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03423

A COMMENTARY ON THE CEYLON CRIMINAL PROCEDURE CODE

(ORDINANCE NO. 15 of 1898.)

BY

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CEYLON:
THE COLOMBO APOTHECARIES CO., LTD.,
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Dedicated
to
My Father

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FOREWORD

BY

The Hon. Mr. Justice M. T. AKBAR, K.C.

It has been the custom in Ceylon for a law book to be introduced to the legal profession through the medium of a foreword. But I do not think many words are necessary from me to commend this Commentary on the Ceylon Criminal Procedure Code to members of the legal profession.

It took Mr. Dias over ten years to prepare this Commentary for the press and the book, as one would expect, shows the same degree of mature care and research which the author has already exhibited in his volumes on the law of Evidence and the law relating to Extradition. The notes have been arranged and printed in a form which will be very helpful to every law student, judge, and practitioner. The source of each section is given, and the important words occurring in the section are discussed in their proper sequence, and at the end the author has collected all the case law in chronological order. What more can a lawyer want ?

I can safely predict a warm welcome for this Commentary on the Code by the Lawyers of Ceylon.

M. T. AKBAR.

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PREFACE.

A commentary on the Ceylon Criminal Procedure Code has been long overdue. The only reason why I have undertaken the publication of such a commentary is because for fourteen years I have had to make the Criminal Procedure Code my special study when serving as Crown Counsel in the Attorney-General's Department.

The manuscript of this book was commenced in the year 1921, but it was not completed until 1932. Several causes contributed to this delay. The work had to be held up from time to time owing to the pressure of my own official duties. Three amendments of the Criminal Procedure Code in the years 1921, 1924, and 1930 made it necessary that certain portions of the text should be rewritten. There was also the suggestion that the law should be amended to enable certain Magistrates to commit cases for trial to the higher Courts without the intervention of the Attorney-General. There was also the possibility of the creation of a local Court of Criminal Appeal—a reform which is considerably overdue. There were certain periods when all work on the manuscript had to be stopped because it appeared that these far-reaching changes in our law of procedure were imminent. Finally, the law being a progressive science, it was necessary that the commentator should keep abreast of the changes in the law effected by judicial interpretation.

These are some of the difficulties which were encountered while this book was being written, and while it was going through the press. It is now offered to the legal profession and to law-students in the hope that it might prove to be of some assistance to them in their researches and studies.

An apology is due to the pre-publication subscribers for the delay in the appearance of the book. It is hoped that the above explanation would satisfy them that there has been no unavoidable delay.

A word might be said about the plan of the book. An endeavour has been made to arrange the text in such a way that it would prove of assistance to the busy lawyer as well as to the student. Taking Section 121 as an example, it will be seen that immediately below the section are cross-references to certain words and phrases which appear in the section. In paragraph 1 appear the source of the section, and a reference to the corresponding section of the Indian Criminal Procedure Code. Wherever possible reference has also been made to the corresponding section of the old Code of 1883. Paragraph 2 contains a general summary of the whole section. Thereafter, in consecutively numbered paragraphs, the section is dissected and dealt with. The last paragraph contains a digest of the case law governing the section under consideration. Whenever possible the very words of the Judges have been quoted. An attempt has also been made to trace the subsequent history of each case cited. For example, the case of *R. v. Cooray* appears at page 234 of the text. It will be seen that this is a decision of the Full Court, and that it is reported in 28 N.L.R. 74 and in 7 Ceylon Law Recorder 151. It may prove of assistance to the reader to know that up to the time this

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volume went to the press, the case of *R. v. Cooray* had been referred to in two subsequent cases, *viz.*, 29 N.L.R. 405, 6 T.L.R. 109, and that it was commented upon in 8 Ceylon Law Recorder at *p.* xli. It is hoped that this arrangement of the text will prove acceptable to the reader.

I do not suppose that this book is without blemish. I expect many errors to be brought to light when it is submitted to the close scrutiny of the profession. I would, however, request the reader to exercise some forbearance in the matter, because the labour involved has been great, and what has been done is really a pioneer attempt to deal exhaustively with the whole body of the adjective law of crimes in Ceylon.

Thanks are due to several willing helpers without whose assistance the publication of this book would not have been possible. Each proof was independently read and corrected by Mr. V. E. Charawanamuttu, Barrister-at-Law, and Mr. H. Vincent Pieris of Ampitiya, Kandy. Our thanks are also due to Mr. W. Talgodapitiya, Advocate, and Mr. L. B. Ratnayaka, Proctor, for the Index and Table of Cases. My personal thanks are due to the Hon. Mr. Justice M. T. Akbar for so kindly writing the Foreword which greatly enhances the value of the work. Last but not least, our thanks are specially due to Mr. R. J. Thomas, Manager of the Printing Department of the Colombo Apothecaries Co., Ltd., and his staff for the excellent arrangements which were made for the printing. I may add that had it not been for the firm conviction of Mr. Thomas in the success of this venture, and for the assistance and co-operation rendered me while the book was going through the press, this work would not have seen the light of day.

THE AUTHOR.

"Marienburg,"
Kandy.
December 1, 1934.

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THE CEYLON CRIMINAL PROCEDURE CODE.

ORDINANCE No. 15 OF 1898.

An Ordinance for consolidating and amending the Procedure of the Courts of Criminal Judicature.

(As amended by No. 5 of 1903, No. 2 of 1906, No. 24 of 1906, No. 37 of 1908*, No. 1 of 1910, No. 18 of 1911, No. 8 of 1913, No. 18 of 1915, No. 11 of 1916, No. 16 of 1918, No. 31 of 1919, No. 40 of 1921, No. 6 of 1924, and No. 19 of 1930.) (See No. 3 of 1904)

Preamble.

Whereas it is expedient to consolidate and amend the law relating to the procedure in the Courts of Criminal Judicature of this Island: It is therefore enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof,† as follows:—

The law of criminal procedure is that branch of the *adjective* law of crimes which regulates the mode by which offenders against the *substantive* law of crimes are brought to justice. The other branch of the adjective law of crimes is to be found in the Evidence Ordinance, and regulates the proof necessary to establish guilt or innocence. The substantive law of crimes is to be found mainly in the Penal Code, and also in various other enactments which have created offences.

Consolidate and Amend.—By the use of these words the legislature intended that the law of criminal procedure applicable to "Courts of Criminal Judicature" within the Colony was to be looked for in this Code alone. A reference to the pre-existing law, and the Indian law, will show that the Code is based mainly on the Criminal Procedure Code of 1883, and on Indian legislation. How far then is one justified in having recourse to the pre-existing law in construing this Code? That such assistance is necessary has often been found to be the case. "The Criminal Procedure Code," said Wood Renton, C.J.,‡ "no doubt presents difficulties of construction in this as in other matters. It was based partly on the old Criminal Procedure Code of 1883, and partly

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* Proclaimed from June 18, 1909, by Proclamation dated June 15, 1909, in *Gazette* No. 6,315 of June 18, 1909.

† See Ceylon Hansard (Session of 1897-1898) pp. 58, 68, 133, 135, 148.

‡ *Senaratna v. Lenohamy* (1917) 20 *N.L.R. at p.* 49. *Coore v. Appu* (1920) 22 *N.L.R. at. p.* 207, 208.

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upon Indian legislation, and its adaptation of the provisions of these enactments is not always either clear or happy." The following passage from *Maxwell on the Interpretation of Statutes** supplies the answer to the question. "It has been said that unless for some special reason, *e.g.*, where a provision is of doubtful import, or employs words of a technical meaning, the pre-existing law is not to be taken into consideration in construing a codifying Act, which implies not only the collection, but in some respects the alteration, of the law. Such an Act, in the main, expresses in abstract propositions the conclusions of law or equity which have been reached by the Judicature, *e.g.*, Bills of Exchange Act, 1882, and Sale of Goods Act, 1893. In relation to the latter, Cozens-Hardy, M.R., has said . . . : "I rather deprecate the citation of earlier decisions. The object and intent of the Statute was, no doubt, simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may, to some extent, have altered the prior Common Law." Yet counsel, and even eminent Judges, will refer to the earlier decisions if only for elucidating an argument. And, indeed, as regards a *Consolidation Act*, *e.g.*, Companies (Consolidation) Act, 1908—if it *re-enacts*, with a like context, *a word or phrase in one of the Acts consolidated, which has received judicial interpretation, that interpretation will, generally, be applicable to the same word or phrase in the Consolidation Act.*"

Courts of Criminal Judicature.—This phrase is not defined in the Ordinance. It is, however, quite clear that these words refer to the Supreme Court, and District Courts sitting in the exercise of their criminal jurisdiction, and to all Police Courts. The Code has no application to Village Tribunals, for the rules of criminal procedure regulating such courts are provided for by the Village Communities Ordinance No. 9 of 1924. *C.f.* the definition of "Court" in the Evidence Ordinance 1895, §3.

* (6th Edition) p. 47-48.

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PART I.

§1

CHAPTER I.

PRELIMINARY

Short title.

1. This Ordinance, which is generally referred to hereinafter as "this Code," shall be called "The Criminal Procedure Code, 1898," and shall come into operation on such day as may be appointed by order of the Governor in Executive Council proclaimed in the *Government Gazette*.

The Ordinance was brought into operation as from the 1st of March, 1899, by Proclamation dated 14th November, 1898, and published in the Ceylon *Government Gazette* No. 5585 of the 18th November, 1898.

Repeals.

2. (1) On and from the day when this Ordinance comes into operation the Ordinances mentioned in the first schedule shall be repealed to the extent specified in the third column thereof, but not so as to render unlawful the continuance of any confinement which is then lawful.

(2) This repeal shall not affect—

(*a*) The past operation of any enactment hereby repealed nor anything duly done or suffered thereunder ; or

(*b*) Any right, privilege, obligation, or liability acquired, accrued, or incurred under any such enactment ; or

(*c*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment ; or

(*d*) Any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid ; but any such investigation, legal proceedings, and remedy may be carried on as if any such enactment had not been repealed.

(3) Whenever reference is made in any enactment now in force to "The Criminal Procedure Code, 1883,"* or to any enactment hereby repealed, such enactment shall be

* Repealed by this Ordinance.

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§3 deemed to refer to the corresponding provisions of this Code so far as the same are applicable.

On and from the day this Ordinance comes into operation.—See §1 *ante*.

This Code.—See §1 *ante*.

Repeals.—See Interpretation Ordinance, No. 21 of 1901, §§5, 10 (1). It is to be observed that these provisions are retrospective in their effect.

Section 2 (3) is based upon §3 (1) of the Indian Act.

Interpretation clause. **3.** (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

§3 is based upon §4 of the Indian Act.

This Code.—See §1 *ante*.

Includes and **Means** when used in statutory definitions.

R. v. Ramanjiyya (1878) 2 *Mad. at p.* 7. "We are of opinion that the word '*include*' . . . is intended to be enumerative, not exhaustive . . . When it is intended to exhaust the signification of the word interpreted, the word '*mean*' is used . . ." *per* Innes & Forbes, J.J. See also *R. v. Nagla Kala* (1896) 22 *Bom. at p.* 237, and *Bahadur v. Mallick* (1910) 37 *Cal.* 643.

Ex parte Ferguson (1871) *L.R.* 6 *Q.B. at p.* 291. Where in a statutory interpretation clause the word '*include*' is used, the intention is to give the word interpreted an extensive meaning, and not a restrictive meaning. See also *The Gauntlet* (1871) 41 *L.J. Adm.* 65, *Bulankulam v. Omeru* (1913) 1 *B.N.C.* 41, and *Bliss v. Perera* (1912) 1 *C.A.C. at p.* 82.

Unless a different intention appears from the subject or context.—*Gantapallai v. Gantapallai* (1897) 20 *Mad.* 470: "*Unless a different intention appears from the subject or context.*" §4 of the Indian Criminal Procedure Code construed. See also *Tara Prosad Laha v. R.* (1903) 30 *Cal.* 910, and *In re Gur Dayal* (1879) 2 *Alla.* 205.

Binding Force of Statutory Definitions.—7 *Tam.* 25. The definitions in §3 are limited to the Criminal Procedure Code.

In re Gur Dayal (1879) 2 *Alla.* 205. The binding force of statutory definitions discussed. "I do not attach so much importance and force to interpretation clauses in acts of the legislature as is sometimes claimed for them, holding that they should not be read merely by themselves, but that they may be controlled and limited by other express provisions of the same law, and, as a consequence, that if inconsistent with and repugnant to such other provisions they may be disregarded . . ." *per* Stuart, C.J.

Complaint. "Complaint" **means** the allegation made orally or in writing to a Police Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence.

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This definition is based upon §4 (1) *h.* of the Indian Act.

This Code.—§1 *ante.*

Police Magistrate.—See *infra.*

Offence.—See *infra.*

Means.—See *supra.*

Taking action under this Code.—*Jagobundhoo v. R.* (1902) 30 *Cal.* 415. *'Complaint'. 'Taking action under this Code'.* A departmental complaint made to a Police Magistrate is not a *'complaint'* within the meaning of §3.

Complaints upon which a Police Magistrate will take action under this Code, *e.g* :—

§§21–22.— Information as to the commission of certain offences, sudden deaths, etc. *C. f.* §362.

§81.—Information that a person is likely to commit a breach of the peace.

§82.— Information that a person is a vagrant, or that he is concealing himself with a view to committing an offence.

§83.—Information that a person is a notorious bad liver or is a habitual criminal or a dangerous character.

§105.—Information as to a public nuisance.

§§126 A–127.— Report by Police Officer or Inquirer of the facts of a case under investigation.

§148.—The normal method by which proceedings before a Police Magistrate are commenced.

§363.—Information as to the death of a person in Police custody, or in an Asylum.

§376.—A report that a lunatic prisoner is capable of making his defence.

§381.— Initiation of proceedings in certain cases of contempt. *C. f.* §440.

§391.—Re-opening of a case by the Attorney-General.

§427.—Police Magistrate's authority to act under the Fugitive Offenders Act, 1881.

§438.—Information as to the abduction or unlawful detention of females. *C. f.* §72.

Offence.—*E.g.*, although maintenance proceedings are regulated by the Criminal Procedure Code, a defendant to such proceedings cannot be said to have committed an offence. *Eliza v. Jokin* (1917) 20 *N.L.R.* 157, *Nona v. Van Twest* (1929) 10 *C.L.Rec.* 51. See under *'Offence' infra.*

Inquiry. "Inquiry" **includes** every inquiry conducted under this Code before a Police Court or by an Inquirer.

This definition is based upon §4 (1) *k.* of the Indian Act.

Includes.—See *supra.*

Police Magistrate.—See *infra.*

Inquirer.—See *infra.*

This Code.—See §1 *ante.*

A Police Court includes a Municipal Court.—See Municipal Councils Ordinance No. 6 of 1910, §§54, 57–58 ; Courts Ordinance No. 1 of 1889 §4 *proviso;* and the amendment of the definition of 'Police Magistrate' by Ordinance No. 31 of 1919 §2 (*infra*).

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§3 **Inquiry.**—*In re Vellavarayam* (1903) 7 *N.L.R.* 116. The word '*inquiry*' in §3 refers both to summary as well as to non-summary proceedings. "Now '*inquiry*' is defined by §3 of the Code . . . It was not contested that the definition included a summary trial . . . I do not think it can be said that there is any authority in the enacting words of the Code itself for limiting the term '*inquiry*' to non-summary investigations," *per* Wendt & Middleton, J.J. Therefore a proceeding under §§81–83 *post* would be an "inquiry" under this Code.

Or by an Inquirer.—These words refer to proceedings under §§120–132 *post;* and do not refer to proceedings under §§362 *et seq. post.* See the definition of 'Inquirer' *infra.*

Judicial Proceeding. "Judicial Proceeding" **means** any proceeding in the course of which evidence is or may be legally taken.

C. f. §4 (1) *m.* of the Indian Act.

Means.—The use of this word is intended to show that the definition is exhaustive.

Bahadur v. Mallick (1910) 37 *Cal.* 643. The expression '*Judicial proceeding*' as used in the Indian Criminal Procedure Code is not exhaustive. The use of the word '*includes*' in the definition under that code shows this. *In the Ceylon Criminal Procedure Code the definition is meant to be exhaustive,* for the word '*means*' is used.

R. v. Rai (1884) 6 *Alla.* 487. The proceedings under §60 *post* are not judicial proceedings.

Evidence.—Defined by §3 Evidence Ordinance 1895.

Discharge. "Discharge," with its grammatical variations and cognate expressions, **means** the discontinuance of criminal proceedings against an accused, but does not **include** an acquittal.

Means.—See *supra.*

Include.—See *supra.*

Discontinuance of Criminal Proceedings.—

Discharge.—See *Weerasinghe v. Wijeyesinghe* (1927) 8 *C.L.Rec.* 207, 29 *N.L.R.* 208; *Senaratna v. Lenohamy* (1917) 20 *N.L.R.* 44; 4 *C.W.R.* 293.

§39.—Discharge of person arrested.

§151.—Discharge of accused by Magistrate after examination of complainant.

