternative expressions. (k) To follow in such a case the language of the Ordinance strictly would be in effect to aver that the Defendant either committed one offence, or that he committed another. (l)

Breaches of different sections of an Ordinance ought not to be charged together, but the offence against each should be separately alleged. (m)

In 6,914 Col. (n) Dias, J., observed "there is nothing in our law or practice, which requires that the Plaint should only contain one charge. There may be cases in which it will be inconvenient to charge two distinct offences in one Plaint, but this (o) is not one of those cases. The evidence in this case is more or less applicable to both charges, and the Defendants could not have been in any way prejudiced by the two charges being included in the same Plaint."

*Process.*—If the Plaint (p) on being presented to, or taken down by the Magistrate, or if the examination of the Complainant, which the Magistrate may make at this stage of the proceedings, (q) discloses no legal crime or offence, or one not cognizable by a Police Court

(i). 14,943 Galley, 1 Bel. 59. 4374 Rat. 1 Bel. 73.

(k). 7216 Col. 4 R. N. 236.

(l). *Ibid.*

(m). 5830 Neg. 2 Bel. 79.

(n). 4 R. N. 230.

(o). One of the Defendants was charged with gaming in breach of Sec. 4, cl. 4, of Ord. No. 4 of 1841, and also, in the same Plaint, with keeping a gaming house in breach of cl. 19 of the same Ord.

(p). No one except the Magistrate has any authority to make endorsements on the Plaint concerning the presence or absence of marks of assault on the person of the Complainant 9,009 Putt. 1 Circ. 46.

(q). 18 of 1871. cl. 2. The right to examine the Complainant does not extend to a case where the Plaint is signed by the Queen's Advocate, 3,116 Col. 4 Circ. 120. The Magistrate must record the examination, (18 of 1871. cl. 2), which should not be on oath or affirmation. The examination should be full enough to afford sufficient facts, to allow of a safe conclusion being drawn in appeal, 6,440 Putt. 2 Gren. 93, and the answers given by the Complainant must be taken down, and not merely the conclusion arrived at by the Magistrate, B. Col. 2 Gren. 79.

the Magistrate should refuse to issue process. (r) An appeal lies against such refusal. (s) It is no ground for refusal of process that there has been a delay of 14 days in preferring the charge; (t) or that the Complainant can suggest no reason for the commission of the offence; (u) or that the charge appears to be frivolous; (v) or that there is a counter case against the Complainant. (w)

(1). *Summons*.—If the Complaint discloses a legal crime or offence, and one cognizable by the Police Court, the Complainant is entitled to a summons against the Defendant. (x) On summons being ordered, the Chief Clerk shall forthwith appoint a day for the appearance of the Defendant, and the hearing of the complaint, (y) and shall intimate the same to the Complainant, or his Proctor or Advocate, and shall issue a summons for the appearance of the Defendant. (z) The summons, which must be, as near as is material, in the form appearing in the schedule to the Ordinance No. 18 of 1861, must contain the number of the Complaint, the names and residen-

(r). 18 of 1871. The order refusing process must be recorded.

(s). *Ibid.*

(t). Col. A. 1 Gren. 10.

(u). 15,652 Avis. 1 Gren. 10.

(v). Col. 1 Gren. 12.

(w.) Col. 1 Gren. 21. Process should not be refused on a merely defective Complaint; but the Magistrate should exercise the power of amendment conferred upon him by R. & O. 24, which provides that "if any error have been committed in recording the complaint, the Magistrate may amend the same at any time before pronouncing judgment." The substitution of another Complainant for the Complainant on the record is an amendment within the meaning of this rule. 85,539 Galle, 2 Gren. 103, 1882 Jaff. 1 Bel. 178. See on the other hand 71720 Mat. 2 Gren. 64.

The amendment must be actually made on the face of the Complaint. 6795 M. C. Galle 2 Circ. 203.

(x). 11 of 1868, cl. 100. The Magistrate may in private prosecutions, before issuing process directed to any person resident more than ten miles from Court, require a reasonable sum to be deposited in Court, to meet the expenses of such person's coming to Court. At the hearing of the case it is the duty of the Magistrate to determine whether the sum or part thereof should be returned to the Complainant, or awarded as expenses to the Defendant. 18 of 1871, cl. 3.

(y). An early day should be fixed. The Police Court is required by cl. 94 of Ord. 11 of 1868 to dispose of the cases brought before it in a summary way. Two months is far too long an interval to fix between the trial and the institution of the charge. 19529 Matalé 3 Circ. 89. See also 5713 Galle, 3 Circ. 89. 63151 Kal., 3 Circ. 156.

(z). R. & O. 5.

ces of the Complainant and Defendant, a statement of the offence complained of, and the time and place of its commission. (a) Where the summons does not contain the name of the Complainant, nor sufficiently describe the offence charged, a conviction will be quashed; (b) and where the summons bore neither the number of the case, nor the names of the parties, the S. C. considered that the omission might mislead the Defendant, and remanded the case. (c)

Except in cases, where prisoners, already in lawful custody are fairly and without any oppressive purpose brought before the Magistrate for summary trial, and except in cases, where the Police Court has granted a warrant instead of a summons to secure the appearance of the Defendant, a summons is as a general rule necessary. But the object of a summons is to bring the party before the Court with full and fair warning why he is brought there, and therefore, when it is clear that the party is already before the Court with full and fair warning, the want of a summons may not be fatal. (d) In 67670 Col. (e) the Defendants were apprehended on a charge of assault, under a warrant issued by a Justice of the Peace, who was also Police Magistrate. After several adjournments, all parties being present, a direction was given in their presence, and with their consent, that the case should be disposed of in the Police Court. The parties were warned to attend, and the following day was named as the day on which the case would be heard. On that day all parties did attend, and the Defendants had their counsel and witnesses with them. A plaint for assault was then entered, and the Magistrate ascertained that the parties were ready. The Defendants pleaded to the plaint, and their case was conducted by counsel, no objection being raised to the regularity of the proceedings, and no application for an adjournment being made. Under these circumstances it was held that the Defendants were before the Court with as full advantages for their defence, as they could have enjoyed, if a summons had been served on them.

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(a). R. & O. 6.

(b). 9534 Mátalé, 1 Bel. 99. Lor. 192.

(c). 36346 Mátalé, Vand. 25.

(d). 67670 Col. 2 Bel. 12. 3 R. N. 20. Crow. 35. 4716 Jaff.

3 R. N. 77.

(e). *supra*.

But where the Defendant was arrested under a Justice of the Peace warrant and bailed to appear before the Justice of the Peace to undergo examination, and on the day appointed for the examination the prosecutor applied to have the case transferred to the Police Court, the Defendant, who was unrepresented by counsel, not objecting, and a plaint for assault was forthwith entered, and the same Magistrate (being a Police Magistrate as well as Justice of the Peace) proceeded there and then to try the case, no appointment of a day for trial being made and no summons served, it was held that the Defendant had not as full and fair notice as possible of how and why he was tried, and that the proceedings were so irregular as to prejudice him in a substantial right. (*f*)

(2). *Warrant*.—A summons is the ordinary and regular process, by which the attendance of a Defendant before the Police Court is secured; but “if the Magistrate shall at any time previous to the day appointed for hearing the complaint, be satisfied by the oath or affidavit, (*g*) of the Complainant or of any other person, that there is probable cause for believing that the Defendant is about to leave the jurisdiction of the Court, or is concealing himself with a view of evading the process of the Court,” the Magistrate may grant a warrant for the apprehension of the Defendant. (*h*)

It is not enough to say by affidavit that the Complainant believes that a summons will not secure the attendance of the Defendant before the Court, omitting any suggestion of a probable cause for believing that Defendant is either about to leave the jurisdiction of the Court, or is concealing himself with a view to evade process. To issue a warrant upon such a ground as this is simply to delegate the Magistrate’s functions to the Complainant, and it is open to question whether in an action brought against the Magistrate for the arrest, effected under the warrant so issued, he could be held entitled to claim the protection due to *bona fides* in the exercise of his office. (*i*)

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(*f*). 18266 Keg. 1 Bel. 190. 2 R. N. 194

(*g*). *i. e.* by the testimony taken upon oath or by affidavit.

(*h*). 11 of 1868 cl. 100. If any person, making such oath or affidavit, wilfully states a falsehood to obtain the warrant, he is guilty of contempt. *Ibid.*

(*i*). Phear, C. J., 3944 Dimb. 2 Circ. 156.

The affidavit should be distinct from the Plaint. They are essentially different documents, and to commingle them is a very slovenly and unauthorized practice. Such a Plaint-affidavit should not be accepted by the Magistrate (*k*).

*Proceedings upon Apprehension.*—Every person lawfully apprehended within the jurisdiction of any Police Court, for any crime, offence, matter or thing cognizable by such Court, shall be brought before such Court without summons, if then sitting, immediately, or, if otherwise, on the first sitting thereof after his apprehension; and the Magistrate of such Court shall proceed forthwith to try him, or in the event of a postponement being necessary, may bind him over in recognizances to appear before the Court on some early day, then and there to take his trial upon the charge preferred against him; or in the event of his failing to enter into such recognizances, may commit him to prison until such early day (*l*); provided always, that if any such person shall be so apprehended as aforesaid, and lodged in any prison or other place of detention, on the night preceding any Sunday or Public Holiday, it shall be lawful for the said Magistrate to cause such person to be brought before him at an early hour next morning, and, after summary investigation, to commit him to prison till the next Court day, or hold him to bail, or discharge him, as the circumstances of the case may require (*m*).

*Summoning of Witnesses.*—Either party is entitled to summon any number of witnesses, whose evidence he may deem necessary for the purposes of his case; and the Chief Clerk must whenever required issue a subpoena, to which must be affixed a stamp of five cents (*n*), to each witness (*o*). Before the subpoenas can be issued, the party must state the names and residences of the witnesses to the Clerk, or must deliver to him a list, or additional list, containing their names and residences (*p*). The Magistrate may require

(*k*). *Ibid.*

(*l*). Police Magistrates are instructed by Colonial Secretary's circular letter of 15th December, 1879, that it is illegal to remand Defendants for a longer period than 48 hours before trial.

(*m*). 11 of 1868, cl. 101.

(*n*). 18 of 1871, cl. 1.

(*o*). R. & O. 17.

(*p*). *Ibid.*

any party to make affidavit that any person whom he desires to subpoena, is a material and necessary witness (g).

*Proceedings on Non-appearance. (1). Absence of Complainant.*—If upon the return day of the summons or upon any day appointed for hearing the complaint (r), the Complainant does not appear, and his absence is not sufficiently accounted for, the complaint shall be dismissed (s). Where a report, purporting to be signed by a Police Headman, and containing a statement of fact, which if true, sufficiently accounts for the Complainant's absence, is presented to the Court, the Magistrate should not dismiss the complaint, without taking some steps to ascertain whether the statement is true or not (t).

The dismissal of the complaint, owing to the absence of the Complainant, is no bar to the filing of a fresh Plaint for the same offence (u); but no complaint once dismissed shall be reinstated without express leave from the Magistrate having been first obtained (v).

This provision is dependent upon a prior application; the Magistrate is not authorized *ex mero motu*, after the dismissal to order the resumption of the Plaint in the same proceedings, or its reinstatement in another case (w). A mere petition unsupported by affidavit is insufficient in itself to warrant the reinstatement of a charge (x).

Instead of dismissing the complaint, the Magistrate may adjourn the hearing to another day, and cause a notice to be issued to the Complainant requiring him to attend on that day (y).

(2). *Absence of Defendant.*—If the Defendant does not appear, and his absence is not sufficiently accounted for, the

(g). *Ibid.*

(r). It is irregular to dismiss the complaint, upon a day not appointed for the hearing, 55899 Kandy, 2 Bel. 8.

(s). R. & O. 13. *Dismiss the complaint* is the proper term, *strike off* is not appropriate to any of the contingencies under which the Complainant can fail. 3784 Galle, 2 Circ. 81.

(t). 3784 Galle, *supra*. See however 3615 Col., 1 Gren. 22.

(u). 4326 Jaff., 3 R.-N. 61. A "*dismissal*" is not the same as a verdict of "*not guilty*." *Ibid.*

(v). 18 of 1871, cl. 5. There is no provision in the R. & O. for reopening Police Court cases once dismissed, 29341 Col., 3 Circ. 147.

(w). 8534 Galle, 4 R.-N. 3.

(x). 28622 Col. 3 Circ. 122.

Magistrate, upon due proof of service of the summons, notice or order requiring his appearance, shall, upon the motion of the Complainant, grant a warrant for his apprehension (*z*).

It is only upon the motion of the Complainant that the Magistrate can act under this rule, and therefore, when both the Complainant and Defendant are absent, the Magistrate has no power to issue a warrant for the apprehension of the Defendant (*a*).