§§156 (2), 157, 158.—Discharge *of accused in a non-summary investigation.

§§191, 196.—Discharge* of accused in summary trials in a Police Court.

§202.—Discharge* of accused in a trial before the District Court.

§§217, 252.—Discharge* of accused in a trial before the Supreme Court.

§388.—Discharge* of accused by a Magistrate on the Attorney-General's orders.

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* *Rex v. Appuwa Veda* (1907) 10 *N.L.R.* 199 (2 *A.C.R.* 1). "I think it is clear that the word '*discharge*' in §202, looking at §3 of the Code, is used in its ordinary sense, and does not import an acquittal," *per* Middleton, J.

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Acquittal.—Where a Judge says "he acquits and discharges an accused, he must be taken to mean what he said." See *Weerasinghe v. Wijeysinghe* (1927) 8 *C.L.Rec.* 207; 29 *N.L.R.* 208, and *c. f. Senaratna v. Lenohamy* (1917) 20 *N.L.R.* 44; 4 *C.W.R.* 293. §3

§96.—Discharge of person imprisoned for failing to give security under *Chapter VII.*

§190.—Order of acquittal by Magistrate in a summary case.

§194.—Acquittal of accused by Magistrate in the absence of complainant.

§195.—Withdrawal of charge by complainant.

§§210, 214.—Acquittal by District Judge.

§221 (2).—Plea of guilty for a lesser offence.

§234.—Acquittal in Supreme Court.

§§283–286.—Pardon.

§290 (5).—Compounded offences.

§318.—Discharge of accused from sentence of whipping, when sentence cannot be carried out.

Plea of Autre Fois Acquit.—§§330, 331 *post.* It is clear that an order of 'discharge' as here defined cannot be made the foundation to a plea of '*autre fois acquit.*'

Chief Justice. "Chief Justice" **means** the Chief Justice of the Island of Ceylon and **includes** an acting Chief Justice.

C. f. §4 (1) *d* of the Indian Act.

Means, Includes.—See *supra.*

Chief Justice of the Island of Ceylon.—§8 Courts Ordinance 1889.

Acting Chief Justice.—§10 Courts Ordinance 1889. *C. f.* §9 (5) Interpretation Ordinance 1901.

Judge. "Judge" **means** a Judge of the Supreme Court and **includes** an acting Judge.

Means, Includes.—See *supra.*

Judge of the Supreme Court.—See §9. Courts Ordinance 1889. A 'Commissioner of Assize' appointed under §24 of the Courts Ordinance is a 'Judge of the Supreme Court,' but he would not be a 'Puisne Justice' as defined in §8 of that Ordinance.

Acting Judge.—§10 Courts Ordinance 1889.

C. f. §9 (5) Interpretation Ordinance 1901.

Judge.—The use of the word 'means' clearly shows that this definition was meant to be exhaustive. Therefore, District Judges and Police Magistrates are not 'Judges.' See the definition of 'Judge' in §17 of the Penal Code. The expression 'District Judge' and 'Police Magistrate' have been specially defined.

Supreme Court. "Supreme Court" and "court" when applicable to the Supreme Court **mean** the Supreme Court of the Island of Ceylon for the time being or the Chief Justice or any Judge thereof.

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§3

Mean.—See *supra*.

The Supreme Court of the Island of Ceylon.—§7 Courts Ordinance 1889.

Chief Justice.—See *supra*.

Judge.—See *supra*.

Attorney-General.
(*Ord. No.* 19 *of* 1930, §2.)

"Attorney-General" **means** the Attorney-General of this Island, and **includes** an acting Attorney-General.

Solicitor-General.
Deputy Solicitor-General.
(*Ord. No.* 19 *of* 1930, §2.)

"Solicitor-General" **means** the Solicitor-General of this Island, and **includes** an acting Solicitor-General, the Deputy Solicitor-General of this Island, and an acting Deputy Solicitor-General.

C. f. §4 (1) *a*, *t* of the Indian Act.

Means.—See *supra*.

Includes.—See *supra*.

Attorney-General.— This definition was added by §2 of Ordinance No. 19 of 1930.

Re Peris Perera (1880) 3 *S.C.C.* 161.—See *at p.* 164, where the history of the office of the Attorney-General in Ceylon is traced. See also *R. v. Herat* (1892) 2 *C.L.R.* 118; *Nonis v. Appuhamy* (1926) 4 *T.L.R.* 71. By Ordinance No. 1 of 1883—the expressions '*Attorney-General*', '*Solicitor-General*', and '*Crown Counsel*' were substituted in place of the expressions '*Queen's Advocate*', '*Deputy Queen's Advocate*' and '*Deputy to the Queen's Advocate*'. §393 *post*—the Solicitor-General and Crown Counsel have all the power of the Attorney-General, except that of entering a *nolle prosequi* (§§202, 217 (1), 388 *post*); or of pardoning an accomplice (§§283–286 *post*). See *Nonis v. Appuhamy* (1926) 4 *T.L.R.* 71; *Attorney-General v. Silva* (1914) 17 *N.L.R.* 193; *Amerasekera v. Lebbe* (1914) 17 *N.L.R. at p.* 325–6; *Corea v. Wijeysinghe* (1915) 5 *B.N.C.* 19. *C. f.* §9 (3) Interpretation Ordinance No. 21 of 1901.

Ordinance No. 19 of 1930 §2 redefined the terms "Attorney-General" and "Solicitor-General" and for the first time gave a *legal* status to the Deputy Solicitor-General.

Right of the Attorney-General to appear in Criminal Cases. See *Nonis v. Appuhamy* (1926) 27 *N.L.R.* 430; 4 *T.L.R.* 71:—

(1) Supreme Court	§216 (2).
(2) District Court	§201
(3) Police Court	
(*a*) Non-Summary	§392
(*b*) Summary	§199

See further §5 *post*.

District Courts.
Police Courts.

"District Courts" and "Police Courts" **mean** District Courts and Police Courts, respectively, as defined by "The Courts Ordinance, 1889."

Mean.—See *supra*.

District Court.—See §§64, 66 Courts Ordinance 1889. See definition of 'District Judge.'

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Police Courts.—See §83 Courts Ordinance 1889.

Municipal Courts are Police Courts.—§57 Municipal Council's Ordinance 1910. See also the definition of 'Police Magistrate.'

Ordinance No. 12 of 1890.—A 'Police Court' may be holden 'at any convenient spot' within the limits of its jurisdiction. See *Wickremaratne v. Don Bastian* (1918) 5 *C.W.R.* 119, which appears to have been decided without any reference to Ordinance No. 12 of 1890. See also *Rasiah v. Sithamparapillai* (1920) 8 *C.W.R. at p.* 118.

Unofficial Police Magistrates.—Have Unofficial Police Magistrates appointed under §84A of the Courts Ordinance 1889 all the powers and authority vested in "Police Courts?"—See Police Magistrate *infra*.

District Judge. "District Judge" **means** the Judge of a District Court and **includes** an acting Judge.

Means.—See *supra*.

Includes.—See *supra*.

Includes an acting Judge.—See §9 (5) Interpretation Ordinance 1901.

District Court.—See definition *supra*.

Judge.—*C. f.* definition *supra*.

Police Magistrate. (§2, 31 *of* 1919.) "Police Magistrate" and "Magistrate" **mean** a Magistrate appointed to a Police Court and **include** Municipal Magistrates.

Mean.—See *supra*.

Include.—See *supra*.

Include Municipal Magistrates.—*C. f.* §57 Municipal Council's Ordinance 1910.

Police Court.—See definition *supra*.

Acting Magistrates.—See §9 (5) Interpretation Ordinance 1901.

Unofficial Police Magistrate.—These officers are appointed by the Governor under the provisions of §84A of the Courts Ordinance 1889. That section declares that Unofficial Police Magistrates "shall have all the powers and authority by the Criminal Procedure Code 1898 vested in *Police Courts*, save and except the power and authority to take proceedings with regard to, hear, try, or determine, any offence which, by that Code, or by any law of this Colony, is summarily triable before a Police Court."

Regarding §84A of the Court's Ordinance in the light of the definition of "Court" in §3 of the same ordinance, it would appear that Unofficial Police Magistrates have only the judicial powers and authority vested in Police Courts subject to the exception that such persons may not try an accused summarily. It would seem that Unofficial Police Magistrates cannot exercise any of the executive functions which may be done or performed by Police Magistrates. See §361 para. 2 *post*.

Government Agent. [§2, 31 of 1919.] "Government Agent" or "Government Agent of the Province" **includes** "the Assistant Government Agent of the District."

Includes.—See *supra*.

Government Agent.—See §9 (3) Interpretation Ordinance 1901.

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§3 Registrar. "Registrar" **means** the Registrar of the Supreme Court and **includes** Deputy Registrar and the persons acting for the time being as Registrar or Deputy Registrar.

C. f. §4 (1) *e* of the Indian Act.

Means.—See *supra.*

Includes.—See *supra.*

Supreme Court.—See *supra.*

Registrar of the Supreme Court.— See the Charter of 1833 §14, and the Courts Ordinance 1889 §15.

Acting Registrars.—§9 (5) Interpretation Ordinance 1901.

Deputy Registrars.—§9 (3) Interpretation Ordinance 1901.

Inquirer. "Inquirer" **means** a person appointed by the Governor under Chapter XII.

Means.—The use of this word indicates that this definition is meant to be exhaustive. Therefore, for the purposes of the definition, 'Inquirers into deaths' (see *Chapter XXXII. post*) are not 'Inquirers'.

Inquiry.—See *supra.*

Police Officer. "Police Officer" **means** a member of an established Police force and **includes** the Inspector-General, Superintendents, Inspectors, Sergeants and Constables of Police.

Means.—See *supra.*

Includes.—See *supra.*

Police Officer.—See Police Ordinance 1865 §6., and *c. f.* definition of 'Peace Officer' *infra*, and see *R. v. Fernando* (1927) 9 *C.L.Rec.* 1; 5 *T.L.R.* 51.

Koch 42. A village headman is not a '*Police Officer*' either within the meaning of the Police Ordinance 1865, or of the Criminal Procedure Code.

Bulankulam v. Omeru (1913) 1 *B.N.C.* 41, a 'headman' is not a 'Police Officer' within the meaning of §54 of the Police Ordinance 1865. (1889) 4 *Tam.* 7, 10 *followed.*

Police Officers are Public Servants.—§19 Penal Code.

Police Station.—See *infra.*

Inspector-General of Police. (*Ord. No.* 6 *of* 1924 §2.) "Inspector-General of Police" **includes** a "Deputy Inspector-General of Police."

This new definition was added to this Code by §2 of Ordinance No. 6 of 1924 so as to include the two Deputy Inspectors-General of Police (see §24A Ordinance No. 16 of 1865) who are vested with the same powers as the Inspector-General of Police.

Peace Officer. "Peace Officer" **includes** Police Officers and Headmen appointed by a Government Agent in writing to perform Police duties.

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Includes.—See *supra.*

Police Officers.—See *supra* and *R. v. Appu* (1929) 10 *C.L.Rec.* 127. §3

Peace Officers.—(i) are 'public servants' §19 Penal Code.

(ii) *Costa v. Sinho* (1903) 7 *N.L.R.* 287. A Police Vidane appointed by the Government Agent "by virtue of the powers vested by the Governor" is a '*Peace Officer*' as defined by §3 of the Code.

(iii) Are 'Irrigation Headmen' elected under Chapter IV. of the Irrigation Ordinance 1917 'Peace Officers' within the meaning of the Criminal Procedure Code?

(iv) See *Attorney-General v. Skinner* (1912) 15 *N.L.R.* 222.

Government Agent.—See *supra.*

Cognizable and Non-Cognizable Offences.—See *infra.*

Penal Code. "Penal Code" **means** the Ceylon Penal Code together with every statutory modification or amendment thereof.

Means.—See *supra.*

The Ceylon Penal Code.—Ordinance No. 2 of 1883. *C.f.* §4A Interpretation Ordinance 1901.

Pleader. "Pleader" used with reference to any proceeding in any court **means** (1) an Advocate; (2) any person authorized under any law for the time being to practise in such court.

C.f. §4 (1) *r* of the Indian Code.

Means.—See *supra.*

Court.—See definitions of 'Supreme Court,' 'District Court' and 'Police Court' *supra.*

Advocate.—§18 Court's Ordinance 1889 and the rules framed thereunder; Ordinance No. 12 of 1848; Charter of 1833 §17, 22.

Any person authorised under any law for the time being to practice in such Court.—These words would refer both to Advocates and Proctors.

Pleader.—*Moonesinghe v. Pereira* (1925) 27 *N.L.R.* 76; 3 *T.L.R.* 110; 6 *C.L.Rec.* 156, *Per* Jayawardene, J.: "Under the Criminal Procedure Code a 'pleader' means (1) an Advocate, (2) any person authorised under any law for the time being to practise in such court, and under §287 'every person accused before any Criminal Court may of right be defended by a pleader.' It may be contended that in view of the definition of the term 'pleader' an advocate can defend an accused without being instructed by a proctor. I do not think this would naturally follow, if the rule of the profession as recognised by this court (*i.e.*, the Supreme Court) is otherwise . . ."

N. B.—As to the position of Crown Counsel—See §§199, 201, 216 (2), 392, and §287 para 6 *post.*

The word occurs in the following sections of the Code:—§7, 189 (3), 199, 201, 211, 234 (3), 235.

Advocate.—The word is used in §216 (2).

Counsel.—The word is used in §§208, 210, 212, 217 (3), 222, 232, 234 (3) and 237.

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§3 Police Station. "Police Station" **means** any post declared generally or specially by the Government to be a Police station : and "officer-in-charge of a Police station" **includes,** when the officer-in-charge of a Police station is absent therefrom or unable from illness to perform his duties, the police officer present at the Police station who is next in rank to such officer.

C. f. §4 (1) *s* of the Indian Act.

Means.—See *supra.*

Includes.—See *supra.*

Police Officer.—See *supra.*

Declared by the Governor to be a Police Station.—See Police Ordinance No. 16 of 1865 and *c. f. Chapter XII. post.*

Officer-in-charge of a Police Station.—See §§38, 121, 124, 127, 134 *post* ; and Police Ordinance 1865, §55.

Person. "Person" **includes** a company or association of persons, whether incorporated or not.

Includes.—See *supra.*

Person.—See §10 Penal Code, §3B of the Interpretation Ordinance 1901, and *c. f.* §18 Ordinance No. 6 of 1918.

Prescribed. "Prescribed" **means** prescribed by this Code or by any rules made thereunder.

Means.—See *supra.*

This Code.—See §1 *ante.*

Rules Made Thereunder.—*e.g.*, §441 *post.*

Offence. "Offence" **means** any act or omission made punishable by any law for the time being in force in this Island.

C. f. §4 (1) *o* of the Indian Act.

Means.—See *supra.*

Offence.—See §38 of the Penal Code where the word 'offence' is given a restrictive meaning.

See *Lushington v. Mohamadu* (1913) 16 *N.L.R. at p.* 367; *Notley v. Anthonis* (1921) 22 *N.L.R. at p.* 336. The default to maintain a wife is an offence within the meaning of §3 of the Criminal Procedure Code. *Herft v. Herft* (1927) 9 *C.L.Rec.* 60 ; 29 *N.L.R.* 324.

Cognizable and Non-Cognizable Offence.—See *infra.*

Act or Omission.—*C. f.* §§30, 31 of the Penal Code, and see *infra.*—'Words which refer to acts extend to omissions.'

By any law for the time being in force in this Island.—*Adams v. R.* (1903) 26 *Mad. at p.* 614–616.

Punishable.—(i) Among the punishments recognised by law for the punishment of offenders are :—death, imprisonment* (rigorous

* See §3 (10) Interpretation Ordinance 1901 and see *Jayasinghe v. Boteju* (1913) 1 *B.N.C.* The term '*imprisonment*' standing alone 'simple imprisonment'. See Ordinance No. 21 of 1901 §3 (10) ; *Kulugammana v. Baba Sinno* (1908) 4 *N.L.R.* 221.

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and simple), whipping, forfeiture of property, fines, §52 Penal Code; Transportation (Ordinance No. 13 of 1911); Police supervision, preventive detention. See §§13–17 *post*, and §52 *et seq.*, Penal Code. §3

(ii) *Cassim v. Kandappa* (1901) 5 *N.L.R.* 311. '*Punishment*' defined. Binding over to keep the peace is not a '*punishment*'. See *R. v. Baronchi* (1914) 17 *N.L.R.* 444 (*Full Court*).