The absence of the Defendant is not a ground for dismissing the complaint (*b*); nor is the fact that Defendant cannot be arrested (*c*), or that he is reported "not to be found" (*d*). It is not the duty of the Complainant to attend and point out a Defendant for the service or execution of process, except where, from want of acquaintance with the individual or perhaps other causes, the officers entrusted with the process are unable to execute or serve it without such assistance (*e*); and where the Fiscal reports that the Defendant is not known, the Complainant must be afforded an opportunity of pointing him out to the Fiscal's officer (*f*); if the description of the Defendant is insufficient the Complainant should be allowed to amend his Plaint unless it appears that the insufficient description is of ill purpose on his part (*g*).

Where the Complainant has delayed to take out a warrant which has been ordered, the Magistrate is justified in not repeating his order for the warrant, and in dismissing the complaint (*h*).

*Proceedings on Appearance. (1) Adjournment on Cause Shewn.*—If both parties are present, but if the Magistrate is satisfied by affidavit, or otherwise that either party is not ready to proceed to a hearing by reason of the absence of any material witness, (such witness not being kept away

(*y*). R. & O. 13.

(*z*). R. & O. 15.

(*a*). 44881 Keg., 2 Circ. 167.

(*b*). 8310 Galle, 1 Bel. 24; 7651 Mitalé, 3 Gren. 66.

(*c*). 7843 Col. 2 Gren. 80.

(*d*). 2874 Col. 1 Gren. 19.

(*e*). 1770 Col., 12 Dec. 1876, note to 15650 Col., 1 Circ. 28.

(*f*). 15650 Col., *supra*.

(*g*). *Ibid.* 1770 Col., *supra*.

(*h*). 5476 Batt., 2 Gren. 7.

(*i*). R. & O. 18.

by such party), or for other sufficient cause, he may allow the hearing to stand over upon such terms as the circumstances of the case may render necessary (*i*). The mere consent of the parties, or of their Proctor or Advocate, is not to be deemed sufficient ground for adjournment, unless some sufficient cause shall also be shewn to the satisfaction of the Magistrate (*k*). The Magistrate may also examine any witnesses that are present, and adjourn the further hearing, until the evidence of the absent witnesses has been obtained (*l*).

Magistrates should shew firmness in refusing applications for adjournments, except in very special instances, and where the interests of justice evidently require more time to be allowed (*m*). The party applying should satisfy the Court by clear affidavit, or other sufficient means, that there are witnesses in existence who can prove material facts, and that no reasonable means of securing the attendance of those witnesses has been neglected (*n*). It is the duty of the Complainant to point out his witnesses to the Fiscal's officer, and where the witnesses are not known to the process server, and have not in consequence been served with subpoenas, the Complainant is not entitled to an adjournment (*o*). The Complainant however has a right to demand an adjournment, where one of the Defendants, against whom process has issued, is absent through no fault of the Complainant (*p*). If the Complaint have been amended in any matter of substance, the Defendant is entitled to an adjournment to enable him to prepare his defence on the new matter (*q*); and if the amendment amount to the substitution of a substantially new Complaint, this constitutes a recommencement of the prosecution, and a fresh summons should issue, unless the Defendant expressly waives this step (*r*).

(*k*). *Ibid.*

(*l*). *Ibid.*

(*m*). 19860 Cháva., 1 Bel. 157, 2 R.-N. 91. The S. C. has repeatedly animadverted upon the inexpediency of frequent adjournments in Police Court cases.

(*n*). 1618 Col., 1 Gren. 12; 14151 Panw., 1 Gren. 33; 10118 Jaff., 2 Bel. 111.

(*o*). 19646 Gala., 3 Gren. 8.

(*p*). 7270 Jaff., 3 R.-N. 142.

(*q*). R. & O. 24.

(*r*). 82798 Mát., 2 Circ. 187; 8466 Putt., 4 R.-N. 205.



So if it appears that the Defendant has been misled by a wrong day being laid in the Plea, an adjournment should be granted (*s*).

The Defendant must be allowed time to bring his witnesses, or to subpoena them (*t*); he has a right to be heard by the counsel, whom he has engaged for his defence (*u*); but the S. C. will not interfere with the Magistrate's power to decline to grant an adjournment, because the Defendant states that he has engaged an Advocate, who is not present (*v*).

The Magistrate may make it one of the terms, upon which the adjournment is granted, that the applicant pay the costs of the opposite side reasonably occasioned by such adjournment (*w*).

No appeal lies against the Magistrate's order allowing an adjournment, and the S. C. will not interfere in such a case to issue a *mandamus*, except on good cause shewn (*x*).

(*z*). *The Trial*. 1. *The Plea*.—If both parties are ready (*y*), the Magistrate shall cause the Plea to be read to the Defendant, and shall call upon him to plead to it, and take down his plea in writing on the record (*z*). If the Defendant shall refuse to plead, or be silent, or otherwise state matters not amounting to a plea of *guilty* or *not guilty*, the Magistrate shall record a plea of *not guilty* (*a*). The plea of *guilty* to be available for conviction must, if expressed in the form of an admission, fully confess the charge (*b*); an admission, that would be strong evidence under a plea of *not guilty* does not necessarily amount to a plea of *guilty* (*c*).

(*s*). 19690 Point P., 2 Bel. 7; Crow. 10.

(*t*). 2787 Mullai., 1 Bel. 98.

(*u*). 54750 Kandy, 2 Bel. 3; Crow. 6.

(*v*). 2944 Panw., 2 Bel. 62.

(*w*). 22372 Point P., 2 Circ. 54.

(*x*). 70075 Mat., 1 Gren. 10.

(*y*). Before taking the plea, the Magistrate should ascertain if both parties are ready, and make a note on the record of their readiness. A frivolous or palpably false excuse should not delay the trial, but it is very desirable that the record shew what excuse is made for not being ready, and how the Magistrate dealt with it. 19431 Keg., 2 Bel. 32; Crow. 71.

(*z*). R. & O. 20.

(*a*). *Ibid*.

(*b*). 17993 Bala., 3 Lor. 280; Thomson. Vol. 1, p. 609.

(*c*). 3898 Jaff., 1 Bel. 59.

An admission of the act without any admission of the *mens rea* is not a plea of *guilty*, as if a defendant were to admit the asportation in a case of theft, but in such a form as not to admit the *animus furandi* (*d*), or were to confess a criminal act, but plead at the same time facts in exculpation (*e*).

Where the Defendant pleads *not guilty*, and then proceeds to make an admission, the Magistrate has no right to record a plea of *guilty*, or to find the Defendant *guilty*, but should proceed to hear the case regularly (*f*).

Where the Defendant pleads *autre fois acquit*, he should be called upon to plead over to the charge at the same time that he puts in the special plea, and the trial should then be proceeded with; the Police Court is a Court of summary jurisdiction, and a Defendant cannot be prejudiced by such a proceeding, as he is entitled to an acquittal, should his special plea be eventually upheld (*g*). If the Defendant pleads to the name, by which he is called upon to plead, he cannot in appeal object to any error therein (*h*).

2. *The Hearing*.—On recording the plea (*i*), the Magistrate shall proceed to hear the Complainant (*k*), and his witnesses (*l*), and shall then hear any statement, which the Defendant, or his Proctor or Advocate, may make with reference to the evidence, and also any witnesses, who may be called for the defence (*m*). The Magistrate cannot elect what witnesses

(*d*). 10922 Col., 1 Bel. 20; Thomson, Vol 1, p. 609.

(*e*). 21988 Jaff., 1 Bel. 116.

(*f*). 69894 Mat., 1 Gren. 3; 48212 Bala., 4 R.-N. 42.

(*g*). 28517 Mat., 1 Bel. 146.

(*h*). 3069 Nuw. El., 1 Bel. 81.

(*i*). The Complainant has a right to have the Defendant called upon to plead, and, if he pleads *not guilty*, to have his evidence heard. 18528 Panw., Vand. 256. The Magistrate cannot dismiss the case unheard, on account of something that transpired before him in another case. 445 Galle, 2 Bel. 38.

(*k*). The examination of the Complainant at this stage of the proceedings, unlike the examination authorized by cl. 2 of 18 of 1871 must be on oath or affirmation. 82377 Galle, 2 Gren. 4.

(*l*). The Complainant has a right to have all his witnesses heard. 51202 Galle, 2 Bel. 77; 24868 Galle, 3 Lor. 1.

(*m*). The Magistrate should not refuse to hear the evidence tendered by the Defendant, though he believes the evidence tendered by the Complainant in proof of the facts offered to be disproved by the Defendant, and though in his opinion the evidence tendered by the Defendant is not likely to be of any avail. 942 Point P., Murray 5; 6942 Col., 2 Gren. 56. If the Defendant declines to call evidence, a note to that effect should be made in the record. 9609 Kandy, 1 Bel. 31.

he will hear on either side, nor in what order they are to be called (*n*); but he can reject witnesses, who remain in Court after they were ordered to leave (*o*). The Defendant may defend himself, and the Complainant may conduct the prosecution, personally, or by a Proctor, or Advocate; but the presence of the Complainant, or the Defendant, cannot be dispensed with at the hearing of the charge, unless the Magistrate shall expressly so direct (*p*).

3. *Judgment*.—After hearing the evidence for the defence the Magistrate shall pronounce his judgment (*q*), where the judgment is evidently based, not on the facts proved in the case, but on something, which has transpired in another case, it will be set aside (*r*). If the Defendant be found *not guilty* of the complaint, he shall, unless there be other cause of detention, be at once discharged (*s*).

4. *Sentence*.—If he be found *guilty*, the Magistrate shall pronounce sentence on him (*t*). The sentence should be certain, and not in the alternative of fine or imprisonment (*u*); if illegal in part, it is illegal *in toto* (*v*). A sentence,

(*n*). 3222 1 Mal., Bel. 31.

(*o*). 5002 Matale, 1 Bel. 63.

(*p*). 11 of 1868. cl. 102. "But where Defendants were convicted in the absence of the Complainant, and no objection was taken in the Court below although Defendants were represented by a Proctor, and the substantial rights of the parties were not prejudiced, the S. C. declined to interfere. 4127 Kalp., 2 Gren. 68.

(*q*). R. & O. 21. A Magistrate has no power to call on a Defendant to enter into recognizances to appear when called upon, to receive judgment. 57623 Kal., 4 R.-N. 118.

(*r*). 57531 Kandy, 2 Bel. 39. The judgment was "see 57534 Defendant is acquitted."

(*s*). R. & O. 22.

(*t*). R. & O. 23. The greatest caution should be exercised before inflicting heavy pecuniary mulcts upon native villagers, whose lands must in all probability be sold to pay large fines. D. C. Kal., <sup>2142</sup>~~11038~~, 4 R.-N. 307. Cases must be very rare, which demand the infliction of both imprisonment and fine upon an ordinary Sinhalese villager. 19992 Matale, 3 Circ. 135.

(*u*). 62967 Mat., Vand. 27.

(*v*). 13240 Batt., 1 Lor. 237; 1 Bel. 100. But in 19550 Jaff., 2 Lor. 81, where the Magistrate sentenced a Defendant to 3 months imprisonment with hard labour, and a fine of £5 "and in default of payment to be imprisoned for 5 months more," the S. C. treated the latter part of the sentence as surplusage.

which is not expressed in formal and intelligible language, as where the Defendant is fined "ten shs. stg." (*w*), or "two £" (*x*), is bad.

5. *Conviction*.—The judgment together with the sentence forms the conviction. If there is any serious variance between that and the charge, the proceedings will be quashed (*y*). The charge cannot be altered after conviction, either to amend any fatal defect, or to make it agree with the conviction; any such alteration will make the conviction irregular (*z*).

6. *Award of Expenses*.—The Magistrate may at the trial of any case award the reasonable expenses of the party, and of such witnesses as shall have attended, against the Complainant or Defendant (*a*).

The Magistrate may also award expenses in any case, which shall be dismissed for non-appearance of the Complainant, the Defendant being present (*b*). Reasonable expenses may include Proctor's fees (*c*); but where there is no proof of actual cost having been incurred, the most that should be awarded is a moderate sum for expenditure of time and trouble in coming to court (*d*). No expenses can be awarded to a Defendant, who has not appeared (*e*).

7. *The Record*.—A full and complete record shall in all cases be kept of the evidence of the witnesses, and of all other proceedings had in the case; and all judgments and sentences shall be pronounced in open court, and

(*w*). 7008 Point P., 1 Bel. 63.

(*x*). 4185 Point P., 1 Bel. 31.

(*y*). 21390 Neg., 1 Bel. 116; 86821 Galle, 2 Gren. 106.

(*z*). 8281 Matale, 1 Bel 82, 1 Lor. 2.