Goodeve v. Madrasa (1910) 13 *N.L.R.* 171; 2 *Curr.L.R.* 189. An order under §26 of the Indian Coolies Ordinance No. 13 of 1889 is not a '*punishment.*'

Fernando v. Siman (1912) 6 *S.C.D.* 82. Forfeiture of article used in commission of an offence against the Excise Law. This is a '*punishment*'. See §413 *post.*

Commissioner of Stamps v. Senanayaka (1919) 6 *C.W.R.* 120. An application made to a Magistrate by the Commissioner of Stamps under §50 of the Stamp Ordinance 1909 is not a criminal proceeding and an order made thereunder is not a '*punishment.*'

Wickremasuriya v. Don Lewis (1915) 1 *C.W.R.* 192.—See §184 *post.*

Offence.—The following cases will also be found useful:—

Perera v. Adonis Appoo (1900) 4. *N.L.R.* 365 *Qu.* Are proceedings under the Cattle Trespass Ordinance 1876 criminal in their nature? See *Henry v. Aluvihare* (1907) 10 *N.L.R.* 353, and *Sinniyah v. Achchipulle* (1887) 8 *S.C.C.* 79.

R. v. Mack (1905) 1 *Bal.* 195. An order to deliver over property under §§414 and 419 of the Criminal Procedure Code is not an order made in a 'criminal cause or matter.'

Gunasekera v. Jayaratne (1905) 1 *Bal.* 154. A proceeding which may end in imprisonment is a 'criminal cause or matter.' *C. f. Thyriar v. Sinnatamby* (1916) 4 *C.A.C.* 104.

Cornelis v. Lorensia (1912) 16 *N.L.R.* 229. A proceeding for the purpose of rectifying a register of births under Ordinance No. 1 of 1895 is not 'a criminal proceeding.'

Eliza v. Jokino (1917) 20 *N.L.R.* 157. Maintenance proceedings are not 'criminal proceedings.' See *Katherina v. Davith* (1917) 19 *N.L.R.* 500, *Bebi v. Tidiyas Appu* (1914) 18 *N.L.R.* 81, and *Esanda v. Suratu* (1919) 6 *C.W.R.* 125, *Nona v. Van Twest* (1929) 10 *C.L.Rec.* 51 (Two Judges), 6 *T.L.R.* 140, 30 *N.L.R.* 449.

Kumarihamy v. Banda (1918) 1 *C.L.Rec.* 53 *Qu.* Are proceedings under §§325, 326 of the Civil Procedure Code criminal in their nature? *Held* in the negative.

Cognizable offence. "Cognizable Offence" **means** an offence for which and "cognizable case" **means** a case in which a peace officer may, in accordance with the second schedule, arrest without warrant.

C. f. §4 (1) *f* of the Indian Code.

Offence.—See *supra.*

Means.—See *supra.*

Peace Officer.—See *supra.*

Judicial Proceeding.—See *supra.*

Schedule.—See *infra.*

Cognizable Offence.—*R. v. Deodhar Singh* (1899) 27 *Cal. at p.* 151. Where a Peace Officer, who, under a law in force, is empowered to arrest without a warrant, the offence in question is a '*cognizable offence.*'

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§3 Column 3 of Schedule II. *post* shews what offences under the Penal Code are cognizable and what are not. See §290 para 3 *post*. With regard to offences other than those created by the Penal Code, the Schedule declares that offences which are punishable with death, or imprisonment for three years and upwards, are deemed to be cognizable, while offences punishable with imprisonment for less than three years or only with fine are deemed to be non-cognizable. To this general rule there are many exceptions created by various Ordinances.

*(*a*) **Cognizable and Non-Cognizable Offences created by Ordinances other than the Criminal Procedure Code.**

Enactment.	*Title.*	*Section.*
Ordinance No. 6 of 1865 ..	Master Attendants ..	.. 40
Do No. 17 of 1869 ..	Customs ..	..102A
Do No. 13 of 1888 ..	Merchandise Marks ..	.. 20
Do No. 14 of 1888 ..	Trade Marks ..	.. 43
Do No. 5 of 1889 ..	Brothels ..	.. 3
Do No. 17 of 1889 ..	Gaming ..	.. 17
Do No. 15 of 1890 ..	Official Secrets ..	.. 10
Do No. 8 of 1892 ..	Inscribed Rupee Stock ..	28
Do No. 8 of 1902 ..	Explosives ..	.. 13
Do No. 28 of 1906 ..	Knives ..	.. 16
Do No. 13 of 1907 ..	Cruelty to Animals ..	.. 11
Do No. 11 of 1908 ..	Post Office ..	.. 98 (See Ord. No. 3 of 1916)
Do No. 33 of 1908 ..	Hotel-keeper's Protection	2 (2)
Do No. 8 of 1912 ..	Excise ..	.. 33, 36
Do No. 29 of 1919 ..	Former Aliens ..	4 (3)
Do No. 2 of 1925 ..	Pearl Fisheries ..	17
Do No. 15 of 1925 ..	Trade Marks ..	.. 66
Do No. 2 of 1926 ..	Reconvicted Criminals ..	17

(*b*) **Other cases where an accused may be arrested without a Warrant.**—See §32 *et seq.*

Non-cognizable offence. "Non-cognizable Offence" **means** an offence for which and "non-cognizable case" **means** a case in which a Peace Officer may not arrest without warrant.

C. f. §4 (1) *n* of the Indian Code.

Means.—See *supra.*

Offence.—See *supra.*

Peace Officer.—See *supra.*

Cognizable Offence.—See *supra.*

Non-cognizable Offences.—(1) See column 3 of Schedule II. and under 'cognizable offence' *supra.*

(2) See §33 *post* and the list appearing under the definition of 'cognizable offence.'

Bailable offence. "Bailable Offence" **means** an offence shown as bailable in the second schedule or which is made bailable by any other law for the time

* This list does not purport to be exhaustive, but is intended to furnish examples only.

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being in force, and "non-bailable offence" **means** any other offence. §3

C. f. §4 (1) *b* of the Indian Code.

Means.—See *supra*

Offence.—See *supra*

Schedule.—See *infra.*

Provision in the Code relating to Bail.—See *Chapter XXXVI. post* (§§394–400).

Column 5 in Schedule II. *post* derives its authority from the definition of "bailable offence" in this Code.—See §290 para 3 *post.*

***"Made bailable by any other law for the time being in force":—**

Enactment.	*Title.*	*Section*
Ordinance No. 13 of 1888 ..	Merchandise Marks ..	.. 20
Do No. 14 of 1888 ..	Trade Marks ..	.. 43
Do No. 5 of 1889 ..	Brothels ..	.. 3
Do No. 17 of 1889 ..	Gaming ..	.. 17
Do No. 15 of 1890 ..	Official Secrets	.. 11
Do No. 8 of 1892 ..	Inscribed Rupee Stock	.. 28
Do No. 8 of 1902 ..	Explosives ..	.. 13
Do No. 11 of 1908 ..	Post Office ..	.. 98 (See Ord. No. 3 of 1916)
Do No. 33 of 1908 ..	Hotel-keeper's Protection	2 (2)
Do No. 8 of 1912 ..	Excise ..	.. 38
Do No. 2 of 1925 ..	Pearl Fisheries	.. 17
Do No. 15 of 1925 ..	Trade Marks ..	.. 66

Indictable offence. "Indictable Offence" **means** an offence triable only by the Supreme Court or a District Court.

Means.—See *supra.*

Offence.—See *supra*

Supreme Court.—See *supra.*

District Court.—See *supra.*

Indictable Offence.—This definition is clearly meant to be contrasted with the definition of 'Summary Offence.' As it is, it is inartistic and open to misconstruction. What the definition intends to convey is that offences which are not triable by a Police Court, but only by a higher court upon indictment, are 'indictable offences.'—See §§10, 11 *post.* It is true that offences ordinarily triable by higher courts may sometimes be tried summarily by a Police Court under §§152 (3), and 166 *post*, but these are in the nature of special exceptions to the general rule, whereby indictable offences are under certain circumstances permitted to be tried summarily.

Summary offence. "Summary Offence" **means** a case triable by a Police Court.

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* This list contains 'bailable' as well as 'non-bailable offences.' This list does not purport to be exhaustive, but is intended to furnish examples only.

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§3

Means.—See *supra.*

Case.—*C. f.* 'Cognizable Case' and 'Non-Cognizable Case' *supra.*

Police Court.—See *supra.*

Triable by a Police Court.—'Summary' Offences are those offences which a Police Court can hear and determine to a finish under the provisions of *Chapter XVIII post.*

(i) Under the Penal Code such offences are "Summary" as are shown in Schedule II. as being triable by a Police Court. See §9 *post.*

(ii) With regard to offences other than those created by the Penal Code, the jurisdiction of Police Courts to try offences summarily is limited by §11 (*b*) *post.* It should be observed, however, that the law has created many exceptions to this rule by declaring that offences which are punishable with imprisonment exceeding six months, or with fines which may exceed one hundred rupees, may be tried summarily by Police Courts. Furthermore, §8A of the Interpretation Ordinance 1901 enacts that 'where in any Ordinance . . . it is declared that any offence shall be triable summarily, or by a Police Magistrate, or words are used implying that any offence shall be summarily triable, or by a Police Magistrate, in any such case, unless the contrary intention appears, the Magistrate trying the case shall be deemed to have power to inflict the full penalty prescribed for the offence, notwithstanding any limitation of his ordinary powers or jurisdiction.' Examples of such exceptions will be found appended to §11 (*b*) *post.*

(iii) In certain cases a Magistrate may try and determine summarily offences which he is not ordinarily permitted to deal with summarily.—See §§152 (3), 166 *post.*

In re Vellavarayam (1903) 7 *N.L.R.* 116—The trial of a *summary* offence by a Magistrate is an '*Inquiry*' within the meaning of this Code. See definition of '*Inquiry.*'

Fine.

"Fine" **includes** any fine, pecuniary forfeiture, or compensation adjudged upon any conviction of any crime or offence or for the breach of any Ordinance by any court.

Includes.—See *supra.*

Offence.—See *supra.*

Court.—See *supra.*

"A fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity, for it is a punishment which operates directly on the very feeling, which impels men to such offences."

Fine.—Various ordinances have provided that purely civil debts due from the subject to the Crown or other public bodies should be recoverable through the legal machinery of the Police Court as if the debt were a 'fine.' See §312 paras. 3, 12 *post.*

The following are examples* :—

Enactments.		*Title*	*Section.*
Ordinance	No. 1 of 1869 ..	Gas ..	.. 11
Do	No. 3 of 1870 ..	Kandyan Marriages	.. 32
Do	No. 4 of 1870 ..	Service Tenures	.. 19
Do	No. 3 of 1871 ..	Gas Meters ..	.. 16

* This list is intended to furnish examples, and does not purport to be exhaustive.

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Enactments.		*Title.*	*Section.*
Ordinance	No. 13 of 1888 ..	Merchandise Marks	.. 13
Do	No. 19 of 1889 ..	Maintenance ..	.. 9*
Do	No. 20 of 1896 ..	Nuwara Eliya Board of Improvement	.. 85
Do	No. 13 of 1898 ..	Local Boards	..104
Do	No. 11 of 1908 ..	Post Office ..	.. 14, 50
Do	No. 35 of 1908 ..	Ceylon Telegraph	.. 38
Do	No. 7 of 1909 ..	Crown Landmarks	.. 13
Do	No. 22 of 1909 ..	Stamps ..	.. 50,† 66 (2)
Do	No. 25 of 1909 ..	Cattle Diseases	.. 8 (2)
Do	No. 4 of 1916 ..	Vehicles ..	.. 49‡
Do	No. 2 of 1918 ..	Money Lending	.. 18
Do	No. 28 of 1919 ..	Definition of Boundaries	2 (*d*) (See Ord. No. 1 of 1844)
Do	No. 11 of 1920 ..	Local Government	..194 (5), 223
Do	No. 20 of 1927 ..	Motor Car ..	.. 67 (5)

Pecuniary Forfeiture.—*Govindan v. Pitche* (1917) 20 *N.L.R.* 115, 3 *C.W.R.* 278. The accused was convicted under §53 (4) of the Police Ordinance 1865 with obstructing a public road by keeping his 'sherbet cart' thereon. He was fined Rs. 5 and an order made *forfeiting* the cart and its contents. *Held*, that the order as to the forfeiture was wrong. "Section 15 of the Criminal Procedure Code, which enumerates the punishments which a Police Court can impose, makes no mention of forfeiture, but 'fine' which is mentioned, is defined by §3 to include a 'pecuniary forfeiture.' The forfeiture in this case, however, is not a pecuniary forfeiture. It is to be observed that if the value of the goods forfeited be regarded as coming within the term 'pecuniary forfeiture,' it would seem that the punishment exceeds the amount of fine awardable under §53 of the Police Ordinance . . ." per Ennis, J. See *R. v. Silva* §11 *post*. *C. f.* §§52 (4), 114, 116, 123 Penal Code.

Compensation.—*e.g.*, §§253B–253E *post*, and the examples given thereunder. See *Wirarahia v. Ediris* (1900) 1 *Br.* 173.

"A Penalty" has been held to be a fine.—*In re Lakmia.*—See §312 para 14 *post*.

Chapter. Schedule. Section.

"Chapter" **means** a chapter of this Code, and "Schedule" **means** a schedule hereto annexed, and "Section" **means** a section of this Code.

This Code.—See §1 *ante*.

Means.—See *supra*.

See §3 (2) Interpretation Ordinance 1901.

Place.

"Place" **includes** a house, building, tent and vessel.

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* *Valliamma v. Sammugam* (1928) 9 *C.L.Rec.* 161.

† See the Full Court decision *Gunawardene v. Gunasekera* (1922) 1 *T.L.R.* 90.

‡ See *Silva v. Peris* (1925) 7 *C.L.Rec.* 20.

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§3 **Includes.**—See *supra*.

Place.—See §§24–25 para 7, §70 para 4 *post*.

Toussaint v. Silva 6 *Tam.* 31. A court-house verandah is a public place.

Kandappa v. Konamali 6 *Tam.* 117. An open space about a Hindu Temple is a public place.

Jayasuriya v. Arnolis (1919) 6 *C.W.R.* 307. The witness-shed of a Gansabawa is a public place.

R. v. Thallman (1863) 33 *L.J.M.C.* 58. The roof of a house may be a '*public place*.'

R. v. Harris (1871) 40 *L.J.M.C.* 67. A urinal situate on the side of a public footpath and open to the public is a *public place*.

R. v. Wellard (1884) 14 *Q.B.D.* 63. Charge of indecent exposure of the person in a public place. A place which was not visible from the public road, and to which the accused had no right to go, but where persons were in the habit of going without any strict legal right to do so was held to be a '*public place*.'

C. f. §428 Penal Code.

Writing. Written.

"Writing" and "Written" **include** printing, lithography, photography, engraving, and every other mode in which words or figures can be expressed on paper or on any substance.

Include.—See *supra*.

Writing.—*C. f.* §3 (2) *infra*, §27 Penal Code, §3 Evidence Ordinance, and §3 (17) Interpretation Ordinance 1901.

Writing includes shorthand.—*Attygalla v. Seemsudeem* (1905) 4 *Tam.* 138 ; and see §§298, 303 *post*.

Words referring to acts include illegal omissions.

Words to have same meaning as in Penal Code.

Words which refer to acts done extend to illegal omissions ; and

All words and expressions used herein and defined in the Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code.

The above is based on §4 (2) of the Indian Act.

Acts extend to omissions.—*C. f.* §§30, 31 Penal Code. See also the definition of 'offence' *supra*.

Words and expressions defined in the Penal Code and not hereinbefore defined.—See §§7–9, 11–16, 18–37 and 39–51 Penal Code. See also §3 (1), (10), Interpretation Ordinance 1901.

Jayasinghe v. Boteju (1913) 1 *B.N.C.* 32. The word 'imprisonment' when it stands alone means 'simple imprisonment.'

Sheriff v. Pitchiumma (1924) 6 *C.L.Rec. at p.* 67. "The term 'criminal force' is defined in §340 of the Penal Code ; that definition applies to the term when used in the Criminal Procedure Code §3 (1)", *per* Jayawardene, J.

Cassim v. Kandappah (1901) 5 *N.L.R.* 311. "It is clear that binding over to keep the peace is not a punishment. 'Punishment' is not

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defined in the Criminal Procedure Code, but it is defined in the Penal Code. The Criminal Procedure Code says in §3 that expressions not defined in the Code shall have the same meaning as they have in the Penal Code. Section 52 (of the Penal Code) enumerates punishments, and binding over to keep the peace is not one of them" *per* Bonser, C.J. *C.f. Dissanayaka v. Fernando* (1902) 6 *N.L.R.* 144, *R. v. Baronchi* (1914) 17 *N.L.R.* 444, *Wickremasuriya v. Lewis* (1915) 1 *C.W.R.* 192, and *Broome v. Carolis* (1916) 19 *N.L.R.* 276.

Robo v. James (1930) 8 *T.L.R.* 46; 3 *C.A.R.* 128 *at p.* 130.

"Injury" §252D.—This word has the same meaning given to it in §43 of the Penal Code.

Government Analyst. (*Ord. No.* 19 *of* 1930, §2 (2))

"Government Analyst" **includes** any person appointed to be or to act as Government Analyst, or Deputy or Assistant Government Analyst.

This definition was added to the Code by §2 (2) of Ordinance No. 19 of 1930, under §406 (3)–(5) it is only the Government Analyst that is recognised by the Code. This means that every report issued by the Department of the Government Analyst has to be signed by one officer, even though the experiments or analyses had been performed by his Assistants. This amendment of the law overcomes this difficulty.

Signatures to be in handwriting.

(2) Whenever by or for the purposes of this Code any person is directed or required to sign a document the signature must be written with a pen or other like instrument and must not be affixed or impressed by a stamp or other like means.

This Code.—See §1 *ante.*

Person.—See *supra.*

Written.—See *supra.*

Sign.—This would include the 'mark' of an illiterate person—§3 (17) Interpretation Ordinance. It would not include the affixing of a facsimile signature, *e.g.*, by means of a rubber stamp.

Dingiri Mahatmaya v. Sinno (1900) 1 *Br.* 339. Warrant of arrest for non-payment of road tax. Signature of Chairman of the Road Committee impressed by means of a rubber stamp thereon. *Held*, the warrant was defective.

Hendrick v. Fonseka (1917) 4 *C.W.R.* 122. Civil warrant endorsed by Fiscal. Fiscal's signature affixed by means of a rubber stamp. *Held*, the endorsement was bad. *C.f.* 5 *S.C.C.* 144, and *Babappu v. de Silva* (1892) 1 *S.C.R.* 166.

Silva v. Arnolis Appu (1920) 8 *C.W.R.* 305, 2 *C.L.Rec.* 209—(*distinguishing Babappu v. de Silva*)—Where a Government Agent authorised the issue of a warrant to which his office assistant affixed a rubber stamp, but not in the presence of the Government Agent, *held* that the warrant was defective.

Note.—There are certain statutory exceptions to this general rule, *e.g.*, Ordinance No. 11 of 1884 (as amended by Ordinance No. 15 of 1915) and Ordinance No. 6 of 1907, §13A.

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§4 Trial of offences under Penal Code and other laws.

4. All offences under the Penal Code* shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences.

Offence.—See §3 *ante*.

Inquiry.—See §3 *ante*.

Capacity of Courts to try.—See §§9-12 *post*.

§4 is based upon §5 of the Indian Act.

Offences under the Penal Code.—*Surendra Nath Banerjee v. Chief Justice and Judges of the High Court* (1883) 10 *Cal.* 109. "Their Lordships are of opinion that a contempt of the High Court by a *libel* . . ., published out of Court when the Court is not sitting, is not included in the words '*offences under the Indian Penal Code*,' although the contempt may include defamation . . ." *per* Sir B. Peacock. Therefore, the provisions of §5 of the Indian Criminal Procedure Code relating to the procedure under which "all offences under the Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court as stated above. It was further held that the jurisdiction of the High Court to commit for contempt of court was unaffected by the Criminal Procedure Code.

Offences under any other Law.—*Nedaram Thakur v. Joonab* (1895) 23 *Cal.* 248. Enactment creating an offence, but specifying no procedure for its trial. *Held*, that the offence was triable according to the rules laid down in the Criminal Procedure Code. See *Vyramuttu v. Duraisamy* (1917) 19 *N.L.R. at p.* 396 (and see §12 *post*). See also *R. v. Fernad* §41 para. 7 *post*.

"Subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences",†

e.g., (i) §55 Ordinance No. 9 of 1924 which directs certain specified offences (some of them being offences under the Penal Code) to be exclusively triable by Village Tribunals.

(ii) When Ceylon was under 'martial law' in 1915, offences under the Penal Code, and, therefore, triable under the Criminal Procedure Code, were tried by Courts Martial under the Army Act and according to the Rules of Procedure regulating the proceedings of Courts Martial. *C.f. The application for a writ of habeas corpus for the production of W. A. de Silva* (1915) 18 *N.L.R.* 277.

(iii) See §53 Courts Ordinance No. 1 of 1889.

N.B.—*Casus omissi* are provided for by §6 *post*.

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* No. 2 of 1883.

† See §6 *post* where a list of the more important Imperial Statutes relating to Criminal Procedure will be found. See *R. v. Fernad* §41 para 7 *post*.

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Saving of powers of Supreme Court and Attorney-General.

5. Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the Supreme Court or of the Judges thereof or of the Attorney-General. §5

This Code.—See §1 *ante*.

Supreme Court.—See §3 *ante*.

Judge of the Supreme Court.—See §3 *ante*.

Attorney-General.—See §3 *ante*.

I. Powers or jurisdiction of the Supreme Court.—

***Power to admit, suspend and remove from office advocates and proctors.**—Ordinance 1 of 1889 §§18, 19 ; Penal Code §4.

Power to appoint 'Commissioners to administer Oaths'.—Ordinance 1 of 1889 §20. *C. f.* Ordinance 10 of 1895 §13.

†Power to grant injunctions.—Ordinance 1 of 1889 §22.

Power to inspect and examine the records of inferior Courts.—Ordinance 1 of 1889 §46, see also §8 *post*.

Power to issue writs of *mandamus*,‡ *procedendo*,‖ *certiorari*,¶ prohibition** and *quo warranto* (Ordinance 4 of 1920 §2);†† Ordinance 1 of 1889 §46.

Power to order the transfer of cases.—See §422 *post*, and Ordinance 1 of 1889 §46 (read together with Ordinance No. 1 of 1900 §2).

Power to issue writs of *habeas corpus*.‡‡—Ordinance 1 of 1889 §§49, 50.

Power to make rules.—Ordinance 1 of 1889 §53, and see §441 *post*.

Power to order the payment of costs.—See *post* §§352, 431, 432.

Power to issue search warrants to search for documents in the custody of the Postal or Telegraph authorities.—See §68 (3) *post*.

Power to order bail.—See §§396, 412 *post*.

Power to order the disposal of property which is the subject of an offence.—See §§414, 416 *post*.

Original criminal jurisdiction of Supreme Court.—Ordinance 1 of 1889 §§21 (1), 27–38. See also §§10, 13 *post*.

Appellate jurisdiction of Supreme Court.—Ordinance 1 of 1889 §§21(2), 39–41. See §§343 (2), 347–350 *post*.

Revisional jurisdiction.—See §§356–360 *post*.

Jurisdiction to decide 'cases stated' and the like.—See §§353–355 *post*, and see Ordinance 1 of 1889, §52.

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* The Supreme Court cannot be compelled to admit or enroll advocates and proctors—*In re Salgado* (1892) 1 *S.C.R.* 189. The Supreme Court has the power to *reinstate* an advocate or proctor who has been removed from office for misconduct—*In re Monerasinghe* (1917) 4 *C.W.R.* 370.

† See *Mahamado v. Ibrahim* (1895) 2 *N.L.R.* 37.

‡ *C.J.* §337 *post*. See *In re Salgado* (*supra*); *In re Fernando* (1883) 5 *S.C.C.* 170.

‖ See (1857) 2 *Lor.* 95.

¶ See (1873) Grenier D.C. 122, 125.

** See *In re Ferguson* (1874) 1 *N.L.R.* 181; *In re Vellayarayam* (1903) 7 *N.L.R.* 116, *Application for a writ of prohibition on members of a Court Martial* (1915) 18 *N.L.R.* 334 ; *In re Abdul Latif* (1917) 19 *N.L.R.* 348.

†† See *In re Fernando* (1914) 17 *N.L.R.* 314. It was this case that led to the amendment of the law. See also (1922) 4 *C. L. Rec.* 81.

‡‡ *In re de Silva* (1915) 18 *N.L.R.* 277.

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§5 *Jurisdiction to punish for contempt of Court.—§440 *post.*, and Ordinance 1 of 1889, §51. Penal Code §4, and see §381 *post.*

Jurisdiction to try Offences of 'sedition' by trial 'at bar.'—See §440A *post* (Ordinance 18 of 1915).

Jurisdiction to try perjurers summarily.—See §439 *post.*

Simultaneous exercise of jurisdiction.—Ordinance 1 of 1889, §23, and *c. f.* §262 (2) *post.*

II. Powers of the Attorney-General.—The King cannot appear in his own courts to support his interests in person, but is represented by his Attorney, who bears the title of His Majesty's Attorney-General. Ordinarily in his absence, or during his incapacity, his duties devolve upon the Solicitor-General. The Attorney-General is head of the Bar. In England he has no greater rights than other members of the bar, and his opinion is, in the eyes of the court, entitled to no more authority than that of any other member of the Bar. There is, however, one great privilege enjoyed by the Attorney and Solicitor-General of England in criminal cases, *viz.*, the right to the 'last word' in every prosecution in which they appear, and this whether the defence has called evidence or not. This right has not been expressly extended to or withheld from Ceylon, and it would seem that in view of the provisions of §6 *post*, this being a *casus omissus* in our law of criminal procedure, the English rule should apply in Ceylon.

The history of the office of Attorney-General will be found traced in the case *in re Peris Perera* (1880) 3 *S.C.C.* 161.—See *R. v. Herat* (1892) 2 *C.L.R.* 118, *Nonis v. Appuhamy* (1926) 4 *T.L.R.* 71. By Ordinance No. 1 of 1883, the expressions "Attorney-General" and "Solicitor-General" were substituted for the expressions "Queen's Advocate" and "Deputy Queen's Advocate."

The Solicitor-General, Deputy Solicitor-General, and Crown Counsel have all the powers of the Attorney-General in criminal matters, except that of entering a *nolle prosequi*, **or of pardoning an accomplice.**—See under §3 *ante*, and *Nonis v. Sarnelis* (1926) 4 *T.L.R.* 71.

The Attorney-General by means of his *fiat* **may transfer any inquiry or trial of a criminal offence from one court or place to another court or place.**—See §47 Ordinance No. 1 of 1889, and *c. f.* §§387, 422 *post.*

The Attorney-General may also elect in what court offences may be tried.—See §93 Ordinance No. 1 of 1889.

The Attorney-General, moreover, has a power of superintendence over the proceedings of Village Tribunals.—See §§64, 65 Ordinance No. 9 of 1924.

The other powers of the Attorney-General in so far as they relate to the law of criminal procedure will be found in this Code.—See §§145, 147, 157–158, 185–186, 192, 196, 199, 201–202, 216 (2), 217, 222, 284–286, 336–337, 355 (3), 364, *Chapter XXXV.*, §§395, 422(2),(4), 440A *post.* See also the Order-in-Council of 1931 §§6, 32.

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* See *Surrendra Nath Banarjee v. Chief Justice* (See §4 *ante*); *In re Ferguson* (*supra.*)

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Law of England when applicable.

6. As regards matters of Criminal Procedure for which no special provision may have been made by this Code or by any other law for the time being in force in this Island, the law relating to Criminal Procedure for the time being in force in England shall be applied, so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto. §6

This Code.—See §1 *ante*.

§6 should be read and construed in the light of §4 *ante*. That section provides that, except where otherwise provided, all offences, whether under the Penal Code or under any other law, shall be inquired into and tried according to the provisions of the Criminal Procedure Code. Section 6 deals with *casus omissi*, and provides that, where no special provision has been made either in this Code or in any other law regarding matters of criminal procedure, such matters are to be governed and regulated by the law of procedure regulating those matters under the existing English law, " so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto." It is to be noted that §100 of the Evidence Ordinance provides a similar rule with regard to *casus omissi* under the Evidence Ordinance. See §441 *post* and §53 of the Courts Ordinance 1889, which enable the framing of rules to regulate matters connected with criminal procedure.

The following are examples of *casus omissi*:—

(i) Expert witnesses, such as medical witnesses, are permitted to remain in Court during the trial of an accused. The ordinary practice is that all witnesses should leave the Court when the trial commences. Under the English law, an exception is made in the case of witnesses who have come to give evidence of a purely ' expert ' character. These witnesses, except under special circumstances, are allowed to be present in court and hear the whole of the evidence in the case. The Code being silent on the point, the English practice is followed here. Thus, although §174 of the *Civil* Procedure Code enacts that the witnesses in civil cases are to be kept out of Court during the trial, it was held* that the Court had a discretionary power to allow experts, whose presence was necessary for the proper elucidation of the case, to remain in court during the trial. The same principle applies with greater force to the Criminal Procedure Code, because there is no provision corresponding to §174 of the Civil Procedure Code in this Code.

(ii) It has been held† that, like in England, an accused, while on his trial, may make an unsworn statement from the dock without giving evidence on oath or affirmation from the witness-box‡.

(iii) Whenever an accused person has been found guilty of an

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* *Colombo Electric Tramway Co. v. Colombo Gas and Water Co.* (1915) 1 *C.W.R. at p.* 9.

† *R. v. Sittambaram* (1918) 20 *N.L.R. at p.* 266. (Full Court.)

‡ One text writer on the English Criminal Law has expressed a doubt as to whether an accused, *who is defended by counsel*, would be now permitted to make an unsworn statement from the dock, in view of the provisions of law which permit every prisoner to give evidence on oath. See Harris' Criminal Law (II. ed.) p. 390-391. It is also submitted that an accused, while making an unsworn statement from the dock, should not be permitted to produce documentary evidence.

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§6 offence, the court may, irrespective of the provisions of the Reconvicted Criminals Ordinance 1926, inquire into his character and antecedents to enable the Court to award a proper sentence.* See §167 para 5.

(iv) Under the English law, whenever a point of pure *law* is argued in a trial before a jury, it is the practice to allow the Jury to remain in Court throughout the argument. Thus, in the case of *R. v. Seddon* (1912)† at the close of the case for the Crown, the defending Counsel submitted to the Judge, as a matter of law, that there was no case to go to the Jury. The Jury were permitted to remain in Court right through the argument. But where the question relates to the admissibility of evidence, the rule is for the jury to retire. Our Code being silent on this point, the English rule should be followed.

(v) Under the English law in trials on indictment, if the accused gives evidence, but calls no further evidence, the prosecuting counsel is entitled to sum up his case to the jury immediately after the accused has given evidence‡. Our Code is silent on the point. Thus neither §210 (2), nor the provisions of *Chapter XX. post* expressly provide for this case. In a case tried before Bertram, C.J., in the Central Circuit the point was raised‖, but not decided. In the case of *R. v. Joronis* (1921) 22 *N.L.R.* 468, it has since been laid down that the English Law on the point should prevail. See §§234, 237, 296, etc., *post.*

(vi) The right of the Attorney or Solicitor-General to the 'last word' in all criminal cases in which they appear, irrespective of the fact whether the defence calls evidence or not.—See §5 *ante.*

(vii) No criminal trial can proceed until the accused has pleaded to the charge.—An accused may not be able to plead (*a*) because he cannot be made to understand the proceedings, *e.g.*, being deaf; or (*b*) because he is insane and is, therefore, incapable of making his defence; or (*c*) because he stands '*mute of malice*,' *i.e.*, contumaciously refusing to plead.

The case of an accused who cannot be made to understand the proceedings is governed by §288 *post.* It will be observed that the section does not refer to trials before the Supreme Court. If the accused stands mute owing to insanity §368 applies, and it is to be noted that in trials upon indictment the first issue to be tried in such cases is whether the accused is incapable of making his defence. Where an accused stands '*mute of malice*' the trial proceeds.—§§206, 221 (1) *post.* See *R. v. Pindorissa* (1927) 5 *T.L.R.* 101; 29 *N.L.R.* 385. See §368 para. 7 *post.*

If the accused is found to be insane and incapable of making a defence, the procedure laid down in *Chapter XXXIII* will apply. If, on the other hand, the accused is found to be incapable of understanding the proceedings, it would seem that the presiding Judge in terms of §288 may make such order which the circumstances of the case demand.

(viii) The immunity of the King and of foreign Sovereigns from arrest.—See §23 para. 7 *post.*

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* *A. G. v. Kandaiya* (1911) 14 *N.L.R.* 211; *Nikapota v. Gunasekera* (1911) 14 *N.L.R.* 213 (Two Judges). These cases, however, must be read in the light of *Daniel v. Othoman* (1916) 2 *C.W.R. at p.* 312.

† Notable British Trials Series pp. 133-139.

‡ *Harris' Principles of Criminal Law* (II ed.) *p.* 392; and see *R. v. Gardner* (1898) 1 *Q.B.* 150.

‖ See the case reported in the "Times of Ceylon" dated 27-3-20.

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(ix) "The principle that the jurisdiction of a Magisterial Court is ousted by a *bona fide* claim of title is not a principle of substantive criminal law. It is a principle of criminal procedure, and may be legitimately 'received' into our system under §6 of the Criminal Procedure Code. It has been so received, and, . . . has obtained the *imprimateur* of the Full Court in *Sourjah v. Faleela* (1913) 16 *N.L.R.* 249 . . .," *per* Bertram, C.J., in *Weerakoon v. Ranhamy* (1921) 23 *N.L.R. at p.* 39 ; 3 *C.L.Rec.* 181. §6

No special provision made . . . by any other Law for the time being in force in this Island*.—

(i) **Rules framed by the Supreme Court.**—Under §53 (3), Courts Ordinance 1889. *C.f.* §441 *post.*

(ii) **The Admiralty Offences (Colonial) Act, 1849.**—(12 & 13 *Vict. c.* 96).—An Act to provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty.

(iii) **The Extradition Act, 1870.**—(33 & 34 *Vict. c.* 52).