(*a*). 18 of 1871, cl. 4. It is only on the trial of the case, and when at the trial it appears to him reasonable, that it is competent for the Magistrate to make this award. When therefore the charge has been, by permission of the Magistrate, withdrawn before trial, it is not competent to him to award the Defendant's expenses. 869 Cháva., 1 Circ. 5.

(*b*). 18 of 1871, cl. 4.

(*c*). 7622 Panw., 3 R.-N. 208. The Proctor's fees in that case were taxed at £1; but in 5080 C. R. Cháva., (1 Lor. 22.) it was stated that the usual fee was 10s., and the S. C. considered it doubtful whether a Proctor could recover more than that amount in the absence of a special agreement.

(*d*). 87434 Galle, 3 Gren. 17; 85877 Galle, 2 Gren. 97.

(*e*). 5535 Jaff., 3 Gren. 36.

reduced into writing on the record, and signed by the Magistrate (*f*).

*Appeal.*—Any person wishing to appeal from any final (*g*) judgment, or sentence, of a Police Court for any error in fact (*h*), or in law, may do so by petition to the S. C. (*i*). The petition must be delivered to the Chief Clerk (*k*) within ten days from the day on which the judgment or sentence was pronounced (*l*). There is no provision for allowing appeals, which have been filed after the appealable time has elapsed (*m*). The Magistrate is bound to forward to the S. C. petitions of appeal, when duly filed, whether there be valid grounds for appeal or not (*n*).

“No judgment, sentence, or order pronounced by any Court shall on appeal be reversed, altered, or amended on account of any error, defect, or irregularity, which shall not have prejudiced the substantial rights of either party” (*o*). The defect, which is relied on in appeal, may be either in the wording of the Plaint, or in the manner of the proceedings. With reference to the former it is specially provided that “no complaint shall be held to be insufficient by reason of a departure from the strict letter of the forms [contained in the schedule to the Ordinance No. 18 of 1861], or by reason of any defect, or imperfection, which does not prejudice the substantial rights of the Defendant upon the merits” (*p*).

Where the omission in the Plaint of the day on which

(*f*). R. & O. 25. The proceedings otherwise are null and void. 14036 Kuru, 1 Lor. 94.

(*g*). No appeal lies from an interlocutory order of the Police Court, 45996 Galle, Crow. 130; 6951 Mal., 4 R.-N. 136.

(*h*). 7 of 1874, cl. 6.

(*i*). R. & O. 28.

(*k*). It is irregular for a party to present an appeal, by forwarding it direct to the S. C., and not through the Court below. 6951 Mal., 4 R.-N. 136; — Galle, 4 R.-N. 396.

(*l*). R. & O. 28.

(*m*). 63267 Kal., 3 Circ. 123.

(*n*). 6753 Mátalé, 3 Gren. 41.

(*o*). 11 of 1868, cl. 20.

(*p*). R. & O. 3. This provision is intended to save the administration of criminal justice, as far as possible, from the ill consequences of excessive strictness of procedure, not to give ground for carelessness of duty on the part of Police Magistrates, Phear, C. J., 1974 Galle, 1 Circ. 10.

the offence was committed is material, as in prosecutions for breach of an Ordinance, which are limited to a particular time from the commission of the offence, such an omission will be held to have prejudiced the Defendant's substantial rights (*q*); but where the particular day is not material, and need not be proved, the S. C. will not consider its omission so material as to prevent substantial justice being done (*r*).

The S. C. will sometimes, where the evidence supplies an omission in the Pleint, treat a Pleint, which would otherwise be fatally defective, as cured by the evidence (*s*); or will amend a defective Pleint to uphold a conviction, if there is sufficient evidence in support of the charge (*t*), particularly if no objection to the form of the Pleint has been taken before plea, or at the trial, and the Defendant has not been prejudiced by the defect (*u*).

As a rule objections on the score of irregularities, whether in the Pleint (*v*), or in the proceedings (*w*), should be taken in the Court below, and trifling irregularities, which do not prejudice any substantial right, and which are not objected to at the time, will not be considered fatal (*x*), especially if the Defendant has had the assistance of Counsel (*y*).

But a conviction will be set aside, in general where objection has been taken to the irregularity in the Court below (*z*), or, even where no objection has been taken, if the Defendant was not represented by Counsel (*a*), or where the irregularity is of a serious nature, and such as to deprive the Defendant of any substantial safeguard (*b*).

The following irregularities are fatal; consenting to let off parties with nominal fines, on condition that they plead

- (*q*). 19690 Point P., 2 Bel. 7, Crow. 10.
- (*r*). 2238 Galle, 1 Bel. 3.
- (*s*). 5883 Col. M. C., 3 Circ. 8.
- (*t*). 17032 Mátalé, 1 Circ. 56.
- (*u*). 19557A Kandy, 4 Circ. 101.
- (*v*). 845 Mát., 1 Gren. 16; 5883 Col. M. C., *supra*.
- (*w*). 1882 Jaff., 1. Bel. 197; 20994 Galle, 1 Lor. 103.
- (*x*). 1882 Jaff., *supra*; 67670 Col., 2 Bel. 12.
- (*y*). 67670 Col., *supra*; 4167 Kalp., 2 Gren. 68.
- (*z*). 71720 Mát., 2 Gren. 64; 11385 Kandy, 1 Circ. 18.
- (*a*). 18266 Keg., 1 Bel. 190.
- (*b*). 67670 Col., 2 Bel. 12.

guilty (*c*); examining the Defendant (*d*); reading over as evidence depositions taken in a former criminal case, (although the persons who gave the evidence are present, and are offered to the Defendant for cross examination) (*e*); receiving as evidence depositions taken before a Justice of the Peace on the trial of a charge transferred from the Justice of the Peace to the Police Court (*f*), even where the deposition is read over to the witness in the Police Court, and he deposes to its correctness (*g*); treating evidence given in one case as evidence in another (*h*); trying together two sets of Defendants charged, under separate Plaints, with distinct offences (*i*); delivering one judgment in two cases (*k*); the giving of evidence by the Magistrate himself (*l*), or the Magistrate's taking no evidence himself, but acting upon evidence taken by a former Magistrate (*m*).

- (*c*). 2 Gren. 36.  
 (*d*). 14266 Kal., 1 Bel. 76, J. & B. 30.  
 (*e*). 1383 Pána., 1 Bel. 147, 2 R.-N. 74.  
 (*f*). 460 Mátalé, 1 Bel. 12.  
 (*g*).  $\frac{5174}{23}$  Mullai., 1 Bel. 36.  
 (*h*). 48351 Bala., 4. R.-N. 53  
 (*i*). 62811 Kal., 3 Circ. 96.  
 (*k*). 18844 Point P., 4 R.-N. 111.  
 (*l*). 20979 Galle, 1 Bel. 88.  
 (*m*). 4942 Rat., 2 Bel. 118.

## OFFENCES BY SERVANTS.

### I. QUITTING SERVICE.

*Cl. 11*]. Any servant or journeyman artificer, who ..... shall quit the service of such employer without leave or reasonable cause, before the end of his term of service or previous warning as required by the third clause of this Ordinance, or for such longer period as may be specially stipulated in his contract, shall be punishable, etc.

PLAINTS.—(1). *Desertion of Servant bound by Verbal Contract*.—That the Defendant did on the *first* day of *June* last at *Kandy*, being a servant of *the Complainant* under a verbal contract for hire and service for the period of one month, renewable from month to month, quit the service of his employer without leave or reasonable cause, before the end of his term of service or previous warning as required by § 3, in breach of § 11 of the Ordinance No. 11 of 1865 (n).

(2). *Desertion of Servant bound by Contract in Writing*.—That the Defendant did ..... being a *servant of the Complainant (o)*, under a contract in writing, executed in the manner prescribed by § 7 of the Ordinance No. 11 of 1865, for hire and service for the period of *one year*, quit the service of his employer, without leave or reasonable cause before the end of his term of service or previous warning for the period of *six months*, being the period specially stipulated in his contract, in breach of § 11 of the Ordinance No. 11 of 1865.

An ordinary contract of service is a several contract on the part of each servant. The offence of quitting service is, therefore, a distinct offence as regards each person who quits, and should strictly speaking form the subject of a separate prosecution (p). In accordance however with the practice re-

(n). It has not been thought necessary to give a separate form of *Plaint* for desertion on the part of a journeyman artificer under a verbal contract for hire according to time, because such contract is, in the absence of a special agreement, taken to be a contract for hire for one day only. *Cl. 5*.

(o). *Journeyman artificer in the employ of the Complainant*.

(p). 5090 *Dik.*, 4. *Circ.* 103.



ferred to on page 6, and within the limitations there laid down, a number of Defendants may be joined in one Plaint (*g*).

In the Plaints for quitting service and for the other offences by servants, the Defendant must be described as a *servant* (*r*); "cooly," (*s*) "monthly paid cooly" (*t*), "monthly paid labourer" (*u*), are not equivalent to *servant*; and a contract of service with some definite person must be averred (*v*).

The term of service should, in the Plaints for quitting service, be set out, as being a material fact relevant to the charge (*w*). It is irregular to substitute *leave* for *quit* (*x*). "Leave without notice or any other reasonable cause" (*y*), and "quit service without previous notice, or any reasonable cause" (*z*), are insufficient; the Plaint must aver that the Defendant quitted "before the end of his term of service" (*a*).

Where the Defendant is prosecuted for this offence, or any other of the offences created by clause 11, in the district in which he was arrested, such district not being that in which the offence was committed, the Plaint must set out facts sufficient to show on its face jurisdiction in the Court (*b*).

PENALTY.—Any servant or journeyman artificer guilty of any of the offences created by clause 11 is "punishable by the Police Court of the district wherein such offence shall have been committed, or wherein the offender shall have been apprehended, by forfeiture of all wages then due, if not exceeding the wages of one month, or for the

(*g*). 71470 Mat., 2 Gren. 28; 14847 Panw., 3. Gren. 23.

(*r*). 4826 Rat., 2 Circ. 82; 17357 Náwal. 1 Gren. 8.

(*s*). 4826 Rat., *supra*.

(*t*). 11369 Pussel., 4 Circ. 35.

(*u*). 16854 Panw., 2 Circ. 72.

(*v*). 21269 Kandy, 5 Circ. 48. (Defendant was described as in the service of "M. estate") 17364 Panw., 20 Jan., 1880, (Defendant was charged with "leaving the service of the Suptdt. of M. Estate or of the Complainant") 11369 Pussel., *supra*.; 6545 Rat., 4 Circ. 3.

(*w*). See the remarks of Phear, C. J., in 16854 Panw., *supra*.

(*x*). 11369 Pussel., *supra*.

(*y*). 24766 Náwal., 4 Circ. 16, 4 Circ. 35, 4 Circ. 142.

(*z*). 19557A Kandy, 4 Circ. 101.

(*a*). *Ibid.* 20392 Mátalé, 4 Circ. 44. It is not altogether plain whether, in the words "without leave or reasonable cause, before the end of his term of service or previous warning," "without," or "before the end of his term of," are to be understood before "previous warning." The punctuation is in favour of the latter interpretation.

(*b*). 2479 Rat., 4 R.-N. 378.

period of warning specially stipulated for, or by imprisonment with or without hard labour not exceeding three months, or by such forfeiture together with such imprisonment at the discretion of the Court" (c).

"Whenever any servant or journeyman artificer is brought before any Court or Justice of the Peace, on the ground of his having quitted the service of his employer, or having refused or neglected to work, without leave or reasonable cause before the end of his term of service, or previous warning, such Court or Justice of the Peace may, if the employer of such servant or his agent so requires, and the labourer consents thereto, instead of punishing or committing to trial the offender, direct him to return to the service of his employer. And the Court or Justice shall keep a record of the proceedings had before him, and shall certify at the foot thereof that he has satisfied himself that the servant has of his own free will consented to return to the service of his employer" (d).

No servant or journeyman artificer shall be liable to punishment for neglecting or refusing to work, or for desertion, disobedience or neglect of duty, if, at the time of such alleged offence, his wages shall have been unpaid for any period longer than a month (e). Provided always that in computing the amount of wages due at any time, such servant or journeyman artificer shall be debited with the amount of all advances of money made to him, and with the value of all food, clothes, or other materials supplied to him,

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(c). Cl. 11. In a case under cl. 17 of the Ord. No. 3 of 1834 (D. C. Crim. Col. 910) it was contended that money advanced might be treated as "wages due" and declared forfeited. The Court, while refusing to adopt this construction of a penal enactment, observed "certainly in apportioning the additional punishment directed by the Ord., it ought not to be forgotten that, when wages are paid in advance, the first branch of the penalty becomes nugatory, and that consequently whatever loss the delinquent is to sustain must be imposed in the shape of the additional discretionary punishment." Marshall, p. 489.

(d). Cl. 23.