(iv) **The Courts (Colonial) Jurisdiction Act, 1874.**—(37 & 38 *Vict. c.* 27).—An Act to regulate the sentences imposed by Colonial Courts where the jurisdiction to try is conferred by Imperial Acts.

(v) **The Territorial Waters Jurisdiction Act, 1878.**—(41 & 42 *Vict. c.* 73).—An Act to regulate the law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's Dominions.

(vi) **The Fugitive Offenders Act, 1881.**—(44 & 45 *Vict. c.* 69).

(vii) **The Colonial Prisoners Removal Act, 1884.**—(47 & 48 *Vict. c.* 31).—An Act to make further provision respecting the removal of prisoners and criminal lunatics† from one British Possession to another British Possession.

(viii) **The Merchant Shipping Act, 1894.**—(57 & 58 *Vict. c.* 60) §§684–711.

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* See also Naval Deserters Act 1847 (10 & 11 *Vict. c.* 62) §9 ; Naval Discipline Act 1866 (29 & 30 *Vict. c.* 109) §101 ; The Army Act 1881 (44 & 45 *Vict. c.* 58) §§41, 154, 162, 168.

† 'Criminal Lunatic'—See Ord. No. 1 of 1873, §4 (3) as amended by Ord. No. 16 of 1919, §2.

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§7

PART II.

CHAPTER II.

POWERS OF CRIMINAL COURTS.

Inquiries may be held in private.

7. Notwithstanding anything contained in Section 86 of "The Courts Ordinance,"* a Magistrate inquiring into an offence may, if he thinks fit, order at any stage of the inquiry that the public generally or any particular person shall not have access to or be or remain in the court, provided that in no case shall the pleader of the accused be excluded except in case of gross misconduct.

Offence.—See §3 *ante.*

Magistrate.—See §3 *ante.*

Pleader.—See §3 *ante*, and see §§189, 199, 287, 297 *post.*

Inquiry.—See §3 *ante.*

The general rule is that the sittings of every Court of Law in the Colony shall be public, and all persons may freely attend the same.—See §86 Courts Ordinance 1889. *C.f., Mohidin v. Nalle Tamby* (1896) 1 *N.L.R.* 377 ; *Suppramaniam Chetty v. Curera* (1898) 3 *N.L.R.* 193 ; *Kulantaivelpillai v. Marikar* (1918) 20 *N.L.R.* 471.

Exception 1.—Any Court in its discretion, in all proceedings and trials where evidence of an indecent or offensive character is to be led, may order the exclusion from the court of all persons who are not directly interested in the case, "excepting advocates, proctors, jurors, assessors, witnesses, and officers of the Court."—§86 Courts Ordinance 1889† See *Druce v. Druce, R. v. Governor of Lewes Prison.*

The words within inverted commas should be given a restrictive construction in the interests of public morality, and in order to give effect to the spirit of the section. Thus, every juryman summoned to attend Court cannot claim the right to remain in Court, the exception clearly applying only to those jurymen who have actually been empanelled to try the case. Similarly, it would seem that it is only the counsel and proctors actually engaged in the case who are entitled to claim the right to remain in Court. See also 9 *Halsbury's Laws of England* §705, *p.* 362, 619.

Exception 2.—§7 of this Code gives a Magistrate inquiring into *any* offence a discretion of excluding the public generally or any particular individual from the Court. The only limitation imposed upon the discretion thus conferred upon the Magistrate is that the prisoner's pleader‡ cannot be excluded from court, except in case of gross misconduct. See §287 *post*, and §§189, 199, 287, 297 *post.*

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* No. 1 of 1889

† See General Order 915—exclusion of children from Police Court.

‡ Neither can the accused be directed to leave the Court during his trial—see *Dias on the Evidence Ordinance* p. 217, 220 and see *R. v. Amaris* (1923) 662-662A P. C. Panadura 79458 (*S.C.M.* November 9, 1923) following *Peris v. Perera* (1912) 1 *B.N.C.* 3.

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Exception 3.—An examination held by a Magistrate under §149 *post* may be held in private—§150 (2) *post.*

Exception 4.—Witnesses to facts in criminal cases are excluded from Court until it is time for them to give evidence. This rule does not ordinarily apply to purely expert witnesses, *e.g.*, medical witnesses, who are allowed to remain in Court.

Exception 5.—Every Court has an inherent jurisdiction to exclude the public from a trial if this is required for the administration of justice.—*R. v. Governor of Lewes Prison*, or for the preservation of order—*Re the Sheriff of Surrey.*

R. v. The Governor of Lewes Prison (1917) 2 *K.B.* 254. There is an inherent jurisdiction in every Court, including a Field General Court Martial to exclude the public from a trial if this is necessary for the administration of justice.

Re the Sheriff of Surrey (1860) 2 *F. & F.* 234. The Judge of Assize has authority to order the Court or any part of it cleared if quiet is not preserved. " English Courts of Justice are open to the public in the fullest sense, and I trust they will ever remain so ; but it was going far beyond either law or necessity to avow that there is no power reposed in the presiding Judge to order such modifications of the arrangements of the Court as are indispensable to that which it is the office of a Judge to carry out, *viz.*, the efficient administration of Justice," *per* Cockburn, C.J.

Druce v. Druce (1903) 72 *L.J.P.* 51. Clearing the Court when public decency and morality require it. See *R. v. Martindale* (1894) 3 *Ch.* 193 ; *Malan v. Young* (1889) 53 *J.P.* 822 ; 6 *T.L.R.* 38 ; *Scott v. Scott* (1913) *App. Cas.* 417.

Court.—A Police Court can be held at *any convenient spot* within the limits of the Magistrate's jurisdiction. See Ordinance No. 12 of 1890 and the definition of " Police Court" §3 *ante.*

Powers of Superintendence.

8. In addition to all other powers vested in the Supreme Court and the Judges thereof such court in the exercise of its power of superintendence may inspect all inferior courts and give directions as to the keeping of the records thereof.

Supreme Court.—See §3 *ante.*

Judge.—See §3 *ante.*

In addition to all other powers vested in the Supreme Court and the Judges thereof.—See §5 *ante*, Introduction to *Chapter XX* para 2 *post*, and §46 Courts Ordinance 1889.

Inferior Courts.—District Courts, Courts of Requests, Police Courts and Village Tribunals.

" Inspector of Magistrates' Courts."—There is no such officer known to the law. It is only the Judges of the Supreme Court who can inspect the Minor Courts.

Criminal summary jurisdiction of Police Courts.

9. Every Police Court shall have, as heretofore and under and subject to the provisions of this Code, full power and authority and is hereby required to hear,

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§9 try, determine, and dispose of in a summary way all suits or prosecutions for offences committed wholly or in part within its local jurisdiction, which offences by this Code or any law in force in this Colony are made cognizable by a Police Court.

Jurisdiction to inquire into the commission of offences.

And also jurisdiction to inquire into, subject to and as provided for by this Code, all offences committed or alleged to have been committed wholly or in part within the local jurisdiction of such courts or into which jurisdiction is by this Code given to such courts to inquire, and to summon and examine all witnesses touching such offences, and to summon and apprehend all criminals and offenders and deal with them according to law ;

To require sureties for the peace.

And to issue warrants to search or to cause to be searched all places wherein any stolen goods or any goods, articles, or things with which or in respect of which any offence has been committed are alleged to be kept or concealed, and to require persons to furnish security for the peace or for their good behaviour according to law ;

To inquire into cases of sudden or accidental death.

And also jurisdiction, under and subject to this Code, to inquire into all cases in which any person shall die in any prison or asylum or shall come to his death by violence or accident, or when death shall have occurred suddenly, or when the body of any person shall be found dead without its being known how such person came by his death ;

Proviso saving exclusive jurisdiction of Village Tribunals.

Provided, however, that nothing herein contained shall be held to give a Police Court summary jurisdiction to hear or determine any suit or prosecution for or in respect of any offence over which any Village Tribunal has exclusive jurisdiction under any special law.

This Code.—See §1 *ante*.
Inquiry.—See §3 *ante*.
Police Court.—See §3 *ante*.
Offence.—See §3 *ante*.
Sanction to prosecute.—See §147 *post*.
Initiation of proceedings before Police Courts.—See §§80–83, 105, 126A, 130, 148–149, 362, 380–384, 413, 427, 440, 440A *post*.

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§9

This section defines the jurisdiction of Police Courts to try summary offences, and to investigate non-summary offences. See also §§83, 84A Courts Ordinance 1889.

1. **Jurisdiction to try Summary Offences.**—A Police Court can try all suits and prosecutions for offences which have been committed within its territorial jurisdiction, provided such offences are made "cognizable" by a Police Court either by this Code, or by some other law in force*.

By this Code.—Column eight of Schedule II. of this Code declares what offences *under the Penal Code* are triable by Police Courts. See also §§10 *post*, and 152 (3), 166 *post*.

Any law in force in this Colony.—These words refer to the summary trial of offences created by enactments *other than the Penal Code*. In such cases the rule by which the jurisdiction of a Police Court to try such offences summarily is ascertained is to be found in §11 *post*.

Where in any Ordinance . . . it is declared that any offence shall be triable summarily, or by a Police Magistrate, or words are used implying that any offence shall be triable summarily or by a Police Magistrate, in any such case, unless the contrary intention appears, the Magistrate trying the case shall be deemed to have power to inflict the full penalty prescribed for the offence, notwithstanding any limitation of his ordinary powers or jurisdiction.—See §8A Interpretation Ordinance 1901†.

Hear, try, determine, and dispose of in a Summary way.—*i.e.*, subject to the rules of procedure contained in *Chapter XVIII.* and other provisions of this Code.

Exclusive Jurisdiction of Village Tribunals.—See §55 Village Communities Ordinance No. 9 of 1924.

Koch 49.—Browne, J., has in this case commented upon §9.

2. **Jurisdiction to investigate non-summary offences.**—Subject to the rules regarding territorial jurisdiction, a Police Court can investigate all non-summary offences according to the rules of procedure contained in *Chapter XVI.* and other provisions of this Code.

3. **Power to issue search warrants, etc.**—See §§68–76, 78–79, 119, 124 *post*. See *R. v. Pareed* (1927) 9 *C.L.Rec.* 43.

4. **Power to order that security shall be furnished.**—See §§80–98 325-326 *post*.

5. **Power to inquire into the cause of any sudden or accidental death.**—See §§21 (*b*), 362 (4), 363–366 *post*.

6. **Other powers not expressly mentioned in §9.**—

(*a*) **Power of Police Magistrates to punish.**—See §§15–16 *post*.

(*b*) **Power of Magistrates to try summarily offences which are non-summary.**—See §§152 (3), 166 *post*.

(*c*) **Power to compel the restoration of abducted females‡.**—See §438 *post*.

(*d*) **Power to punish summarily for perjury.**—See §440 *post*.

(*e*) **Power to disperse unlawful assembly.**—See §§99 *et seq. post*.

(*f*) **Power to arrest.**—See §§40, 41 *post*.

(*g*) **Power to issue an injunction in cases of public nuisance.**—See §§105–113 *post*.

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* *Weerasinghe v. Perera* (1922) 4 *C.L.Rec.* 67.

† See *Weerakoon v. Ranhamy* (1921) 23 *N.L.R. at p.* 39.

‡ *C.f.* §72 *post* as explained in *Soosaipillai v. Vallipuran* (1920) 7 *C.W.R.* 287.

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§10 (*h*) **Power to detain offenders attending Court.**—See §293 *post.*

7. **Powers of Unofficial Police Magistrates.**—See §3 *ante* under "Police Magistrate."

8. *Weerasinghe v. Perera* (1922) 4 *C.L.Rec.* 67.—An application for maintenance should be made to and investigated by the Police Court within whose jurisdiction the refusal or neglect to maintain the applicant occurred. See *Gunawardena v. Abeywickreme* (1914) 2 *Crim. App. R.* 7, and *Sampihamy v. Carolis* (1914) 3 *B.N.C.* 55.

Offences under Penal Code.

10. Subject to the other provisions of this Code any offence under the Penal Code* may be tried by the Supreme Court or by any other court by which such offence is shown in the eighth column of the second schedule to be triable.

Offences under other laws.

11. Any offence under any law other than the Penal Code shall, when any Court is mentioned in that behalf in such law, be tried by such Court. When no Court is mentioned it may be tried by the Supreme Court or by any other Court mentioned in the second schedule: Provided that—

(*a*) No District Court shall try any such offence which is punishable with imprisonment for a term which may exceed two years or with a fine which may exceed one thousand rupees; and

(*b*) Except as hereinafter provided no Police Court shall try any such offence which is punishable with imprisonment for a term which may exceed six months or with a fine which may exceed one hundred rupees.

This Code.—See §1 *ante.*

Offence.—See §3 *ante.*

Supreme Court.—See §3 *ante* and §13 *post.*

District Court.—See §3 *ante* and §14 *post.*

Police Court.—See §3 *ante* and §15 *post.*

Fine.—See §3 *ante.*

Penal Code.—See §3 *ante.*

Territorial jurisdiction of Courts.—See §§135–146 *post* and Courts Ordinance 1889, §§28, 32.

Sanction to prosecute.—See §§104, 147, 175, 380, 384, 425 *post.*

Committal of accused.—See §§12, 387, 391.

The capacity of Courts to try offenders.—Sections 10 and 11 of this Code deal with the capacity of Courts to try offenders. It will be observed that while §10 is confined to offences under the Penal Code, §11 relates to all other offences. The capacity of a Court to try an offence is not the same thing as the capacity of a Court to punish. This will be found dealt with under §§13–17 *post.*

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* No. 2 of 1883.

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§11

Before a Court can try an offender, there are other conditions which must be fulfilled before the Court can be said to have the necessary jurisdiction. Thus, it must be shown that the Court has the necessary territorial jurisdiction ; or if the offence is one which needs the sanction of some person before the trial can take place, it must be shown that such sanction has been obtained. Moreover, in trials before the Supreme and District Courts* the accused should be duly committed for trial after non-summary proceedings have been taken.

1. **Capacity to try offences under the Penal Code.**—See §10 (see §290 para. 3 *post*) and §293 para. 5 *post.*

If the Court otherwise has jurisdiction to try the offender, then—

(*a*) every offence under the Penal Code can be tried by the Supreme Court.

(*b*) A District Court can try such offences when it is stated in column eight of Schedule II. of this Code that the offence is triable by a District Court*.

R. v. Perera (1898) 3 *N.L.R.* 131. " It is puzzling to find that the Legislature by Ordinance 1 of 1888, §11 gave jurisdiction to District Courts to try the offence of uttering *all* forged documents, both those of forgery, the forgery of which can, and those the forgery of which cannot be tried by District Courts. It may be that it was intended to give District Courts only the power to try uttering of ordinary forged documents punishable under §§454 and 458, but the words of the Ordinance are clear and extend to the uttering of all forged documents . . ." *per* Lawrie, J. *Note.*—The Criminal Procedure Code 1898, which repealed Ordinance No. 1 of 1888, has not altered the law here laid down.—*R. v. Dharmawardene* (1908) 1 *S.C.D.* 48 (4 *A.C.R.* i).—Although the offence of forgery of a valuable security is punishable exclusively by the Supreme Court, the offence of uttering a forged valuable security (§459) may be tried by a District Court. *R. v. Perera* (1898) 3 *N.L.R.* 131 followed.

(*c*) A Police Court can try offences under the Penal Code, when it is similarly stated in Schedule II. of this Code that the offence is triable by a Police Court.—See §9 *ante.*

Note 1.—Some offences triable by Police Courts may be within the exclusive jurisdiction of the Village Tribunals.—See Ordinance No. 9 of 1924 §55, and §9 *ante.*

Note 2.—Where a Police Magistrate is also a District Judge he may try non-summary offences summarily.—See §152 (3) *post.*

Note 3.—A Police Magistrate may also, with the consent of the accused, summarily try offences triable by a District Court.—See §166 *post.*

Note 4.—There is nothing to prevent a Magistrate from taking non-summary proceedings in a case which is summarily triable by him. —See §192 *post.*

R. v. Thomis (1900) 1 *Br.* 19 (following *R. v. Mathes* (1889) 8 *S.C.C.* 199). A District Court may try an offence summarily triable by a Police Court provided the Magistrate has treated it as a non-summary case and the Attorney-General has duly ordered its committal to the District Court.

R. v. Don Davit (1900) 1 *Br.* 400. Where, in a case which was summarily triable in the Police Court, the Magistrate took non-summary

* See §§12, 18, 384 *post.*

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§11 proceedings and the Attorney-General ordered the committal of the accused to the District Court, *held*, (i) that the District Court could not question the validity of the commitment, and (ii) that the District Court could lawfully try the charge. "The provision in Schedule II. to the Criminal Procedure Code of 1898 in respect of §368 of the Penal Code limits only the jurisdiction of the Police Court . . ., but it uses no such words of limitation in respect of District Court jurisdiction . . ." *per* Browne, J.

Note 5.—A Magistrate, however, should not split up an offence into its component parts in order to give himself jurisdiction.—*Nagamma v. Themis Sinno* (1911) 1 *C.A.C.* 56.