(e). Cl. 21. The Ord. No. 5 of 1841 contained no provision to this effect. In 11831 Trinco. (1858 3 Lor 35; 1 Bel. 116), it was decided that the fact of the previous month's wages' being in arrear did not justify a servant in quitting without notice. This doctrine was not extended to cases, where not one month's, but several months' wages were in arrear. 4927 Nuw. El., (1863. 3 R.-N. 27, 2 Bel. 18, Crow. 43).

which the employer is not liable under the Ordinance to supply at his own expense (*f*). Provided also that the fact of such wages being so due shall not affect the liability of such servant or journeyman artificer to punishment under the provisions of the Ordinance, unless he shall at least 48 hours previously to the time of the alleged offence have demanded from his employer the payment of his wages so due, and his employer shall have refused or failed to pay the same (*g*). The words "if at the time of such alleged offence his wages have been unpaid for any period longer than a month" mean that the due wages must have remained unpaid for at least a month after they ought to have been paid (*h*). The wages of a servant under a monthly hiring are payable monthly (*i*); that is to say, they become due and should properly be paid for each month on the last day of the month, or on the first day of the succeeding month. The wages of September for instance ought to be paid on the 30th September or 1st October, but they cannot be taken as unpaid for a period longer than a month, until the month of October has expired. A servant, under a monthly hiring, cannot therefore, on the first of each month or subsequently during the month, demand his wages due for the previous month, and, if these remain unpaid for 48 hours after demand, quit service without being criminally responsible (*k*). It is not necessary, to bring the servant within the operation of the proviso, that a clear month's wages should be due; the Ordinance only mentions "wages" (*l*). Where it is sought to set off against wages due a sum alleged to be owing by the servant as an advance, it must be shewn that the Defendant has actually received

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(*f*). Cl. 21.

(*g*). *Ibid.*

(*h*). 20392 Mátalé, 4 Circ. 44; 16236 Náwal., Vand. 64.

(*i*). Cl. 4.

(*k*). 20392 Mátalé, *supra*.

(*l*). 16236 Náwal. *supra*. The rule is "to ascertain what was the exact amount due to each cooly for the number of days during which he worked for the last month before his desertion, and then to ascertain if the amount due after all deductions was in excess of this sum. The balance then remaining represents wages due to him before the commencement of the month. If such balance exists the cooly has wages due to him for a period longer than a month." *Ibid.*, 2 Gren. 59. *Note*.

the advance (*m*); and where the amount has been advanced to a third party in the first instance, as for instance to a head kangany to enable Defendant, a sub-kangany to bring coolies to an estate (*n*), the Court must be satisfied that all parties were at one in the arrangement that Defendant was to be responsible as a debtor to the estate, and that Defendant understood and assented to the arrangement (*o*). It would further seem that, in such a case, the fact of Defendant having submitted to deductions being made from his pay, on account of money so advanced to a third party, would not be regarded either as amounting to an acknowledgment that he was an original debtor to the estate, or as evidencing a novation transferring to the estate a debt originally contracted in favour of another (*p*).

The effect of clause 18, is to place a new proprietor in the shoes of the old as regards non-payment of wages (*q*).

EVIDENCE.—*That the Defendant*]. Persons under the age of twenty one years labour under a general incapacity to enter into absolutely binding contracts; yet they may bind themselves by contracts which are for their own benefit, and a contract of service may be one of these (*r*). Such a contract would subject the minor to the statutable regulations applicable to masters and servants, although he might not be liable to any action upon it (*s*). But it is otherwise where the contract is not beneficial to the minor. Where an infant entered into a contract binding him to serve his master, but which authorized the master to stop his wages when the steam engine stopped working for any cause, and was, therefore, held to be inequitable and not binding upon the infant, and then he absented himself from his work, whereupon the master procured his conviction under 4 Geo. 4, c. 34. s. 3, the Court of Queen's Bench quashed the conviction, as there was no binding contract (*t*).

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(*m*). 78486 Mát., 4 R.-N. 197; 7393 Nuw. El., Vand. 78.

(*n*). 1573 Dimb., 4. R.-N. 186.

(*o*). *Ibid*

(*p*). *Ibid*.

(*q*). 16143 Gamp., Vand. 54. In 21269 Kandy, (5 Circ. 38). Clarence, J., attributed this effect to cl. 25. That clause, however, only applies to contracts to serve "for a period exceeding one month."

(*r*). 10154 Nuw. El., 4 R.-N. 129; 72024 Mát., 2 Gren. 52; R. v. *Chillesford*. 4 B. & C. 94, Manley Smith, p. 9.

(*s*). R. v. *Chillesford*, *supra*.

(*t*). R. v. *Lord*. 12 Q. B. 757. Manley Smith, p. 459.

The minor must be old enough to comprehend the situation and its consequences; where it appeared that the minor, who was charged with quitting service, was a sickly boy of not more than ten years of age, Clarence, J., was not prepared to say that he was of capacity to bind himself by a contract, and observed that the Plaintiff against him should not be entertained (*u*).

*On the first day of June last*]. It is not necessary that the date of the desertion should be proved exactly as laid in the Plaintiff (*v*).

*Being a Servant*]. We will first state some general principles for guidance in deciding who are, and who are not servants, within the meaning of the Ordinance, and then discuss the particular classes, which are included in the term "servant" by the Ordinance.

1. The relation of master and servant does not exist where work is to be done under a contract for a sum certain, or where the time of work is entirely left to the discretion of the contracting party; as where a person contracts to *saw a log of jakwood* for £2, no specific time being fixed within which the work is to be completed (*w*), or contracts to *split shingles* at a certain rate (*x*); or where a *goldsmith* undertakes to make articles of jewelry (*y*).

2. To constitute a person a *servant*, within the meaning of the Ordinance, it is necessary that he should be continuously employed. Thus a *resthouse cook*, who was sent for and cooked whenever visitors came to the resthouse, but who was not employed at other times, and who was paid daily (*z*), and the *tindal* of a cargo boat, paid by the trip (*a*), have been held not to be servants under the Ordinance. So under the Ordinance of 1841 it was held that a person engaged to beat *tom-toms* at a wedding ceremony was not a "menial or domestic servant or labourer (*b*)."

(*u*). 10154 Nuw. El., *supra*.

(*v*). 12275 Rat., Vand. 167. Where the particular day is not material, it need not be proved even on an indictment.

(*w*). 24684 Mát., 2 Lor. 296; 1 Bel. 134, J. & B. 47.

(*x*). 8644 Panw., 3 R.-N. 229, 2. Bel. 122.

(*y*). 23985 Trinco., 3 Gren. 8. Cf. also the decisions under the English statute 4 Geo. 4, c. 34. cited by Manley Smith, p. 457.

(*z*). 3042 Jaff., 4 R.-N. 237.

(*a*). 15 Col., Vand. 53.

(*b*). 15290 Trinco., 1 Bel. 152.

3. The provisions of the Ordinance are not intended to affect *cartmen*, *boatmen*, and the like, whose remuneration regards the hire of the boat or cart as well as the personal services of the individual (*c*).

4. Persons, whose occupation requires the exercise of special manual skill, or of intellectual ability, are not within the meaning of the Ordinance, as a *farrier* (*d*) or a *lithographing boy*, employed in an office on a salary of R15 a month (*e*); but Dias, J., held that a *saddler* (*f*) might be convicted of quitting service.

The word *servant* as used in the Ordinance, unless otherwise expressly qualified, extends to and includes:—

(1). *Menial and domestic servants*. Under clause 17 of Ordinance No. 3 of 1834, which applied to “menial and domestic servants ..... who may be employed in or about the house, outhouse, stable, coach house, grounds, or gardens, or as palanquin bearer, or cooly,” it was held that *mudwall builders* were menial and domestic servants within the meaning of the clause (*g*), and the court observed “if the word *menial* were to be taken in its strict meaning, assigned to it by the law of England, viz:—‘a servant who lives within the household and with the family of the employer,’ the clause would be nearly inoperative,” and in a case (*h*) under the Ordinance of 1841 Temple, J., stated that a menial and domestic servant means “one who lives under his master’s roof” (*i*); no general rule, however, can be laid down as to who do, or do not, come within the category of menial and domestic servants (*k*). Under the Ordinance

(c). 8862 Neg., (Coll. Court), 1 Bel. 57, under the Ord. No. 5 of 1841. L. M. 1853, p. 23.

(d). 100595 Kandy, Fern. 8.

(e). 82758 Galle, 2 Gren. 13.

(f). 6562 Kandy, 4. R.-N. 111. Defendant was employed in a saddlery establishment on a salary of R30 a month.

(g). 910 D. C., Col. Crim., Marshall, pp. 489, 496.

(h). 1376 Rat., 1 Bel. 29.

(i). No doubt following Blackstone, who derives *menial* from *infra moenia!* Vol. 1, p. 425.

(k). *Nicholl v. Graves* 33 L. J. C. P. 259, Manley Smith, p. 75. Under the English Act 4 Geo. 4, C. 34, and the other statutes *in pari materia*, a Magistrate has no jurisdiction over domestic servants. The English decisions as to who do or do not come within the category of menial or domestic servants have reference to the notice required to terminate the service, there being a well known rule, founded on custom, in the case of menial and domestic servant

of 1841 it was held that a *wetnurse* (l) was a domestic servant.

(2). *And other like servants.* The meaning of these words was discussed at considerable length by Creasy, C. J., in 82759 Galle (m), in which case it was contended that a *dhoby*, who worked for more than one employer, and washed outside his employers' premises, was not a servant within the meaning of the Ordinance; "These words," he observed, "like all other words in a statute must not be treated as meaningless, if a reasonable meaning can be assigned to them; but to hold that no servant can come under the Ordinance, unless he be in all respects, a menial or domestic servant, would be to treat those words as meaningless surplusage. We consider them to reasonably mean such servants, as, with regard to the nature and mode of their employment and services, generally resemble menial or domestic servants, but with some circumstances or circumstance of variance, such circumstances or circumstance of variance not being important enough to efface the effect of the general similitude. The regular *dhoby* of a household, employed and paid, not for a piece work, but by the month, appears to us to be a person generally resembling the domestic servant of the household. He who collects and washes the dirty linen of the household, and has to bring it back and count it out clean, is employed about the regular and necessary business of the household, just as much as the *appu*, who spreads part of the linen, when cleaned, on the table, or the body servant, or *ayah*, who puts away in the *almirahs* other linen which the *dhoby* has washed; and decidedly the *dhoby's* services are not of a higher order than theirs are. Having established the general similitude, we must next look for the features of difference. It may be suggested that the *dhoby* does the main part of his work off the premises. But this seems to us to be a very unimportant matter; the same might be said of an errand boy habitually sent off the premises. The really differential circumstance appears to be this; an ordinary *dhoby* does the washing of several households. But the effect of

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that their contract of service may be determined at any time by giving a month's warning, or paying a month's wages.

(l). 17809 Kal., 2 Lor. 46, 1 Bel. 106.

(m). 2 Gren. 11.

this variance does not to our minds obliterate the effect of the general similitude; and we hold accordingly, both on the reason of the thing, and on the authority of the previous decision of this Court in the Negombo case (*n*), that a dhoby, employed as this appellant was, comes within the words "menial, domestic, or other like servants."

(3). *Pioneers, kanganyes, and other labourers, whether employed in agriculture, road, railway or other like work.* The clause "is worded in such a manner that we cannot apply to it the ordinary rule of making the special words at the commencement control all the general words that follow. Neither a pioneer, nor a kangany is an 'other like' servant, yet both pioneers and kanganyes are clearly included. The true meaning seems to be that it includes all menial and domestic servants, and also all out-door labourers, whether employed in a private family, or in agriculture, or on road, railway, or other like work. It also includes pioneers and kanganyes, and persons employed in employment similar to the employment of pioneers and kanganyes" (*o*). The following persons come within the category of persons who are in employment similar to the employment of a kangany, a *kanakapillai* (*p*) on an estate, who keeps the accounts or memoranda of the coolies employed at work in the field, but who has to attend parade in the same way as the coolies and kanganyes, and whose name is borne on the check-roll; and a *road-overseer* (*q*), who is "not a superintendent of work in a position far superior to that of the labourers, but, like a kangany, bound to accompany labourers, and to set them to work, and to exact their full amount of labour, and to direct the manner in which they perform their labour." But the Ordinance does not extend to employes in public offices, such as a *kangany* in the Fiscal's office (*r*).

(*n*). 1 Gren. 9. The number of the case is not given and the facts are inadequately reported. Under the Ord. of 1841 it was held that a dhoby was not the servant of one who employed him to wash clothes and get them ready within a stipulated time. 4273 Jaff., 2 Bel. 36.

*o*). 100361 Col. (Coll. Court), 2 Bel. 128, 3 R.-N. 288.

*p*). 4536 Kandy, Fern. 15.

*q*). 100361 Col., *supra*.