Note 6.—Certain offences which ordinarily are summarily triable by a Magistrate may cease to be so triable by reason of the fact that the accused is a 'reconvicted criminal.'—See Ordinance No. 2 of 1926 §6 (2).

2. **Capacity to try other offences***.—See §11. Note the absence of the words "subject to the other provisions of this Code."

(*a*) If the law which creates the offence specifies the Court, the offender *shall* be tried by that Court, notwithstanding the fact that the offence is one which ordinarily would have been beyond the jurisdiction of the Court in question to punish.

The following are examples :—

Supreme Court.—The Former Enemy Alien Ordinance No. 19 of 1919, §5.

District Court.—The Inscribed Rupee Stock Ordinance No. 8 of 1892, §28 : Post Office Ordinance No. 11 of 1908, §89 ; Telegraphs Ordinance No. 35 of 1908, §41 ; Opium Ordinance No. 5 of 1910, §28 ; The Former Enemy Alien Ordinance No. 19 of 1919, §5.

Police Court.—§8 of the Interpretation Ordinance 1901 enacts that where in any Ordinance it is declared that any offence shall be triable summarily, or by a Police Magistrate, or words are used implying that any offence shall be triable summarily or by a Police Magistrate, in any such case, unless the contrary intention appears, the Magistrate trying the case shall be deemed to have power to inflict the full penalty prescribed for the offence, notwithstanding any limitation of his ordinary powers or jurisdiction.—See §9 *ante*†.

The following furnish examples of Offences thus made triable by Police Courts:—

Enactment.	*Title.*	*Section*
Ordinance No. 4 of 1861 ..	Joint Stock Companies ..	111 (3)
,, No. 6 of 1865 ..	Master Attendants ..	40
,, No. 16 of 1865 ..	Police	98
,, No. 8 of 1867 ..	Pioneers and Government Property	5
,, No. 17 of 1869 ..	Customs	115
,, No. 9 of 1876 ..	Cattle Trespass ..	17
,, No. 16 of 1877 ..	Prisons	69
,, No. 3 of 1886 ..	Coastwise Passenger Traffic	15

* See *Silva v. Wijeysingha* (1886) 7 *S.C.C.* 203—capacity of District Courts to deal with contempts of Court. *C. f. In re Ferguson* (1874) 1 *N.L.R.* 181.

† As to when the jurisdiction of a Police Court is ousted by a *bona fide* claim of right—see *Weerakoon v. Ranhamy* (1921) 23 *N.L.R.* 39.

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Enactment.	*Title.*	*Section.*
Ordinance No. 6 of 1887	Petroleum	25
,, No. 6 of 1888	Joint Stock Companies (Amendment)	16
,, No. 13 of 1888	Merchandise Marks	3 (2A), 3(3), 5*
,, No. 5 of 1889	Brothels	3
,, No. 8 of 1889	Quarries	7, 9
,, No. 6 of 1890	Salt	18
,, No. 15 of 1890	Fortifications and Official Secrets	13
,, No. 18 of 1890	Chanks	11 (1)
,, No. 7 of 1893	Rabies	13
,, No. 5 of 1894	Indian Native Passenger Traffic	11
,, No. 1 of 1896	Municipal Council (Amendment)	46, 60
,, No. 20 of 1896	Nuwara Eliya Board of Improvement	87
,, No. 3 of 1897	Prevention of Disease	6 (2)
,, No. 20 of 1898	Customs (Amendment)	8 (2)
,, No. 4 of 1899	Pilots	14
,, No. 9 of 1899	Cemeteries	42
,, No. 5 of 1901	Insect Pest and Quarantine	6
,, No. 11 of 1901	Poisons	11
,, No. 12 of 1901	Fertilizers	8 (1)
,, No. 21 of 1901	Interpretation of Language used in Ordinances	8A
,, No. 9 of 1902	Railway	40
,, No. 8 of 1904	Cacao Thefts	19A†
,, No. 8 of 1905	Buddhist Temporalities	43
,, No. 12 of 1905	Old Metal	11 (1)
,, No. 26 of 1906	Electricity	11
,, No. 6 of 1907	Plant Pests and Sanitation	9 (2)
,, No. 12 of 1907	Destitute Immigrants	16
,, No. 16 of 1907	Forests	52A‡
,, No. 18 of 1907	Waterworks	43
,, No. 11 of 1908	Post-office	50, 89
,, No. 21 of 1908	Rubber Thefts	18A
,, No. 35 of 1908	Telegraphs	41
,, No. 38 of 1908	Dairies and Laundries	15A (2), 19
,, No. 1 of 1909	Game Protection	31
,, No. 6 of 1910	Municipal Councils	54, 58, 239
,, No. 7 of 1912	Public Performances	4
,, No. 8 of 1912	Excise	48, 54
,, No. 9 of 1912	Medical Wants	34
,, No. 24 of 1914	Aerial Navigation	6
,, No. 33 of 1916	Firearms	39
,, No. 36 of 1917	Prices Regulation	3
,, No. 6 of 1918	Business Names	8,10,11,12,15(3)

* See *Vyramuttu v. Duraisamy* (1917) 19 *N.L.R.* 395.
† See *Appuhamy v. Abdul Hamidu* (1909) 2 *Leader* 110.
‡ See *Jayasekara v. Dissanayaka* (1911) 14 *N.L.R.* 408 and see *Weerakoon v. Ranhamy* (1921) 23 *N.L.R. at p.* 39.

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§11

Enactment.	*Title.*	*Section.*
Ordinance No. 1 of 1920 ..	Education	40 (1)
,, No. 2 of 1920 ..	Midwives	9, 10
,, No. 17 of 1920 ..	Buffaloes Protection ..	5
,, No. 19 of 1920 ..	Restriction of Imports and Exports	7
,, No. 3 of 1921 ..	Treaty of Peace (Austria)	3 (3)
,, No. 4 of 1921 ..	Treaty of Peace (Bulgaria)	3 (2)
,, No. 6 of 1923 ..	Employment of Women, &c.	4 (*c*)(*d*)(*e*)
,, No. 10 of 1924 ..	Plant Protection ..	7
,, No. 2 of 1925 ..	Pearl Fisheries ..	10
,, No. 6 of 1926 ..	Heavy Mineral Sand ..	5 (2)
,, No. 4 of 1927 ..	Obscene Publications ..	2
,, No. 8 of 1927 ..	Waste Lands Ordinance..	5 (2)
,, No. 12 of 1927 ..	Crown Grants (Authentication) Ordinance, 1927	4
,, No. 20 of 1927 ..	Motor Car	57
,, No. 17 of 1929 ..	Poisons	74 (5)
,, No. 9 of 1930 ..	Betting on Horse Racing	10
,, No. 10 of 1931 ..	Muslim Intestate Succession	14

Qu.—Does the general rule formulated above mean that, where the Ordinance creating an offence has specified a court, no other court, even though it is a higher court to the one specified, can try the offender ? See §§31, 64, 66 Courts Ordinance 1889.

(*b*) If the law creating the offence does not specify a Court,

(i) The **Supreme Court** may try the offender.

(ii) The **District Court** can try the offence, if it is punishable with a maximum of two years' imprisonment *or* with a maximum fine of Rs. 1,000.

R. v. Fonseka (1900) 4 *N.L.R.* 223. The indictment charged the accused with committing an offence under §13 of Ordinance No. 10 of 1844. This offence was punishable with a fine of £100 or imprisonment of either description for six months, and to a further fine of 5*s.* for every gallon of arrack which may be proved to have been distilled by the accused. *Held*, that this charge was beyond the jurisdiction of a District Court to try. " If proof were given that a single gallon had been distilled, the respondent would at once have been liable in law and in fact to pay £100.5*s.* 0*d.*, which is more than the District Court had jurisdiction to impose."

R. v. Silva (1911) 14 *N.L.R.* 336. The accused was indicted under §8 (1) of the Opium Ordinance 1910. *Held*, " It is clear that §11 of the Criminal Procedure Code fixes the jurisdiction of District Courts with reference only to imprisonment and fine in the same way that the Criminal Procedure Code of 1883, by §12 made the length of the imprisonment by which the offence is punishable the only test of jurisdiction. As the *forfeiture* of an article *in specie* does not fall within the definition of a fine, it follows that the provision as to the forfeiture of the opium should not be taken into account in considering whether offences under §8 (1) are within the jurisdiction of a District Court," *per* Lascelles, C.J., & Middleton, J.

An offence under §543 of the Civil Procedure Code would be triable by a District Court.

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(iii) A **Police Court** can try the offender if the offence is punishable with a maximum of six months' imprisonment or a maximum fine of Rs. 100. "Except as hereinafter provided"— §12

Jayasekera v. Dissanayaka (1911) 14 *N.L.R.* 408. The offence created by §9 of the Forest Ordinance 1907 is punishable with imprisonment for a term which may extend to six months, or with a fine which may extend to Rs. 500, or with both, in addition to such compensation for the damage done to the forest as the convicting court may direct to be paid. *Held*, that a Police Court had no jurisdiction to try such an offence. "The words '*except as hereinafter provided*' relate, I think, to sections 15, 16, and 17 of the Criminal Procedure Code, which respectively enable Police Courts to combine sentences of imprisonment and fine, to sentence to imprisonment in default of payment of a fine, and to pass consecutive sentences in case of conviction for several offences at one trial. It would seem to follow, therefore, from the provisions of section 11, that unless the Police Court had been '*mentioned*' in §9 of Ordinance No. 16 of 1907 as a Court for the trial of offences against that section, it has no jurisdiction to entertain charges under section 9 of Ordinance No. 16 of 1907, which may be punished with a fine of Rs. 500," *per* Wood Renton, J., following 622. P.C. Ratnapura 9025 (*S.C.M. Dec.* 7, 1908). *Note.*—§52A of the Forest Ordinance now makes the offence triable summarily by a Police Magistrate.

Cases illustrating jurisdiction of Police Courts:—

Gunasekera v. Van Cuylenberg (1894) 3 *S.C.R.* 59. An offence created by Ordinance No. 2 of 1877 enacted that "if any notary shall act in violation of, or shall disregard, or neglect to observe, any of the foregoing rules and regulations, he shall be guilty of an offence and be liable, on conviction thereof, to a fine not exceeding Rs. 200." It was held that a Police Court had jurisdiction to try the offence in view of the wording of §12 of the old Criminal Procedure Code. Under *this Code* it is clear that the Police Court would have no jurisdiction in view of §11 (*b*). See *Ireson v. Whittel* (1891) 1 *C.L.R.* 34.

(1899) *Koch* 19. Offence created by §9 Ordinance No. 17 of 1895 punishable with a fine not exceeding Rs. 500. *Held*, that under §11 (*b*) of the Criminal Procedure Code the Police Court had no jurisdiction to try such an offence.

Appuhamy v. Abdul Hamidu (1909) 2 *Leader* 110. It was held here that the effect of §11 of this Code was to make an offence under §4 of the Cacao Thefts Prevention Ordinance 1904 non-summary. *Note.*—§19A of the Ordinance now makes all offences under the Ordinance summarily triable.

(1899) *Koch* 49. In this case §11 of this Code was contrasted with the corresponding provision under the old law.

District Courts not to have original criminal jurisdiction.

12. No District Court shall take cognizance of any offence unless the accused person has been committed for trial by a Police Court duly empowered in that behalf or unless the case has been transferred to it from some other court for trial by order of the Supreme Court.

District Court.—See §3 *ante.*

Offence.—See §3 *ante.*

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§12

Police Court.—See §3 *ante*.

Supreme Court.—See §3 *ante*.

Original Criminal Jurisdiction of District Courts.—See Courts Ordinance 1889, §64. (*Note.*—the marginal note to §12.)

Of Supreme Court §§27–37 Courts Ordinance 1889.

Committal for Trial by Magistrate.—See §§158, 159, 162, 163, 165, 192, 387 *post*.

Information.—See §385 *post*.*

Transfer of Criminal Cases.—See §422 *post*, and Courts Ordinance 1889, 46–48, 93 and §§203 (2) 218 (2) *post*.

Other limitations imposed on the capacity of District Courts to try Offences.—See §§18, 384 *post*.

Procedure at Trials by District Courts.—See §§200–215 *post* (by Supreme Court §§216–253 *post*).

Section 12 refers only to District Courts. Even if the other conditions regarding jurisdiction have been satisfied, a District Court cannot try an offender unless,

(i) **The Accused has been duly Committed for Trial.**—*Vyramuttu v. Duraisamy* (1917) 19 *N.L.R.* 395. §3 (5) of the local Merchandise Marks Ordinance 1888 gives a person who is charged with an offence under §3 of that Ordinance the right to demand that his case should be tried before the District Court. The accused, who were charged with an offence under §3 of the Ordinance, exercised the right of election given them, and the Magistrate forthwith, without taking non-summary proceedings, forwarded the case to the District Court. The District Judge, however, refused to try the case, holding that he had no jurisdiction to try the case, as it had not been duly committed for trial. *Held*, that the order of the District Judge was correct. " In the two decisions above-mentioned† it was held that where a person charged with offences against the provisions of the Merchandise Marks Ordinance, 1888, elects . . . to be tried by the District Court, the Police Magistrate is at once *functus officio*, and has no power to take non-summary proceedings. This ruling is, *prima facie*, contrary to the provisions of §12 of the Criminal Procedure Code . . . But it is sought to be supported by the language of §4 of the Criminal Procedure Code which enacts that ' All offences . . . under any other law shall be inquired into and tried according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offence.' The answer to this argument, however, appears to me to be that §3 (5) of the Merchandise Marks Ordinance, 1888, does not prescribe the ' manner ' in which a case is to be dealt with, where the person charged elects to be tried by the District Court. There is nothing in the Ordinance that can be said to create any special procedure in such cases, and I am clearly of opinion that the District Judge is right in holding that effect must be given to §12 of the Criminal Procedure Code by the adoption of non-summary proceedings, " *per* Wood Renton, C.J. & Shaw, J.

If there has been a Valid Committal, can the District Judge refuse to try the Indictment ?—See §387 *post*.

R. v. Martino Perera (1897) 3 *N.L.R.* 43. If the accused has been duly committed for trial before the District Court on charges which

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* *C.f.*—*R. v. Vaiyapuri* (1895) 1 *N.L.R.* 92.

† *R. v. Vaiyapuri* (1895) 1 *N.L.R.* 92 ; *Spicer v. Vayiyapusi* (1894) 3 *C.L.R.* 83.

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the Court could try, it cannot refuse to try the accused simply because the evidence led discloses a charge which the Court had no jurisdiction to try. See also *R. v. Kolendavail* (1891) 1 *S.C.R.* 198 ; *Attorney-General v. Appuwa Veda* (1907) 10 *N.L.R.* 199 (2 *A.C.R.* 1) ; *R. v. Harmanis* (1903) 8 *N.L.R.* 138.

R. v. Thomis (1900) 1 *Br.* 19. See §§10, 11 *ante.*

R. v. Don Davith (1900) 1 *Br.* 400. See §§10, 11 *ante.*

R. v. Kolanda (1901) 5 *N.L.R.* 236 (2 *Br.* 142, 315). Under the Courts Ordinance 1889, and the Criminal Procedure Code, it is the duty of the Attorney-General to decide on what charges and in what court an accused shall be tried. If he errs, it is an error which a District Judge cannot correct. It is the duty of the District Judge to hear all the available evidence and give his verdict according to law. He cannot acquit the accused without hearing the evidence for the prosecution. " If a man guilty of murder was indicted in the District Court for grievous hurt, it seems to me that it would be the duty of the Judge to try the charge of grievous hurt, and, if he found the facts amounted to grievous hurt, to give his verdict accordingly, notwithstanding he was of opinion that the facts in the case made out a charge of wilful murder which he had no jurisdiction to try . . ." *per* Bonser, C.J.

R. v. Fernando (1905) 8 *N.L.R.* 354. The Attorney-General committed to the District Court the trial of a charge under §382 of the Penal Code (*which at that time was triable only by the Supreme Court*). The District Judge convicted the accused of an offence under §380 (which he was competent to try) without any objection from the accused. *Held*, that the conviction was right. See *R. v. Babasinno infra.*

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 263.—where the right of the Attorney-General to commit cases for trial is fully discussed.