(*r*). 13783 Matalé, 4 R.-N. 68, following 1376 Rat., 1 Bel. 29, in which it was decided that a *peon* on the establishment of the District Court was not a menial or domestic servant.



There are besides a number of instances, in which it is not easy to state under which class of servant, as that word is defined by the interpretation clause, persons, who have been held to be servants, come, or to reduce to any principle the decisions of the S. C. Thus *tappal runners* (*s*) are servants, but *a diver* (*t*) who catches fish by means of kraals in a river, and is paid R10 a month, is not a servant within the meaning of the Ordinance; on the other hand a *toddy drawer* (*u*), who is paid R3 a month and  $\frac{3}{8}$  of a penny (*sic* in orig.) for every gallon drawn is a servant.

*Of the Complainant*]. Coolies are not in any sense in the service or employment of a kangany, who is set over them to superintend their work (*v*); and if they are the servants of the proprietor or superintendent of an estate, they cannot be convicted of quitting the service of a kangany on that estate (*w*).

*Under a contract for hire and service*]. Some evidence should be given of the contract; vague and general statements such as "I charge the Defendants, who are coolies in my employment, with desertion" (*x*), or "I am a kangany on O. estate. I have weeding contracts. Defendant was one of my coolies, and she worked one of my contracts" (*y*), or the evidence of witnesses, who can only speak to the Defendant, by the Defendant's name being on a check-

(*s*). 3873 Man., 2 Gren. 4. The report is misleading. The Complainant was a tappal contractor, and the charge was for seducing and harbouring his runners.

(*t*). 69556 Mát., 1 Gren. 1.

(*u*). 72220 Mát., 2 Gren. 94. In a case under the Ord. of 1841 (23822 Mát., 25 May, 1859) a toddy drawer, who was paid 4s. 6d. a month and a pice for every gallon of toddy drawn, was held to be a servant, but in case No. 23520 of the same Court, decided the same day in appeal, a toddy drawer, who received a gratuity of £3 to begin with, and was paid  $1\frac{1}{2}$  (*sic* in orig.) for every gallon drawn, was held not to be a servant.

(*v*). 14467 Gala., Vand. 54; 99114 Kandy, 3 Gren. 62.

(*w*). 4752 Pussel., 2 Bel. 100; 9510 Pussel., 3 Gren. 62, but see 98813 Kandy, 3 Gren. 56, where Morgan C. J. affirmed the conviction of coolies charged with quitting the service of a kangany; observing "the evidence shews that the coolies were employed to serve under the kangany."

(*x*). 5090 Dik., 4 Circ. 103.

(*y*). 18467 Panw., 25 Nov., 1881.

roll (z), are insufficient. It is not necessary that the Defendants should have become actually working servants of the Complainant; to hold that would be to nullify those parts of clause 11, which impose a fine on a servant, who neglects to attend, when and where he has contracted to attend in *commencing* work (a).

*For the period of one month*]. To shew that the Defendant's term of service is for the period of one month, the making of the contract should be proved, or facts should be stated sufficient to give rise to the statutable presumption, which is directed by clause 3 (b). That clause is as follows:—"Every verbal contract for the hire of any servant, except for work usually performed by the day or by the job or by the journey, shall (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate) be deemed and taken to be a contract for hire and service for the period of one month, and to be renewable from month to month, etc." The meaning of the proviso "notwithstanding that the wages under such contract shall be payable at a daily rate" (c) was discussed by Phear, C. J., in 18173 *Mátalé* (d); "it is a *daily rate*," he observed, "when the servant undertakes 'I will serve you by the month at the rate of a rupee a day,' but it is *not a daily rate*, when it is said 'I will serve you by the month, but I agree that I shall only be paid for such days, as I may work, at a rupee a day.' The distinction between the two cases appears to be plainly obvious. The Legislature by the words quoted ["notwithstanding, etc."] meant to provide that a service might be a month to month service, notwithstanding that the wages of each month was to be reckoned day by day, according to the number of days in the month, and so would be less in a month of 28 days,

(z). 18262 Panw., 13 July, 1881.

(a). 17357 *Náwal*, 1 Gren. 8; 14322 Panw., 2 Gren. 44.

(b). 16854 Panw., 2 Circ. 72.

(c). This proviso is absent from the corresponding clause of the Ord. No. 5 of 1841. Under that Ordinance it was at one time regarded as open to question whether the hiring of an estate coolie, paid by the month for every working day, was a daily or a monthly hiring. Cf. 5140 *Náwal*, (1857) 2 Lor. 140; 56486 *Kandy*, (1863) ? R.-N. 9, 2 Bel. 9, Crow. 25.

(d). 2 Circ. 94.

than it would be in a month of 31 days. But it did not mean to say that, when the contract was for the day only, day after day it might be, but only as work might be given and taken, that it should in such case necessarily be presumed, in the absence of evidence to the contrary; that the contract was a contract of monthly service."

No contract entered into in Ceylon for the hire and service of any servant, or journeyman artificer, for any period of time longer than one month is valid in law, so as to subject any party thereto to the provisions of the Ordinance for not performing the same, unless the contract is in writing, and clearly expresses the terms and conditions thereof, and is signed or acknowledged by the parties thereto in the presence of a Police Magistrate, or a Justice of the Peace, or other person expressly authorized by the Governor, such Justice or other person not being himself the employer of such servant or journeyman artificer, or the agent of such employer (e). It is the duty of the Police Magistrate, Justice of the Peace, or other authorized person to see that the contract is fully explained to the parties, and to certify on the contract that they fully understand the terms thereof, and are desirous to fulfil the same (f). The contract when produced in evidence, and bearing the certificate of the Police Magistrate, Justice of the Peace, or duly authorized person, is *prima facie* evidence of the matters and things contained therein (g). The contract must be executed in triplicate, and it is the duty of the Police Magistrate, Justice of the Peace or other authorized person, to give or cause to be given one copy thereof to the servant, and to send or to cause to be sent within ten days of the execution thereof, another copy to the Police Magistrate of the district wherein such contract shall have been executed, under pain of a penalty of Fifty Rupees; and such Police Magistrate is required to preserve the counterpart and to allow any person who may be interested in the contract to inspect the same (h). No contract (except contracts entered into by the officers of Govern-

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(e). Cl. 7.

(f). *Ibid.* Where a corresponding requirement under Ord. No. 5 of 1841 had not been complied with, this was held fatal to the prosecution. 10615 Jaff., 2 Bel. 108.

(g). Cl. 7.

(h). *Ibid.*

ment under clause 8), for the hire and service of any servant or journeyman artificer, whether made in Ceylon or in India is valid under the provisions of the Ordinance if made for a longer period than three years (*i*).

Clause 7 applies not merely to contracts, expressly stated to be for a longer period than one month (*k*), but to contracts for work, which according to usage, and the customary nature of such work, would last for longer than a month; as where the Defendants were engaged for "the cinnamon season" (*l*), or were to have weeding contracts (*m*). So servants who have given their employer a month's notice, and have left at the end of the month, but who have not worked out or repaid the amount of advances made to them, cannot be convicted of quitting service, in the absence of a duly executed contract to serve for a period proportional to the amount of the advances (*n*).

The servant, who has entered on a contract of service for a term certain, not being one from month to month, which does not comply with the provisions of clause 7, cannot be treated as a monthly servant under the Ordinance; such a contract is not necessarily null and void, but it will not subject either party to criminal proceedings for its breach (*o*).

A contract executed in the manner prescribed by clause 7, by which the Defendant bound himself to work off certain advances by serving in the capacity of boot and shoe-maker at R150 a week, Defendant to have the right at any time of claiming his discharge on paying up the amount due to his employer, is within the Ordinance, and will subject the Defendant to punishment for quitting service (*p*).

Every contract entered into in India for the hire and service in Ceylon of any servant or journeyman artificer is valid and binding, so as to subject the parties thereto

(*i*). *Ibid*.

(*k*). 33120 Matalé, 2 Bel. 140; 72636 Mat., 3 Gren. 21.

(*l*). 16499 Neg., 1 Bel. 83, 1 Lor. 9. This was under the Ordinance of 1841.

(*m*). 17357 Nawal., 1 Gren. 8. See, however, as to weeding contracts, 24771 Gamp., 2 Gren. 80.

(*n*). 5082 Maturata, Vand. 7.

(*o*). 5218 Dik., 4 Circ. 135.

(*p*). 25024 Gamp., 2 Gren. 98.

to the provisions of the Ordinance, notwithstanding that the same is not executed in the manner prescribed by clauses 7 and 8; provided that such contract be in writing and signed or acknowledged by the parties thereto or their agents respectively, and clearly express the terms and conditions thereof; and provided also that such contract be valid and binding according to the laws of India in force at the time of entering into the contract (g). Every such contract when produced in any Court in Ceylon is to be deemed valid and binding according to such laws, unless the contrary be proved (r). It is the duty of the employer, or his agent, with whom any such contract is entered into, to give, at the time of entering into such contract, a copy thereof to the servant or journeyman artificer, with whom such contract shall have been entered into (s). In 2206 Hald. (t), a coolie had entered in India into an engagement with Complainant's agent. The contract was embodied in a document executed by the coolie which was in the following terms. "The sum I received this day from you is R10, for which sum of rupees ten I will get coolies to be taken to Macaldeniya in Haldummulla, Ceylon, where I and my coolies will work under you not less than a year, and on your demand I shall repay the sum of rupees ten and redeem this bond; and if I and the coolies fail to go, I will pay one half for one, or half more added to the principal. To that effect I have agreed and granted this debt bond." It was shewn at the trial that a copy of this document had been given to the coolie immediately after its execution. Stewart, J., affirmed a conviction for seducing the coolie from Complainant's service while on his way to the estate, observing "the document places it beyond all doubt that he [the coolie] was under engagement to proceed to Macaldeniya, Complainant's estate."

*Quit the service of his employer*]. The quitting must be voluntary; so where the Defendants were taken up under warrants as deserters from V. estate, and in consequence left M. estate and returned to V, it was held that they could not, in the absence of evidence that the judicial

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(g). Cl. 9.

(r). *Ibid.*

(s). *Ibid.*

(t). 2 Gren. 83.

proceedings as to desertion from V. were collusive, be convicted on a charge of deserting from M (*u*).

*Without leave*]. A complete desertion cannot be justified by a permission for temporary absence (*v*).

*Or reasonable cause*]. A severe assault by a master on his servant is a reasonable cause for the latter's quitting service (*w*). So a servant, who is struck and told "to go," and in consequence deserts, cannot be convicted (*x*). But the non-supplying of advance rice to an estate cooly is not a reasonable cause. The S. C. notices the well known fact that owners of estates are in the habit of advancing rice to their coolies, before the monthly wages fall due. In most cases, the coolies would otherwise be without food, since they are not usually possessed of ready money, and might not have credit at the bazaars, if any are near. But there is no law, which obliges the estate-owner to make this advance. A coolie however, who does a fair day's work, and is refused advance rice, and deserts simply because he must otherwise be without food, should only receive nominal punishment. The servant under such a contract might easily be starved, and yet the master would be acting within his rights (*y*). The wages of a servant under a monthly hiring, where the same shall not be payable at a monthly rate, shall be computed according to the number of days on which the servant shall have been able and willing to work; or if payable at a monthly rate, shall be in proportion to the number of days on which he shall have been so able and willing as aforesaid (*z*). It would appear that in a contract of service for a continuous period, which contains a term that the servant shall only be paid at so much a day for such days as

(*u*). 21892 Gamp., Vand. 178.

(*v*). 83556 Galle, 2 Gren. 6; 24356 Mátalé, 2 Bel. 83.

(*w*). 78362 Mat., 4 R.-N. 129.

(*x*). 14568 Panw., 2 Gren. 85. It appears that by the law of England no master, (except the master of a ship, who has by law authority in case of disobedience or disorderly conduct to correct the mariners in a reasonable manner) would be justified even in moderately chastising a hired servant of full age for dereliction of duty, and that the battery of a servant is a good cause of departure. Manley Smith, pp. 110-111.

(*y*). 78493 Mát., 4 R.-N. 218.

(*z*). Cl. 4.

he works, a corresponding term will be implied, in the absence of express agreement to the contrary, on the part of the employer to furnish the servant with work, or to give him opportunity to work, on all usual working days during the period of service (a).