R. v. Babasinno (1919) 6 *C.W.R.* 10. Even where the evidence discloses an offence beyond the jurisdiction of the District Court, the Supreme Court will not interfere with the conviction if the accused has not suffered any injustice in not being tried for a graver offence. See *R. v. Fernando supra; R. v. Perera* (1916) 19 *N.L.R.* 310 (3 *C.W.R.* 176), see *infra.*

A Police Court duly empowered in that behalf.—*R. v. Perera* (1916) 19 *N.L.R.* 310 (3 *C.W.R.* 176). A District Judge may refuse to try an indictment if it is proved that the non-summary inquiry was conducted before a Police Court which did not have the necessary jurisdiction to investigate the offence. In such a case the accused cannot be said to have been committed for trial by a "Police Court duly empowered in that behalf." *Held further*, that §73 of the Courts Ordinance 1889 cannot be read as giving a District Court the power to try a case in which the preliminary inquiry has been held without any jurisdiction by a Police Magistrate. See §145 *post.*

(ii). **The case has been transferred by the Supreme Court for trial**—§§12 and 203 (2) *post* vest jurisdiction in a District Court to try an offender without a previous non-summary inquiry or an indictment approved and settled by the Attorney-General, if such case has been transferred to the District Court for trial by the Supreme Court. This power of transfer by the Supreme Court is to be found in §46 of the Courts Ordinance 1889, which has been repealed by Ordinance No. 1 of 1900. §422 *post*, which deals with the transfer of criminal cases by the

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§12 Supreme Court, is wide enough to permit of a transfer by the Supreme Court as is indicated in §§12, 203 (2). See generally, Introduction to Chapter XIX. para. 2 and §203 para. 2 *post.* and *c. f.* §218 (2) *post.*

Sentence which Supreme Court may pass.

13. The Supreme Court may pass any sentence authorized by law.

Sentences which District Courts may pass.

14. A District Court may pass any of the following sentences :—

(*a*) Imprisonment of either description for a term not exceeding two years;

(*b*) Fine not exceeding one thousand rupees;

(*c*) Whipping;

(*d*) Any lawful sentence combining any two of the sentences aforesaid.

Sentences which Police Courts may pass.

15. (1) A Police Court may, subject to the provisions of Section 152 (3), pass any of the following sentences :—

(*a*) Imprisonment of either description for a term not exceeding six months;

(*b*) Fine not exceeding one hundred rupees;

(*c*) Whipping, if the offender is under sixteen years of age;

(*d*) Any lawful sentence combining any two of the sentences aforesaid.

(2) Nothing in this section shall be deemed to repeal the provisions of any enactment now in force whereby special powers of punishment are given to Police Courts.

Power of District or Police Courts to sentence to imprisonment in default of payment of fine. [*See* §312.]

16. (1) A District Court or a Police Court may award such term of imprisonment in default of payment of a fine as is authorized by law in case of such default, provided that the term awarded is not in excess of the court's powers under this Code.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the court under sections 14 or 15.

Sentence in case of conviction for several offences at one trial.

17. (1) When a person is convicted at one trial of any two or more distinct offences the court may sentence him for such offences to the several punishments prescribed therefor which such court is

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competent to inflict; such punishments when consisting of imprisonment to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of the other in such order as the court may direct, but it shall not be necessary for a Police Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender for trial before a superior court. §17

Maximum term of punishment.

Provided that if the case is tried by a District Court or a Police Court the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict.

(2) For the purpose of appeal aggregate sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

This Code.—See §1 *ante*.

Supreme Court.—See §3 *ante*.

District Court.—See §3 *ante*.

Police Court.—See §3 *ante*.

Capacity to Try.—

Supreme Court.—§§10, 11 *ante*.

District Court.—§§10, 11 (*a*), 12, 18.

Police Court.—§§9, 10, 11 (*b*).

Village Tribunal.—Ordinance 24 of 1889, §§28, 28A, 29.

Capacity of Village Tribunal to Punish.—Ordinance 24 of 1889, §§28A, 29, 31.

Fine.—See §3 *ante*; see also Penal Code, §§59-64, 66, and §312 *post*.

Offence.—See §3 *ante*.

Rigorous Imprisonment.—See §3 (10) Ordinance 21 of 1901.

Simple Imprisonment.—See §3 (10) Ordinance 21 of 1901.

Imprisonment of either Description.—See §3 (10) Ordinance 21 of 1901.

***Imprisonment.**—See §3 (10) Ordinance 21 of 1901.

Consecutive Sentences.—See §§16, 17, and see Penal Code §§53, 67.

Distinct Offence.—See §178 *post*.

Punishment.—Every offence known to the law is dealt with punitively, but it still remains a disputed question why criminal sanctions should be punitive.

The Objects of Criminal Punishment.—

1. The prevention of future crimes†—this is the general view. Criminal punishments act as a deterrent (*a*) by deterring the offender himself, by acting on his body or on his purse, as by imprisoning him or fining him; (*b*) by deterring others, who realize the fate that has

*See *Jayasinghe v. Boteju* (1913) 1 *B.N.C.* 32, and *Kalugammana v. Babasinno* (1908) 4 *N.L.R.* 221.

†See *Grenier v. Ukkinda* (1917) 4 *C.W.R.* 125. and see the note in (1921) 3 *C.L. Rec. lviii.*

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§17 overtaken the offender—vicarious deterrent*; (*c*) by attempting an actual reformation of the offender—*e.g.*, the special rules of procedure regulating the cases of Youthful Offenders; Borstal Institutes; the special treatment of first offenders, and police supervision.

N.B.—**Habitual Offenders may be Sentenced to Preventive Detention.**—See Ordinance 2 of 1926 §10 as amended by Ordinance No. 27 of 1928 §2. This legislation is aimed at the prevention of future crimes by habitual criminals.

In revision D.C. Crim. Negombo 3250 (Sept. 23, 1918). Three public servants were found guilty of extortion under cover of their official capacity, and the District Judge treated them as first offenders. On an application by the Crown to have the sentence enhanced, the Full Court *held*, "I think that the Crown acted quite rightly in bringing the case to the notice of the Court, and in view of the importance of the principles involved and of the nature of the offence, I thought it right that this application should be heard before the Full Court . . . Wherever we have these public officers for the protection of the public, for forwarding their interest, they have power to exercise authority that carries with it power to exercise oppression . . . It would, . . . be a most serious thing if it were ever laid down by the Supreme Court of this Colony that when an offence of this nature has been brought home by clear and definite evidence to officers holding positions of responsibility, that it is an offence which the courts may condone as a mere case of human weakness, and consider it as yielding to an ordinary temptation. It is the business of the courts to indicate to the public a sense of reprobation and of indignation against acts of this character . . ." *per* Bertram, C.J., Shaw & de Sampayo, J.J.

2. The gratification of the feelings of the injured person. This view is largely held in America—*e.g.*, lynch law. The Criminal Procedure Code recognises this view to some extent in permitting the aggrieved party to compound a criminal charge—§290 *post*—or to withdraw the charge in a summary case—§195 *post*. See *Notley v. Anthonis* (1921) 22 *N.L.R. at p.* 336. "Criminal Procedure is to *resentment* what marriage is to affection"—Sir Fitz James Stephen.

3. The expression of the general disinterested feeling of vengeance of the community when an offence is proved to have been committed—*i.e.*, what a wise bystander would feel who saw the crime committed. "Wrong negatives right, but punishment negatives the negation" —Hegel. "Punishment is not just because it deters; but it deters because it is felt to be just"—Victor Cousin.

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*In the famous case of *R. v. Palmer* owing to the prejudice which existed against the accused a special Act of Parliament known as Palmer's Act had to be passed authorising the Court of Queen's Bench to transfer the trial of the case from Stafford, where the offence was committed, to the old Old Bailey, London. In passing sentence of death against Palmer, at the trial, Lord Campbell, C.J., told him: "The Act of Parliament under which you have been tried . . . gives leave to the Court to direct that the sentence . . . shall be executed either within the jurisdiction of the Central Criminal Court or in the county where the offence was committed. We think that, for sake of example, the sentence ought to be executed in the County of Stafford . . . I hope that this terrible example will deter others from committing such atrocious crimes and that it will be seen that whatever art, or caution, or experience may accomplish such an offence will be detected and punished." *C.f.* §422 *post*.

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***Prevention is not the Sole Object of Criminal Punishment.**— If it were so, (i) an absolutely hardened and incorrigible offender ought to get off scot-free, instead of being the most severely punished of all; (ii) if prevention be all, the fact that an accused acted under the force of temptation or provocation would be a ground for increasing the punishment, whereas Judges have frequently made it a ground of extenuation, as when a thief pleads that he stole in order to satisfy his hunger, or the slayer when he pleads that he struck the blow under provocation, a distinction which the Penal Code recognises and gives effect to,—§§294 *exception* 1, 325, 326, 349. §17

Sections 14–17 deal with the **capacity** of Courts of Criminal Judicature **to punish** offenders. The capacity of such Courts **to try** is to be found in §§9–12 and 18, and §§135–147. *C. f.* §§321, 323 *post.*

The Supreme Court.—The Supreme Court in the exercise of its original criminal jurisdiction, provided it has the capacity to try the offender, is empowered by §13 to impose the maximum punishment prescribed for the offence in question. *C. f.* §31 (1) of the Indian Criminal Procedure Code. See §§17 and 321.

§251.—At what stage should sentence be passed on an accused on conviction before the Supreme Court?

§§305, 308, 309 (*a*), (*b*), (*e*).—Special provisions regarding sentences of death.

§§310, 310A.—Provisions relating to other sentences passed by the Supreme Court.

§§312, 313.—Sentences of fine.

§325 (2).—Release of offenders on probation by the Supreme Court.

§381.—Summary punishment for certain offences of contempt. See also §§439, 440.

†The Supreme Court in the exercise of its appellate or revisional jurisdiction should not, if it enhances a sentence awarded by a lower court, exceed the jurisdiction of the lower court to award punishment. See §347 *post.*

District Courts.—Provided the law creating the offence so authorises, §14 empowers a District Court having jurisdiction to try the offender to impose any of the following sentences :—

(i) Rigorous or Simple Imprisonment for a term of two years or less see §§17 and 321, 323;

(ii) A fine of Rs. 1,000 or less;

(iii) Whipping (see under ' Whipping ' *infra*), and

(iv) Any lawful sentence combining any two of the above.

Imprisonment.—§14 (*a*) lays down a rule similar to that enacted by §53 of the Penal Code, *viz.*, that the imprisonment awarded may be either rigorous or simple. See §323 *post.*

R. v. Dias Sinno (1908) 11 *N.L.R.* 193. " In my opinion, §68 of the Penal Code must be read subject to the enactment of the later Ordinance, §14 of the Criminal Procedure Code, which limits the sentence of imprisonment which a District Court can pass to two years . . ." *per* Hutchinson, C.J. The question is " whether §68 of the Penal Code

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*See Part IV. of this Code.

†An application to the Supreme Court to enhance a sentence passed on an accused by a lower court should be by way of revision and not of appeal. *Attorney-General v. Samarakoon* (1910) 14 *N.L.R.* 5; *Corea v. Grigoris Appu* (1908) 11 *N.L.R.* 331.

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§17 enables a District Judge . . . . . to impose a sentence of imprisonment in excess of the ordinary two years' limit to which his jurisdiction is confined by §14 of the Criminal Procedure Code. In my opinion, §68 of the Penal Code enhances the liability of the accused, but it does not enlarge the jurisdiction of the District Court. The Solicitor-General . . . pointed out to us that there are sections in the Penal Code (*e.g.*, §417) in which the District Court, without exceeding its normal jurisdiction, could give effect to §68 by imposing double the ordinary maximum punishment (*viz.*, one year's imprisonment of either description). I do not think we ought to give §68 any wider application . . ." *per* Wood Renton, J. See §291 para. 2 *post*.

Fine.—Special provisions as to sentences of fine.—§312 *post*.

Fines should not be Excessive.—See §312 (*a*) *post*, §59 Penal Code. *Peris v. James* (1913) 1 *B.N.C.* 20. Excessive fines should not be imposed. "Fines should be regulated according to the circumstances of each case and not to the general considerations of crime in the district," *per* de Sampayo, J. (See Miscellaneous 2 and 3 *infra*.)

R. v. Silva (1911) 14 *N.L.R.* 336. Where an Ordinance declared that a certain offence was punishable with a fine which may extend to Rs. 1,000, and that the article in respect of which the offence was committed might also be forfeited in addition to the fine, *held*, that the District Court had jurisdiction to try such an offence. See §11 *ante*.

Imprisonment in Default of Payment of a fine.—A District Court may award such a term of imprisonment in default of payment of a fine as is authorised by law in case of such default, provided that the term awarded is not in excess of the Court's powers under this Code. Such imprisonment may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Court under §14–16. "Imprisonment authorised by law in default of payment of fine."—See §312 (1) (*b*); (*c*); (*d*); (*e*); (*f*); (*g*) and §§60–65 Penal Code.

R. v. Vidane (1892) 2 *C.L.R.* 31. A sentence in default of payment of a fine should be imposed at the same time as the original sentence was pronounced and as part of it. It is irregular to make such an order at a later stage when it is discovered that the accused is unable or unwilling to pay the fine. See §312 *post*.

Recovery of fines.—See §66 Penal Code, and §§312 (1) (*h*), (2), (3), (4), 313.

Whipping.—See *infra*.

Exceptions to the rule in §14 :—

(*a*) Certain laws specially authorise District Courts to exceed the limits of punishment here laid down, *e.g.*, by §5 of the Former Enemy Aliens Ordinance No. 19 of 1919, a District Court can impose a sentence of Rs. 10,000.

(*b*) Certain laws empower District Courts to award punishments which are not stated in §14, *e.g.*, Preventive Detention, Ordinance No. 2 of 1926, a District Court can award a sentence of five years' preventive detention. See §167 para. 5 *post*.

(*c*) Where an accused is convicted *at one trial* of two or more *distinct** offences, the offender may be sentenced to the several punishments prescribed therefor which the Court is competent to inflict. *R. v. Alexander* (1926) 8 *C.L.Rec.* 12; *Pulle v. Silva* (1906) 9 *N.L.R. at p.*

*See §67 Penal Code and §178 *post*, §§180 para. 4 *post* and 323 *post*.

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82 ; *R. v. Cornelis* (1921) 22 *N.L.R. at. p* 502. If the punishment is one of imprisonment, the sentences are regarded as being consecutive unless the court orders them to run concurrently. See *General Order* 882 and see §321 *post*. In no case, however, can the aggregate punishment so awarded, whether of imprisonment or fine, exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict—§17 (1). *N.B.*—The terms of the new "explanation" added to §35 of the Indian Criminal Procedure Code should be noted, *viz.*, "Separable offences, which come within the provision of section 71 of the Indian Penal Code (*local*—§67 [see §323 *post*]) are not *distinct* offences within the meaning of this section." An *illustration* is appended.—"A. breaks into a house with intent to commit theft and steals property therein. A. has *not* committed distinct offences"—but see §178 para. 3 *post*. Ratanlal commenting on this amendment of the Indian Law states : "It will thus appear that §71 (*local*—§67) of the Penal Code deals with *separable* offences ; §35 (*local*—§17) of the Criminal Procedure Code with *distinct* offences." §17

As to appeal see §335 *post**.

Mendis v. Cornelis (1898) 3 *N.L.R.* 196.—approved and followed in *R. v. Arnolis Appu* (*post*) and *R. v. Abdul Rahim* (*post*). The offence of housebreaking with intent to commit theft and theft committed on the same occasion are distinct offences, and separate sentences may be awarded. "I think there must be some mistake about this, because §67 (of the Penal Code) has nothing to do with a case of this kind, since theft and housebreaking by night are distinct offences, although they occurred on the same occasion. A man may break into a house to commit theft, and may then repent and desist from carrying out his original design. Again, a man may commit theft in a dwelling house without breaking into it . . ." *per* Bonser, C.J.

R. v. Arnolis Appu (1904) 2 *Bal.* 81 (Full Court) following *Mendis v. Cornelis* (1898) 3 *N.L.R.* 196, *R. v. Don William* (1900) 1 *Br.* 17, *Adonis Appu v. Nicholas* (1902) 6 *N.L.R.* 87, and dissenting from *R. v Cara* (1895) 1 *N.L.R.* 320 and 4 *N.L.R.* 55. Where the accused were convicted under two counts with committing housebreaking with intent to commit theft, and with theft, *held*, that these were two distinct offences, and that two separate sentences could lawfully be imposed under §17 of this Code. See *R. v. Cara* (1895) 1 *N.L.R.* 321, 4 *N.L.R.* 55 §178 *post*.

R. v. Abdul Rahim (1913) 16 *N.L.R.* 449. The accused, with the object of obtaining payment of a sum of money deposited by another in the Post Office Savings Bank, forged three distinct documents, and was sentenced to three terms of imprisonment in respect of the three offences, the sentences to run consecutively, but amounting in the aggregate to four years, *held*, that the sentence was lawful. *R. v. Arnolis Appu* (*supra*) and *Mendis v. Cornelis* (*supra*) approved and followed.

On the other hand, where an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.—§67 Penal Code.

In revision D.C. Crim. Colombo 4427 (*S.C.M. October* 27, 1916). Where an accused is convicted on two counts, but one of the offences is

**R. v. Samaranayaka* (1923) 1 *T.L.R.* 265; 5 *C.L.Rec.* 88.

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§17 in effect contained in the other, it is irregular to impose *consecutive* sentences. Thus, it is irregular to impose *consecutive* sentences on a conviction under §§380 and 382 in respect of offences committed in the same transaction. See also *De Rosairo Udayar v. Muna Wappu* (1919) 6 *C.W.R.* 2; *Sangarapulle v. Ratnasekera* (1916) 2 *C.W.R.* 158; *Abeywickreme v. Babunay* (1897) 2 *N.L.R.* 344.