*Before the end of his term of service.*] A verbal contract for hire and service for the period of one month, renewable from month, may be determined:—

(1). By the employer discharging his servant, provided he instantly pays him his wages for the time he has served, and also for one month from the time of such discharge (b);

(2). By lapse of time, at the expiry of a month, from the day on which either party shall have given the other notice or warning of his intention to determine the contract at the expiry of a month from such day (c);

(3). By the misconduct of either party in their relative capacity of master and servant, which may be proved by either party against the other (d);

(4). By release. Where a female coolie's term of service was interrupted by her confinement, and she had done no work, and had not received any rice, wages or anything in the shape of a retaining fee as a servant on the estate since that time, her term of service was held to have elapsed (e). Where it is sought to shew that coolies are released from their service on an estate by the payment by a third party to the estate of advances made to a kangany, who procured the coolies for the estate, there should be evidence as to whether any money is owing by the coolies, whether such money is comprised in the sum paid, whether the payment is made with the knowledge of the coolies, and whether anything passed between them and the other parties to the transaction as to the money (f). Where servants have been released from their contract, the release can, of course, only be rescinded by mutual agreement (g).

The conviction and imprisonment of a servant, under a monthly hiring, for breach of his contract, do not operate

(a). Phear, C. J., 18173 Matalé, 2 Circ. 94.

(b). Cl. 4.

(c). Cl. 3.

(d). Cl. 4.

(e). 14663 Gamp., 2 Bel. 72, under the Ord. of 1841.

(f). 18156 Nával., 2 Gren. 88.

(g). 3313 Kandy, Fern. 12.

as a rescission of the contract of service unless adopted as such by the employer, and the servant is liable to be again convicted, if on the expiration of the term of imprisonment he is guilty of a fresh breach of contract; otherwise the servant might put an end to his contract of service by a wrongful act against the wish of his employer (*h*). Unless provision to the contrary be expressly made therein, no contract entered into and required to be in writing under the provisions of the Ordinance is determinable before the expiration of the period specified therein, except by the mutual consent of the contracting parties, expressed in writing, signed or acknowledged by them in the presence of two witnesses, or except when the party contracting to be employed shall have been convicted of an offence, or have become a prisoner, or permanently disabled from completing his contract, and his employer shall elect to determine the contract, or except for some reason sufficient in law to set it aside; provided that in case of such disability to serve, the employer shall be bound to furnish the immigrant from India, who shall have contracted in India for any period of service in Ceylon, or who shall have contracted in Ceylon for any period of service not less than one year, with adequate means of returning to his own country (*i*).

If the estate, upon which any agricultural servant or journeyman artificer is employed under any contract to serve for a period *exceeding one month*, shall during the pendency of such contract become vested in or be transferred to or placed under the superintendence or management of any person other than the person with or by

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(*h*). 6545 Rat., (Coll. Court). 4 Circ. 3. Clause 24 provides that "if any servant or journeyman artificer having entered into any contract of hire and service subject to the provisions of this Ord., shall during the subsistence of such contract, have been imprisoned or have absented himself without leave, the Court before which the labourer is tried shall award that no part of the period of such imprisonment or of such absence, (and which period the said Court is to ascertain by evidence and define) shall be deemed or taken to be a part of the period of his service, but that such labourer shall be compellable, at the option of his employer, to serve for the full period defined as aforesaid for which he shall have contracted to serve; and until such extended service shall have been completed, he shall be and shall continue subject to the provisions of this Ordinance."

(*i*). Cl. 10.



whom such contract was entered into, such contract and all the rights and liabilities incidental thereto shall be deemed in law to be transferred to the person in or to whom the estate shall become vested or transferred as aforesaid, or under whose superintendence or management the said estate shall be placed as aforesaid, and such last mentioned person and such servant or artificer shall be respectively bound to perform all the terms and conditions of the contract, in the same manner, or as near thereto as the nature of the case will admit, as if the contract had been originally entered into, between such person and such servant or artificer. Provided always that in case such estate shall become vested in or transferred to any person other than the person, with whom such contract shall have been entered into, such servant, or journeyman artificer shall thereupon be entitled to determine such contract, if he shall so elect, and give notice of such being his intention to the person in whom the estate shall have become vested or to whom it shall have been transferred and shall receive all wages then due to him under or by virtue of such contract. Provided, however, that the last mentioned proviso shall not be held to apply to cases where estates are held in partnership by several persons, and where one or more of the partners retire from the partnership, or when on such retirement, other partner or partners shall take the place of the retiring partner or partners, one or more of the original partners, who were parties to the contract, continuing in the partnership (*k*).

*Or previous warning as required by cl. 3*]. Every verbal contract for the hire of a servant for the period of a month, renewable from month to month "shall be deemed and taken in law to be so renewed, unless one month's previous notice or warning be given by either party to the other of his intention to determine the same at the expiry of a month from the day of giving such notice" (*l*). A servant can give a valid notice on any day of his monthly service (*m*). In the case of an estate cooly the notice may be given either to the resident superintendent, or to the proprietor (*n*). No

(*k*). Cl. 25.

(*l*). Cl. 3.

(*m*). 2125 Hald., 2 Gren. 40.

(*n*). *Ibid.*

particular form of notice is necessary; it may be given verbally or in writing, personally or by an authorized agent; all that is required is that the servant should communicate to his employer an unconditional intention of quitting his service at the expiry of the warning (*o*). It is not essential that the notice, if in writing, should be signed by the servant (*p*).

A *bona fide* belief on the part of a servant that he has given a valid notice, when in fact such notice has not been given, is no ground for an acquittal, though it may be for the imposition of only slight punishment (*q*).

The notice begins to run from the date of its receipt by the employer (*r*); where notice has been given in writing, strong evidence of subsequent intention to abandon the notice [much stronger than that afforded by the fact of coolies remaining on an estate for two days after their term of notice has expired,] and proof of the operation of such change of conduct on the other party, would be necessary to render the notice nugatory (*s*); but it is otherwise where the coolies have remained long after the term of notice has expired (*t*).

The mere fact that the servant does not come for his wages cannot be regarded as a waiver of notice (*u*).

## 2. MISCONDUCT IN SERVICE.

*Cl. II*]. Any servant or journeyman artificer ..... who shall be guilty of any drunkenness, wilful disobedience of orders, insolence, or gross neglect of duty, or other misconduct in the service of his employer ..... shall be punishable, etc.

(*o*). 24766 Nāwal., 4 Circ. 16.

(*p*) *Ibid.* Under the Ord. of 1841 a notice signed by a Proctor, who informed the Complainant that he was "instructed by Carpen kangany to give notice that he and his men intend to leave service," was held good as regards the kangany, but inoperative as regards the coolies in the absence of any evidence that they authorized or adopted it. 54780 Kandy, 1 Bel. 184; 9491 Bad., 2 Bel. 89, 3 R.-N. 148.

(*q*). 14847 Panw., 3 Gren. 23.

(*r*). 9491 Bad., 2 Bel. 89, 3 R.-N. 148; 9079 Nuw. El., 3 Gren. 33. If a letter properly directed is proved to have been either put into the Post Office, or delivered to the postman, it is presumed that it reached its destination at the regular time, and was received by the person to whom it was addressed.

(*s*). 9491 Bad., *supra*.

(*t*). 5360 Haris., 2 Bel. 33, Crow. 75.

(*u*). 24766 Nāwal., 4 Circ. 16.

PLAINT.—That the Defendant was ..... being a *servant* (v) of the Complainant, guilty of misconduct in the service of his employer, namely *drunkenness* (w), in breach of § 11 of Ordinance No. 11 of 1865.

The offence of misconduct is entirely independent of the period of service; it is, therefore, not necessary to set out the period of service in the *Plaint* (x).

The misconduct must be “in the service of his employer” and those words should be used (y). Where the misconduct consists in inciting fellow servants to disobey orders, it would appear that the names of the servants so incited should be set out in the *Plaint*, and that there should be an averment that the servants had received certain specified orders from their master, and that the Defendant had incited them to disobey those orders (z).

PENALTY.—Same as for *quitting service* (see *ante* p. 25). It should be noted, however, that the provisions of clause 21, as to the servant’s non-liability to punishment on account of his wages having been unpaid for a period longer than a month, apply only to charges for *disobedience* and *neglect of duty*, but not to charges for *drunkenness* or *insolence*. In the words of Clarence, J., (a).—“The Legislature thought fit to enact that a servant, whose master will not pay him his due wages, shall not be punished for any statutory offence in the nature of a failure to render the due service. But the statutory offence of insolence [and drunkenness] falls under a different category.”

EVIDENCE.—*Wilful disobedience of orders*]. The orders must be not only not contrary to law, but they must be

(v). *Journeyman artificer*.

(w). 1 *Wilful disobedience of orders*. 2 *Insolence*. 3 *Gross neglect of duty*, or as the case may be.

(x). 16854 Panw., 2 Circ. 72, but see 9133 Nuw. El., 3 Gren. 58.

(y). 16853 Panw., 2 Circ. 72. In 845 Matalé (1 Gren. 16) the S. C. affirmed a conviction on the following *Plaint*, “that the Defendant did on the 10th April last and during several days previously, grossly misconduct himself whilst in the employ of the Defendant [*sic*] in breach, etc.” observing “the objection as to the vagueness with which the charge is laid in the *Plaint* (if the objection be a good one) should have been taken before conviction.”

(z). 16854 Panw., *supra*.

(a). 21269 Kandy, 5 Circ. 48.

reasonable (b). It is a reasonable order to a domestic servant to bid him to sleep on a particular night in his employer's house (c). But where a servant, who was ordered by his employer to sleep on a certain night in the latter's house, disobeyed the order, and remained all night with his wife who was ill, and it appeared that the wife's illness was such as to make him naturally and fairly think it his duty to stay by her, in order to attend to her, and, if necessary, to fetch a doctor, Creasy, C. J., was of opinion that, if the servant's disobedience was caused by these facts and feelings, he was not punishable (d).

Where no special contract was proved as to the particular estate, on which the Defendants, who were coolies, were bound to work, the S. C. held that an order to work on either of two estates, distant 6 miles from each other, and both under the management of the Complainant, under whom the Defendants had been serving for several months under a general hiring, was not, assuming both estates to be equally healthy, and looking at the general and necessary course of cultivation in the coffee districts, an unlawful order, but that under special circumstances it might be unreasonable; it was however for the Defendants to prove the special facts, which would make the order so unreasonable as to render disobedience to it not punishable (e). But, in the absence of sufficient evidence as to general hiring, it was held unreasonable to order kanganies to proceed from an estate in Gampola to another estate belonging to the same employer in Dimbula (f). An order to a kangany to watch a store all night after his day's work, on the promise of a holiday on the next day, is a reasonable order (g). Where the Defendant, a Tamil coolie employed on an estate, refused to attend at his employer's bungalow, when sent for on a Sunday, Dias, J., held that the employer was bound to prove that his order was such an order as he had a right to make, observing that it was extremely doubtful whether the employers of coolies had

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(b). 5023 Bad., 1 Bel. 122, 3 Lor. 110.

(c). 1882 Jaff., 1 Bel. 178, 2 R.-N. 180.

(d). *Ibid.*

(e). 5023 Bad., *supra.* Under the Ord. of 1841.

(f). 23847 Gamp., 2 Gren. 13.

(g). 5558 Mātālē, 3 Gren. 5.

a right to their services, as coolies employed for the purposes of planting, on Sunday, beyond a right of control limited to the preservation of order and discipline (*h*).

Evidence of previous disobedience of orders is admissible to prove in any particular case that the disobedience was wilful. This is within the class of cases where in order to ascertain the existence of a guilty *animus*, evidence of other guilty acts of the same kind is, under certain restrictions, admitted by law (*i*). Proof should be given by mentioning specific acts of previous disobedience (*k*).

*Insolence*]. Gesticulating, making much noise in the store where his employer lives, and calling him a *peralikáran* (*i. e.* a quarrelsome person) amount on the part of a kangany to insolence (*l*).

*Gross neglect of duty*]. It is a gross neglect of duty for the head watcher at a mill, who is entrusted with the gate-keys at night, to part with the keys, so that a gate is opened at night and stolen oil passed out (*m*).

*Other misconduct*]. Wilful disobedience of orders given to a person in regard to his own service, is, by the very words of the Ordinance, misconduct; and it is within the spirit and meaning of the Ordinance to hold that inciting fellow servants to disobedience of orders, unless justified in law by some special reason, falls under the head of 'other misconduct' (*n*). To support the charge there should be evidence that the persons, who were incited to disobey orders, were in the service of the Complainant, that they received certain precise orders from the Complainant, and that the Defendant incited them to disobey those orders (*o*).

### 3. REFUSING TO WORK, ETC.

*Cl. 11*]. Any servant or journeyman artificer, who, without reasonable cause, shall neglect or refuse to attend at and during the time and hours, or at the place, when and where he shall have contracted to attend in commencing or carrying on any work, or,

(*h*). 21955 Avis.

(*i*). 1882 Jaff., 1 Bel. 178, 2 R.-N. 180.

(*k*). *Ibid.*

(*l*). 24771 Gamp., 2 Gren. 80.

(*m*). 7397 Col., 1877.

(*n*). 16854 Panw., 2 Circ. 72.

(*o*). *Ibid.* 3944 Dimb., 2 Circ. 156.

in case of no special agreement in that behalf, during such hours as, according to the trade or occupation of such servant or artificer, it shall be usual so to attend, or who without reasonable cause, shall leave unfinished, or refuse to finish any work contracted to be done ..... shall be punishable, etc.

PLAINTS.—(1). *Refusing to Attend at Contract Time or Place.* That the Defendant did ..... being a *servant (p)* of the Complainant, without reasonable cause, *neglect (q)* to attend *at the time when (r)* he had contracted to attend, namely *at 6 a. m.*, in *commencing (s)* the work of *tiling B. Mills*, in breach of § 11 of the Ordinance No. 11 of 1865.

(2). *Refusing to Attend During Usual Hours.*—That the Defendant did ..... being a *servant (p)* of the Complainant, without reasonable cause, *neglect (q)* to attend during the hours when, according to the *trade (t)* of the said *servant (p)* it is usual so to attend, namely *from 6 a. m. to 6 p. m.* in *commencing (s)* the work of *tiling B. Mills*, in breach of § 11 of the Ordinance No. 11 of 1865.

(3). *Leaving Work Unfinished.*—That the Defendant did ..... being a *servant (p)* of the Complainant, without reasonable cause, *leave unfinished (v)* work contracted to be done, namely, *the tiling of the roof of B. Mills*, in breach of § 11 of the Ordinance No. 11 of 1865.

The Plaintiff should state the time or place when or where the Defendant had contracted to attend, when the charge is for neglect to attend at such time or place (*w*), and a Plaintiff, which does not do so is substantially defective (*x*).

PENALTY.—Same as for *quitting service* (see *ante* p. 25). The provisions of clause 21 (see *ante* pp. 26-7), as to the servant's non-liability to punishment on account of his wages having been unpaid for a period longer than a month, apply

(*p*). *Journeyman artificer.*

(*q*). *Refuse.*

(*r*). 1. *During the hours when.* 2. *At the place where.*

(*s*). *Carrying on.*

(*t*). *Occupation.*

(*v*). *Refuse to finish.*

(*w*). 6545 Rat., 4 Circ. 3.

(*x*). 5476 Batt., 2 Gren. 7. The Plaintiff was as follows:—"That the defendants did, during the month of June and October, namely the 1st, 2nd, 3rd, 4th, and 6th in October, and the 5th in June, 1872, wilfully refuse and neglect to work under the Complainant, in Rockwood Estate, after agreeing to do so, against the 11th clause of Ordinance 11 of 1865."

to charges for *neglecting or refusing to work*, and, therefore to the charges in all the above Plaints under that head.

4. DESERTION, ETC., OF SERVANT ENGAGED TO GO UPON A JOURNEY.

*Cl. 12*]. Every servant, who, having engaged to go on any journey, shall without any just cause, desert, or refuse, or neglect to proceed on such journey or any stage thereof, or shall be guilty of any misbehaviour mentioned in the 11th clause of this Ordinance, shall be punishable, etc.

PLAINTS.—(1). *Desertion on Journey*. That the Defendant did ..... being a servant of *the Complainant* and having engaged to go on a journey, namely *from Colombo to Kandy* without any just cause *desert (y)*, in breach of § 12 of the Ordinance No. 11 of 1865.

(2). *Misbehaviour on Journey*.—That the Defendant was ..... being a servant of *the Complainant* and having engaged to go on a journey, namely *from Colombo to Kandy*, guilty of misbehaviour mentioned in the 11th clause of the Ordinance No. 11 of 1865, namely *drunkenness (z)*, in breach of § 12 of the said Ordinance.

PENALTY.—“Punishable by the Police Court of the district wherein such offence shall have been committed, or wherein the offender shall have been apprehended, by forfeiture of all wages then advanced or contracted for, or by imprisonment with or without hard labour not exceeding three months, or by such forfeiture together with such imprisonment at the discretion of the said Court.”

EVIDENCE.—*Without any just cause*]. “No servant engaged for a journey shall be obliged to travel on foot more than twenty-five miles during every twenty-four hours; nor shall any coolie (a) engaged for a journey be obliged to carry a greater weight

(y). 1. *Refuse (neglect) to proceed on the said journey*. 2. *Refuse (neglect) to proceed on a stage of the said journey, namely on the stage from Peradeniya to Kandy*.

(z). 1. *Wilful disobedience of orders*. 2. *Insolence*. 3. *Gross neglect of duty*.

(a). Though the latter part of the proviso only applies to coolies, it is not to be supposed that a master can compel a servant, not being a coolie, to carry a greater weight than 40 lb. or to proceed in case of actual illness or bodily injury. The Courts would undoubtedly hold that such conduct on the part of a master afforded the servant just cause for refusing to proceed on the journey. The proviso with regard to coolies appears to be inserted *ex abundanti cautela*.

than forty pounds, unless otherwise expressly agreed upon for a short distance only, nor to proceed in case of any actual illness or bodily injury, rendering him incapable to travel the journey or any stage thereof" (b).

5. MAKING FALSE STATEMENT OF FORMER EMPLOYMENT, ETC.

Cl. 16]. If any person shall offer himself as a servant or journeyman artificer, asserting or pretending that he hath served in any service or employment, in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his character, or shall in anywise add to or alter, efface, or erase any word, date, matter or thing contained or referred to in any certificate given to him by his last or any former actual employer, or by any other person or persons duly authorized by such employer to give the same, then in any of the said cases, such person or persons so offending shall be liable, etc. (c).

PLAINTS.—(1). *Making False Statement as to Former Employment.*—That the Defendant did ..... offer himself to the Complainant as a servant (d) asserting (e) that he had served in a service (f) in which he had not actually served, namely as cook to A. B., in breach of § 16 of the Ordinance No 11 of 1865.

(2). *Presenting False Certificate of Character.*—That the Defendant did ..... offer himself to the Complainant as a servant (d) with a false (g) certificate of his character, in breach of § 16 of the Ordinance No. 11 of 1865.

(3). *Altering Certificate.*—That the Defendant did ..... add to (h) a word (i) contained (k) in a certificate given to him by A. B. his last actual employer (l), namely the word "honest," in breach of § 16 of the Ordinance No. 11 of 1865

(b). Cl. 12.

(c). Taken from 32 Geo. 3, c. 56, s. 4. Knowingly uttering a forged testimonial to character with intent to deceive and thereby obtain a situation of emolument is forgery at common law in England.

(d). *Journeyman artificer.*

(e). *Pretending.*

(f). *Employment.*

(g). 1. *Forged.* 2. *Counterfeit.*

(h). 1. *Alter.* 2. *Efface.* 3. *Erase.*

(i). 1. *Date.* 2. *Matter.* 3. *Thing.*

(k). *Referred to.*

(l). 1. *By A. B. a former actual employer.* 2. *By C. D. a person (or, C. D. and E. F. persons) duly authorized by A. B. his last (or, a former) actual employer to give the same.*



**PENALTY.**—Fine not exceeding Three Pounds [Thirty Rupees], or imprisonment with or without hard labour not exceeding three months, or such fine together with such imprisonment, at the discretion of the Court (*m*).

**EVIDENCE.**—*Offer himself as a servant*]. A person's presenting himself for employment at the Registrar of Servants' Office is not necessarily the same in meaning as offering himself as a servant. At the most, in making the application at the Registrar's office, the applicant invites the Registrar to be his agent to make an offer of his service to some one, whenever the opportunity for so doing may occur. He does not, by applying at the office, himself make a specific offer of service (*n*). Accordingly a Pleint which charged the Defendant that he did "present himself for employment at the Registrar of Servants' Office with a false, forged, or counterfeit certificate," etc., was held not to disclose an offence under the clause (*o*).

#### 6. DENYING FORMER EMPLOYMENT.

*Cl. 17*]. If any person, having been before in service or employment as a servant or artificer, shall, when offering to hire himself in any employment, capacity, or service, falsely and wilfully pretend not to have been hired or retained in any such previous employment, capacity, or service, then and in such case every such person, so offending, shall be liable, etc. (*p*).

**PLAINT.**—That the Defendant did ..... having been before in *service* (*q*) as a *servant* (*r*) to *A. B.*, when offering to hire himself to *the Complainant* in a *service* (*s*), namely *the service of a cook*, falsely and wilfully pretend not to have been *hired* (*t*) in the said previous *service* (*s*), in breach of §. 17 of the Ordinance No. 11 of 1865.

**PENALTY.**—Fine not exceeding Three Pounds [Thirty Rupees], or imprisonment with or without hard labour not exceeding three months, or such fine together with such imprisonment at the discretion of the Court (*u*).

(*m*). Cl. 16.

(*n*). Phear, C. J., 18990 Col., 2 Circ. 54.

(*o*). *Ibid.*

(*p*). Taken from 32 Geo. 3, c. 56, s. 5.

(*q*). *Employment.*

(*r*). *Artificer.*

(*s*). 1. *Employment.* 2. *Capacity.*

(*t*). *Retained.*

(*u*). Cl. 17.

## OFFENCES BY EMPLOYERS AND OTHERS.

### 1. REFUSING TO PAY WAGES:

*Cl. 14*]. In case any employer, not having reasonable cause of complaint, shall refuse payment of wages when due, or not having given such notice or made such payment as required by the 3rd and 4th sections of this Ordinance, shall refuse to continue full payment to any servant or journeyman artificer, during the whole term of any contract entered into between them, every such employer so refusing shall, etc.

PLAINTS.—(1). *Refusing to Pay Wages when Due.*—That the Defendant did ..... being the employer of the Complainant as a servant (v), and not having reasonable cause of complaint against him, refuse to pay him on his demand the sum of rupees twenty being wages then due from the Defendant as such employer to the Complainant, in breach of § 14 of the Ordinance No. 11 of 1865.

(2). *Refusing to continue full Payment of Wages.*—That the Defendant did ... ..... being the employer of the Complainant as a servant (v), and not having given such notice or made such payment to him as required by the 3rd and 4th sections of the Ordinance No. 11 of 1865 refuse to continue full payment to the Complainant during the whole term of the contract entered into between them, in breach of § 14 of the Ordinance No. 11 of 1865.

The offence created by clause 14 consists in a breach of a contract of personal service, and the case of each servant, who has been refused his wages, is the case of a separate offence (x).

Accordingly where a Complaint was preferred by T. Kangany, for refusal to pay the wages of himself and 170 coolies of his gang, and none of the coolies were named in the Complaint as being servants with whom the Defendant had

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(v). *Journeyman artificer.*

(x). 5330 Rat., 2 Circ. 158.

committed a criminal breach of contract, it was held that the Plaintiff must be treated as complaining of a criminal breach of contract on the part of the Defendant with the Complainant only (*y*). Where no objection is taken to such a Plaintiff, the Magistrate should not stop the case, but may treat the Plaintiff as limited to the case of the Complainant (*z*). Several cases of this nature may, if convenient to all parties, be made the subject of successive charges in the same Plaintiff against the same employer at the instance of one Complainant (*a*).

The Plaintiff for refusal to pay wages when due should contain a specification of the servant, whose wages are refused, of some ascertained or ascertainable amount of wages due to him, an allegation of a specific demand of that amount, and of the refusal of the employer, without reasonable cause of complaint against the servant, to pay the same (*b*).

**PENALTY.**—“Every such employer, so refusing, shall in addition to payment of all wages actually due, or of all that would have become due, if the contract had been properly observed, or both, as the case may be, be liable to a fine not exceeding Five Pounds [Fifty Rupees], or to imprisonment not exceeding three months, or to such fine together with such imprisonment, at the discretion of the Court (*c*).

The Magistrate has no power to order payment of the wages due (*d*).

**EVIDENCE.**—*Plaint* (*r*). Prove that Complainant was in the employment of the Defendant as a servant, that a certain specified amount of wages was at a certain date due to the Complainant by Defendant as his employer, that Complainant made a specific demand upon Defendant for the amount due, and that the latter refused to pay (*e*). The superintendent of an estate is criminally liable for

(*y*). *Ibid.*

(*z*). 83229 *Mát.*, 2 *Circ.* 177 (wrongly reported as a *Mátale* case).

(*a*). 5330 *Rat.*, *supra.*

(*b*). *Ibid.*

(*c*). *Cl.* 14.

(*d*). 77852 *Mát.*, 4 *R.-N.* 163.

(*e*). 83229 *Mát.*, *supra.*

non-payment of wages to the coolies employed on the estate (*f*). And in the case of an estate's passing to a new superintendent during the pendency of a contract of service for a period exceeding one month, it would appear that the effect of clause 25 (*g*) is to place the new superintendent in the shoes of the retiring superintendent as regards this liability (*h*).

A conductor of an estate is not an employer of labour within the meaning of clause 14 (*i*).

*Due as wages*]. The wages of a monthly servant under a verbal contract "shall be payable monthly, except where the service shall have been determined by notice on a day other than the last day of the month, in which case the wages for the broken period shall be payable to the day the service is so determined, and such wages, where the same shall not be payable at a monthly rate, shall be computed according to the number of days on which such servant shall have been able and willing to work; or, if payable at a monthly rate, shall be in proportion to the number of days on which he shall have been so able and willing as aforesaid" (*k*).

An employer who has had to supply his servant, while incapacitated by sickness from labour in his service, with lodging, food, and medical care at his own expense, is not bound to pay to the servant during such period his wages in addition (*l*).

*Reasonable cause of complaint*]. There have been, so far as we are aware, no local decisions as to what is a reasonable cause of complaint, which will exempt an employer from criminal liability for refusal to pay wages when due.

By the English Law, the circumstances which will justify the discharge of a servant will also sometimes justify the non-payment of wages. Thus, if a servant robs his master, the latter may, although a month's notice is required, dismiss him without any notice and need not pay him any

(*f*). 4585 Kandy, Fern. 14.

(*g*). See *ante* pp. 28, 40-1.

(*h*). 21269 Kandy, 5 Circ. 48.

(*i*). 44078 Mátalé, Fern. 6.

(*k*). Cl. 4.

(*l*). Cl. 27.

wages (*m*); and, if a servant embezzle his master's property, the amount embezzled is wholly immaterial; and although the arrears of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything (*n*).

A master cannot set off against a claim for wages due, damages sustained by him through the servant's negligence (*o*); unless it can be proved to have been part of the original contract that the servant should pay out of his wages the value of his master's goods lost through his negligence (*p*); and it would appear that clause 13 (*q*) of the local Ordinance does not render the fact that an employer has sustained damages from the negligence of his servant, to an amount exceeding the sum claimed as wages due, a good defence to a criminal prosecution for refusal to pay wages due, because the Police Court has no power to award payment of wages (*r*).

By the English Law, when a servant, whose wages are due periodically, refuses to perform his part of the contract and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice (*s*), he is not entitled to be paid

(*m*). *Per* Park, J., in *Cunningham v. Fonblanque*, 6 C. & P. 49, Manley Smith, p. 114.

(*n*). *Brown v. Croft*, 6 C. & P. 16, note. *Ibid*.

(*o*). *Le Loir v. Bristow*, 4 Camp. 134, Manley Smith, p. 169.

(*p*). *Per* Lord Ellenborough, *ibid*.

(*q*). "Upon any complaint by any servant or journeyman artificer for non-payment of wages, or damages for breach of contract, or misconduct by his employer, before a Court having jurisdiction in that behalf, it shall be lawful for such Court, at its discretion, to make a proportional abatement out of any sum to be awarded as the wages or damages due to any such servant or artificer for such days or time as he shall have been proved to have been, without the consent of his employer, absent from or neglecting his service or work, and also for the value of any breakages or damage done to any of the property of his employer, by or through the misconduct or gross negligence or carelessness of such servant or journeyman artificer."

(*r*). 77852 *Mát.*, 4 R.-N. 163.

(*s*). The grounds on which a master may discharge his servant without notice are thus classified by Manley Smith, (p. 112).—1. Wilful disobedience of any lawful order of his master. 2. Gross moral misconduct, pecuniary or otherwise. 3. Habitual negligence in business, or conduct calculated seriously to injure his master's business. 4. Incompetence or permanent disability from illness.

any wages for that portion of time during which he has served since the last periodical payment of wages. This is upon the principle that the contract was an entire contract, and the performance of the service for the whole time agreed upon is in the nature of a condition precedent to the right to recover any wages. In such a case the wages have not been earned and are therefore not due (t).

*Plaint (2).—Not having given such notice or made such payment as required by the 3rd and 4th sections.* The notice required by section 3 is one month's previous notice of intention to determine the contract at the expiry of a month from the day of giving such notice. Section 4 provides that any employer shall be entitled to discharge his servant under a monthly hiring, without previous notice, provided such servant shall be instantly paid his wages for the time he has served, and also for one month from the time of such discharge.

## 2. SEDUCING SERVANTS, ETC.

*Cl. 19].* Any person who shall wilfully and knowingly seduce, or attempt to seduce, from his service or employment, any servant or journeyman artificer, bound by any contract to serve any other person or persons, or who shall wilfully and knowingly take any servant or journeyman artificer while so bound into his service or employment, or who shall wilfully and knowingly harbour or conceal any servant or journeyman artificer, who shall have absented himself without leave from the service of such other person to whom he is so bound, or who shall wilfully and knowingly retain in his service any servant or journeyman artificer bound under any contract to serve any other person, after receiving notice in writing that such servant or journeyman artificer is so bound as aforesaid, shall be guilty of an offence.

PLAINTS.—(1). *Seducing the Servant of Another from Service.* That the Defendant did.....wilfully and knowingly seduce (u) from his service (v) O. D. a servant (w) bound by a contract to serve another person (x), namely the Complainant, in breach of § 19 of the Ordinance No. 11 of 1865.

(t). See Manley Smith, p. 178, and the cases there cited.

(u). *Attempt to seduce.*

(v). *Employment.*

(w). *Journeyman artificer.*

(x). *Other persons.*

(2). *Taking the Servant of Another into Service.*—That the Defendant did.....wilfully and knowingly take *C. D.* a servant (*w*), while bound by a contract to serve another person (*x*), namely the Complainant, into his service (*v*), in breach of § 19 of the Ordinance No. 11 of 1865.

(3). *Harbouring Deserters.*—That the Defendant did .....wilfully and knowingly harbour (*y*) *C. D.* a servant (*z*), who had absented himself without leave from the service of another person, namely the Complainant, to whom he was bound by a contract to serve, in breach of § 19 of the Ordinance No. 11 of 1865.

(4). *Retaining in Service the Servant of Another after Receiving Notice in Writing.*—That the Defendant did.....wilfully and knowingly retain in his service *C. D.* a servant (*w*) bound under a contract to serve another, namely the Complainant, after receiving notice in writing that the said servant (*w*) was so bound as aforesaid, in breach of § 19 of the Ordinance No. 11 of 1865.

Coolie cannot be substituted for servant (*a*). In Plaint (1) *seduce* must be used. The word *crimp* does not occur in the Ordinance (*b*). A Plaint alleging that the Defendants "did by persuasions and threatenings keep from Complainant's service" certain coolies, discloses no offence under the clause (*c*). The offences charged in Plaints (3) and (4) are totally distinct, and the words in the Ordinance "after receiving notice in writing" have no connection with the offence of *harbouring* (*d*).

PENALTY.—The Defendant is liable "to a fine not exceeding Five Pounds [Fifty Rupees] in respect of each of the servants or journeymen artificers, whom he shall have so seduced, taken, or harboured, or concealed, or retained as aforesaid, and to imprisonment with or without hard labour for any period not exceeding three months, if the Court shall see fit to impose such imprisonment. Every such offence

(v). *Employment.*

(w). *Journeyman artificer.*

(x). *Other persons.*

(y). *Conceal.*

(a). 4826 Rat., 2 Circ. 82.

(b). *Ibid.*

(c). 5645 Rak., 2 Circ. 19a.

(d). 4826 Rat., *supra*.

shall be cognizable before any Police Court having jurisdiction in the district wherein the offence was committed, or the offender apprehended." But the aggregate penalty inflicted cannot exceed, in a prosecution in the Police Court, the penalty which a Police Court has power to impose (*e*).

EVIDENCE.—*Wilfully and knowingly*]. In prosecutions for all the offences chargeable under the clause there must be evidence that the Defendant knew the servant to be the servant of another. And *bona fides* (*f*), or ignorance that the servant was bound to another (*g*), is a good defence. A finding that the Defendant has been "criminally careless" is not sufficient to justify a conviction (*h*).

*Plaint (1).—Seduce from his service*]. Inducing a coolie under an engagement to proceed to a certain estate, by representing that there is sickness on that estate, to take service on another estate, amounts to seduction (*i*).

But taking a servant up on a warrant upon a charge of desertion (*k*) does not amount to seduction; nor does mere assent on the part of the Defendant to a servant's accompanying him (*l*).

Where certain coolies, who had entered into a contract of service with Complainant's agent, were detained, while on their way to Complainant's estate, for 8 or 9 days by the Defendants, who had a claim against the coolies for Rs. 150, which the Complainant's agent promised to pay, and it was found that the Defendants detained the coolies under a *bona fide* belief that they had a right to detain them until the amount of their claim was paid, it was held that the Defendants could not be convicted of seducing from service (*m*).

Where the offence disclosed amounts to forcible abduction and rape, no prosecution will lie under the Ordinance (*n*).

*Plaint (3).—Harbour*]. This word is used in immediate relation with the absence from service without leave; it must there-

(*e*). 13573 Mátalé, 4 R.-N. 51.

(*f*). 8588 Nuw. El., 2 Gren. 59.

(*g*). 4826 Rat., 2 Circ. 82.

(*h*). 14467 Gala., Vand. 54.

(*i*). 2206 Hald., 2 Gren. 83.

(*k*). 9219 Pussel., 2 Gren. 36; 12647 Panw., Fern. 5.

(*l*). 5291 Mátalé, 2 Gren. 102.

(*m*). 5645 Rak., 2 Circ. 190.



fore mean affording servants a place of safety, or some means of protection from, or shelter against, or of resistance to, the efforts of their master to get them back to his service, or to render them responsible for, or to cause them to make good, the breach of contract committed by them in absenting themselves from his service without leave; in short it must amount to a direct aiding of them in their continuing wrong, and affording them the means of keeping out of the service of their former master (o). A direct refusal by a Defendant to allow a servant to return to his former master would legitimately give rise to the inference that the servant's subsequent non-return was due to support and shelter afforded by the Defendant, unless it appears that the Defendant has done nothing active towards keeping the servant from returning to his former master, in the way of aiding him to keep out of the way of that master's service (p).

*Plaint (q).—Retain in his service*]. Where a Defendant gave coolies employment, after receiving notice, but the employment was very slight and was almost immediately given up, this was held not to constitute a substantial retaining (q).

*After receiving notice in writing*]. Proof of the notice must be given (r). The following document is not such a notice as is required:—"To Mr. .... unless the cooly 'Veri, whom I have already requested you to return to this estate is sent at once by bearer, I will take an action against you for crimping" (s). It is obvious that, where a person *after notice*, continues to employ another man's servant he will be liable for retaining the latter in his service, although at the time of hiring he did not know that he was hiring another man's servant, and therefore would not be liable on a prosecution for seduction.

### 3. OVERWORKING SERVANT ENGAGED FOR A JOURNEY.

*Cl. 12*]. Provided always that no servant engaged for a journey shall be obliged to travel on foot more than twenty-five miles during every twenty-four hours;

(n). 90534 Kandy, 1 Gren. 15.

(o). 4826 Rat., 2 Circ. 82.

(p). *Ibid.*

(q). *Ibid.*

(r). 17747 Patw. 1880.

(s). *Ibid.*

nor shall any cooly engaged for a journey be obliged to carry a greater weight than forty pounds, unless otherwise expressly agreed upon for a short distance only, nor to proceed in case of any actual illness or bodily injury, rendering him incapable to travel the journey or any stage thereof; and any person obliging any servant or cooly, so engaged as aforesaid, to act contrary to the regulations contained in this proviso (t) shall be punishable, etc.

PLAINTS.—(1). *Obliging Servant to Travel on Foot more than 25 Miles in 24 Hours.*—That the Defendant did ... .. oblige the Complainant a servant engaged for a journey, namely from Colombo to Kandy, to travel on foot more than 25 miles in 24 hours, contrary to the regulations contained in the proviso to clause 12 of the Ordinance No. 11 of 1865, and in breach of the said proviso.

(2). *Obliging Coolie to carry a greater Weight than Forty Pounds, etc.*—That the Defendant did ..... oblige the Complainant a cooly engaged for a journey, namely from Colombo to Kandy, to carry a greater weight than forty pounds, the Complainant not having expressly agreed to carry such weight (u), contrary to the regulations contained in the proviso to clause 12 of the Ordinance No. 11 of 1865, and in breach of the said proviso.

PENALTY.—Punishable by the Police Court of the district wherein the offence shall have been committed or wherein the offender shall have been apprehended, by a fine not exceeding Five Pounds, [Fifty Rupees], or by imprisonment, with or without hard labour not exceeding three months, or by such fine together with such imprisonment at the discretion of the Court (v).

(t). This proviso is not very happily worded. It is not of course the servant, who is compelled to travel, etc., who acts contrary to the regulations, as would appear from the wording of the proviso, but the master, who so compels him.

(u). *To proceed, the Complainant being then rendered incapable to travel the said journey [or a stage of the said journey, namely from Pradeniya to Kandy] by actual illness [or bodily injury].*

(v). Cl. 12.



FINIS.

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*Advances?*

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