74 *D.C. Crim. Colombo* 4283 (*S.C.M. April* 3, 1916). The accused was convicted under §§456, 459 and 403 of the Penal Code and awarded consecutive sentences. *Held*, that the accused could not be convicted twice in respect of the same offence, merely because each offence was called by a different name. See *R. v. De Zoysa* (1929) 31 *N.L.R.* 127; 10 *C.L.Rec.* 62; *R. v. Ponnadorai* (1930) 11 *N.L.R.* 23.

Where an accused is convicted of one of several offences, but it is doubtful as to which of them he is guilty (*e.g.*, see illustration to §181 *post*), the offender should be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.—See §67A Penal Code. See also §307 *post*.

Other Provisions Relating to Sentences imposed by District Courts.—

§§214, 304.—At what stage a verdict of conviction is to be recorded.

§306.—The Judgment should specify the offence and punishment awarded.

§321.—As to the commencement of sentences imposed on the same accused in different trials.

§381.—Summary punishment for certain offences of contempt. See also §439, 440; and Chapter XXXIV. See *General Order* 882.

Police Courts.—Provided the law creating the offences so authorises, §15 (1) empowers a Police Court having jurisdiction to try the offender, to impose any of the following sentences :—

(i) Rigorous or Simple Imprisonment for a term of six months or less—see §§17 and 321, 323;

(ii) A fine of Rs. 100 or less;

(iii) Whipping if the offender is under sixteen years of age* (see under 'Whipping' *infra*), and

(iv) Any lawful sentence combining any two of the above—see §323 *post* and §53 Penal Code.

N.B.—Nothing in §15 is to be deemed to repeal any enactment in force whereby special powers of punishment are given to Police Courts—§15 (2). See §8 Interpretation Ordinance 1901, and the list of Ordinances given under §11 *ante*, wherein Police Courts are authorised to exceed their limits of punishment.

Imprisonment.—See under "District Courts."

Puspah v. Podda Naide (1890) 9 *S.C.C.* 121. §68 of the Penal Code does not justify a Police Magistrate in sentencing an accused to be imprisoned for more than six months, even though the accused has previously been convicted. (The Reconvicted Criminals Ordinance 1926 now provides the procedure to be adopted by Magistrates in such cases.)

Fine.—See under "District Courts."

Govinden v. Nagoor Pitchi (1917) 20 *N.L.R. at p.* 117. "§15 of the Criminal Procedure Code, which enumerates the punishments which a Police Court can impose, makes no mention of forfeiture, but 'fine'

*See *Gunawardene v. Punchirala* (1921) 22 *N.L.R.* 411.

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which is mentioned is defined by §3 to include a 'pecuniary forfeiture." The forfeiture in this case, however, is not a pecuniary forfeiture . . ." *per* Ennis, J.

Whipping.—See *infra.*

Exceptions to the rule in §15 (1) :—

(1) Where the Police Court is specially authorised by law to exceed the limits here laid down—§15 (2), and see §11 *ante.*

(2) Where the law permits a Police Magistrate to award a punishment not specified in §15 (1)—*e.g.*, Confinement in a House of Detention—§9 Ordinance No. 4 of 1841, as amended by Ordinance No. 21 of 1919; or Police supervision—§8 Ordinance No. 2 of 1926.

(3) Where the accused is convicted at one trial of two or more distinct offences.—See under "District Courts."

(4) A Magistrate acting under §152 (3) *post* can lawfully impose a District Court sentence.

(5) With the consent of the accused a Magistrate may under the provisions of §166 *post*, summarily try an offence triable by a District Court, and award the punishments set out in §166 (2).*

Other Provisions Relating to Sentences imposed by Police Courts.—

§190.—When the sentence is to be passed.

§304.—Mode of delivering the judgment.

§306.—The Judgment should specify the offence and punishment.

§321.—As to commencement of sentences passed on the same accused in different cases.

§§381, 440.—Summary punishment for contempt. See *General Order* 882.

Kinds of Punishment.†—The punishments prescribed by the Penal Code are to be found in §§52 and 54 of that Code. They are :—

(*a*) Death, *e.g.*, Penal Code §§114, 129, 191, 296, 299 ;

(*b*) Rigorous or Simple Imprisonment.—See §323 *post* ;

(*c*) Whipping (see *infra*).

(*d*) Forfeiture of Property,‡ and

(*e*) Fine.

There are other types of punishment which are referred to in our law. The following are examples :—

Extraordinary types of Punishments.—

Ordinance.	*Title.*	*Section.*	*Punishment.*
Proclamation 23–9–1799 ..	—	.. 3, 48	..Torture
Proclamation 2–3–1815 ..	—	.. 6	..Torture
No. 4 of 1841 .. (as amended by No. 21 of 1919)	Vagrants ..	.. 8, 10	..Houses of Detention

*See *Fernando v. Fernando* (1896) 2 *N.L.R.* 16.

†An order to pay crown costs and compensation (see §253B *post*) is not strictly speaking a "punishment"—see *R. v. Silva* (1901) 5 *N.L.R.* 17, see also *Attorney-General v. Wijeysinghe* (1916) 2 *C.W.R.* 31 and *Sewarinus v. Kuttan* (1917) 20 *N.L.R.* 111.

‡See §§116, 122 Penal Code. *Govinden v. Nagoor Pitchi* (1917) 20 *N.L.R.* at *p.* 117.

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§17

Ordinance.	*Title.*	*Section.*	*Punishment.*
No. 11 of 1865 (as amended by No. 41 of 1916)	Labour	11 (2) 2A	Imprisonment of women
No. 17 of 1869 ..	Customs	65	.. Misdemeanours
No. 1 of 1886 ..	Youthful Offenders ..	—	.. —
No. 18 of 1887 ..	Whipping in N.W.P.	2	.. —
No. 16 of 1889 ..	Whipping ..	—	.. —
No. 15 of 1890 ..	Fortifications and Official Secrets ..	15	.. Banishment
No. 4 of 1891 ..	Whipping (praedial produce) ..	—	.. —
No. 9 of 1902 ..	Railway	41	.. Moderate chastisement by P.M.
No. 3 of 1904 ..	Flogging ..	—	.. —
No. 28 of 1906 ..	Dangerous Knives ..	12	.. Whipping
No. 8 of 1910 ..	Defence Force ..	19	.. Penalties of the Army Act
No. 13 of 1911 ..	Prisoners Removal ..	—	.. Transportation
No. 9 of 1924 ..	Village Communities	55	
No. 2 of 1926 ..	Reconvicted Criminals	8, 10	.. Preventive Detention, and Police supervision. See §167 para. 5 and §253 *post*.

Enactments authorising a forfeiture of property.*

Ordinance.	*Title.*	*Section.*
No. 17 of 1869 ..	Customs	20, 48, 53
No. 8 of 1876 ..	Weights and Measures	12, 14
No. 2 of 1883 ..	Penal Code ..	114, 116, 122
No. 6 of 1887 ..	Petroleum	26
No. 13 of 1888 ..	Merchandise Marks	3 (3), 12 (2)
No. 17 of 1889 ..	Gaming	7 (2)
No. 6 of 1890 ..	Salt	17
No. 15 of 1890 ..	Fortifications and Official Secrets ..	9
No. 18 of 1890 ..	Chanks	7
No. 15 of 1898 ..	Criminal Procedure Code	411, 413
No. 12 of 1900 ..	Export of Arms ..	3
No. 8 of 1902 ..	Explosives ..	13, 15
No. 12 of 1905 ..	Old Metal ..	7 (3)
No. 28 of 1906 ..	Dangerous Knives ..	13
No. 16 of 1907 ..	Forests	40
No. 11 of 1908 ..	Post Office ..	3 (3), 91
No. 19 of 1908 ..	Dried Meat ..	8
No. 21 of 1908 ..	Rubber Thefts ..	16 (3)
No. 4 of 1909 ..	Water Hyacinth ..	6
No. 22 of 1909 ..	Stamp	33
No. 5 of 1910 ..	Opium	24 (4)
No. 8 of 1912 ..	Excise	51, 26 *N.L.R.* 371; 9 *T.L.R.*148

*See *Govinden v. Nagoor Pitchi* (1917) 20 *N.L.R. at p.* 117, and see §§77, 413–414, 417 *post*.

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Ordinance.	*Title.*	*Section.*
No. 20 of 1914 ..	Trading with the Enemy ..	7
No. 24 of 1914 ..	Aerial Navigation ..	7 (2)
No. 33 of 1916 ..	Firearms	44
No. 33 of 1917 ..	Ceylon Coinage ..	2 (1)*
No. 19 of 1919 ..	Former Enemy Aliens	6A (3)
No. 19 of 1920 ..	Restriction of Exports and Imports ..	7
No. 38 of 1921 ..	Dangerous Animals..	7
No. 2 of 1925 ..	Pearl Fisheries ..	8, 9 (2)
No. 30 of 1928 ..	Whaling ..	12
No. 17 of 1929 ..	Poisons ..	75

Whipping.—

1. Who may not be whipped—

(*a*) Women.—See §57 Penal Code, §7 Ordinance No. 3 of 1904; *General Order* 928*C*.

(*b*) Persons sentenced to death, or to a term of imprisonment exceeding five years.—See §57 Penal Code; *General Order* 928*C*.

(*c*) As to youthful offenders.—See §§315 (2), 319, 322 *post*. Ordinance No. 1 of 1886, §19; Ordinance No. 3 of 1904 §§3–5; *General Orders* 915–922, 12 *C.L.Rec. CXXX*.

2. Assuming that an offence is punishable with whipping, what Courts may pass such a sentence?—See §§13–15.

(*a*) The Supreme Court and District Courts may award sentences of whipping if the penal section mentions whipping as a punishment, *e.g.*, §§316, 317, 345 Penal Code. By the Whipping Ordinance No. 16 of 1889† the Supreme Court and District Courts are empowered to inflict sentences of whipping in the case of certain offences under the Penal Code, where whipping was not provided as a punishment under the Code, *e.g.*, rape, robbery, etc.

See *General Order* 928, and *Tambyah's Penal Code p.* 65.

(*b*) Police Courts—

(i) If the offender is under sixteen years of age a Magistrate can order whipping.—See §15(*c*).‡ This is the general rule. Therefore, a Police Court may order a sentence of whipping in the case of youthful offenders in the circumstances set out in §19 (*c*), (*e*) of Ordinance No. 1 of 1886, see §322 *post*. Note the use of the words " fine *or* imprisonment "‖ in §19—*Silva v. Albert* (1909) 3 *S.C.D.* 48. See *General Order* 928*A*, and §58 Penal Code.

Jayasinghe v. Gracianu (1897) 2 *N.L.R.* 336. Where a Magistrate convicted an accused under §368 of the Penal Code and imposed a sentence of six months' rigorous imprisonment and twenty lashes, *held*, " No doubt the offence is punishable with whipping by the Penal Code, and is triable by the Police Magistrate, but . . . the Criminal Procedure Code provides (§15 (1) *c*) that a Police Court shall only inflict whipping if the offender is under sixteen years of age. If the offence is considered so serious as to need whipping, it should be tried by a District Court which has jurisdiction to inflict a sentence of whipping . . ." *per* Bonser,

C. f. Creasy v. Silva (1920) 8 *C.W.R.* 307.

†See *Koch* 64, 65; *R. v. Sinho* (1900) 1 *Br.* 161.

‡See *Gunewardena v. Punchirala* (1921) 22 *N.L.R.* 411.

‖See §41 Railway Ordinance No. 9 of 1902.

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§17 C.J. See Ordinance No. 4 of 1891, and Ordinance No. 28 of 1906, §12.

*(ii) Ordinance No. 4 of 1891 (see §6, Ordinance No. 38 of 1917) empowers a Police Court to award a sentence of whipping in cases of theft of praedial products irrespective of the age of the offender. Special points to be noted are :—

(*a*) The Ordinance is to come into force only in proclaimed provinces or districts.—See §1†.

(*b*) The proclamation must be followed by a notification appointing a Magistrate or Magistrates to administer the Ordinance within the province or district.—§3‡.

(*c*) An accused who is convicted of an offence under §368 (*b*) of the Penal Code, may be sentenced to receive strokes with a cane or rattan or other like implement—§315 (2) proviso *post*, and see *Gunawardene v. Punchirala* (1921) 22 *N.L.R.* 411.—See §6 Ordinance No. 38 of 1917 and *General Order* 928B.

(iii) Under the Knives Ordinance No. 28 of 1906|| a person of any age who is convicted before a Magistrate of an offence under §315 of the Penal Code is liable to be sentenced to be whipped.—§12. The ordinance is designed to check the carrying of dangerous *knives*, but §12 as drafted would embrace all cases of hurt (§315) and not only those caused through the agency of a knife. It was held by de Sampayo, J., in 529 *P.C. Badulla* 8612 (1912) 1 *T.L.R.* 213, which decision was approved of in *Selladurai v. Kandiah* (1923) 1 *T.L.R.* 212, that §12 was perfectly general in its terms, and so long as the conviction of the accused was under §315 of the Penal Code, *e.g.*, causing hurt by burning, the Magistrate had jurisdiction to pass a sentence of whipping. See *Tambyah's Penal Code p.* 65. See *General Order* 928A. "The number of lashes or strokes to be inflicted shall in no case exceed the limit prescribed by Ordinance No. 3 of 1904."

(iv) Under §152 (3) *post* a Magistrate has jurisdiction to impose any sentence which a District Court may lawfully impose. Therefore, a Magistrate who summarily tries an offender under §317 of the Penal Code, may sentence him to whipping, because Ordinance No. 16 of 1889 empowers a District Court to sentence an offender under §317 to whipping.

(v) Under §166 *post* a Magistrate trying an offender summarily with his consent, can only award a sentence of whipping if the accused is under sixteen years. See §166 para. 8 *post*.

(vi) See §68 Penal Code.

(vii) See Ordinance No. 18 of 1887.

3. Procedure ¶—

(*a*) The Flogging Regulation Ordinance No. 3 of 1904 lays down the maximum number of strokes to be inflicted and the nature of the instrument to be used. No law may be passed authorising the award of a greater number of strokes than those laid down by this Ordinance,

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*And see *Gunewardene v. Punchirala* (1921) 22 *N.L.R.* 411.

†Matale District (*Gazette* 5215—28 April, 1893), Kandy and Kurunegala (*Gazette* 5151—1 July, 1892), Kalutara (*Gazette* 6851—2 February, 1917). This list does not purport to be exhaustive.

‡Kandy, Matale, Kurunegala and Kalutara—*Gazettes 6537* of 29 Dec. 1912, *6554* of 4 April 1913, *6583* of 3 Oct. 1913 and *6851* of 2 Feb. 1917.

||See *Koch* 10.

¶The following decisions should be noted—(i) lashes on the buttocks held to be degrading—*Grenier* (1873) *P.C.* 32; (2) a sentence of whipping cannot be carried out in instalments—*Grenier* (1873) *D.C.* 129.

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viz., §3 :—(i) A boy under twelve—six strokes with a rattan. (ii) A boy above twelve and under sixteen—twelve strokes with a rattan.—See §315 (2), 319 *post*. See §19 (*c*) Ordinance No. 1 of 1886. (iii) Offenders over sixteen—twenty-four strokes with a rattan, or twenty-four lashes.—See §308 (2) *post*. In the case of convictions under §368 (*b*) of the Penal Code—the whipping shall be executed with a cane or rattan—§315 proviso. Even in the Supreme Court a sentence of 15 lashes is exceptional.—12 *C.L.Rec. CXXX*.

§4 declares that two sentences of flogging cannot be combined so as to exceed the limits laid down ; and §5 extends the same principle to punishments for breaches of prison regulations.

Under §19 (*c*) of the Youthful Offenders Ordinance 1886, in the case of an offender over twelve and under sixteen, the accused is not to be awarded more than ten strokes. This maximum was fixed as a result of the joint interpretation of §319 *post*, and §8 of Ordinance No. 3 of 1904.

(*b*) The manner in which the sentence is to be carried out.—

(i) In the case of youthful offenders the sentence should be carried out at once—§19 Ordinance No. 1 of 1886. It is because the sentence has to be executed forthwith that the law provides that there shall be no appeal in such cases—§335 (1) (a), (2) *post*. See §319 *post* where a distinction is drawn in cases where the youthful offender is sentenced to whipping only, and to cases where the whipping is to be accompanied by some additional punishment. See also §308 (2) *post*.

(ii) In the case of adults.—See §308 (2) *post*.

(*a*) The Court may indicate the time and place—§315 *post*—but such sentence cannot be executed until ten days have elapsed from the date the sentence was pronounced, or until the order of the Supreme Court, if an appeal has been taken, has been notified to the accused and in any event until the Governor has considered the case—§316 *post*.

(*b*) No sentence of whipping on *adult* offenders is to be executed until the Governor has made order thereon—§316 (1) *post*. The provisions of *General Order* 927 should be carefully observed.

(*c*) With regard to the carrying out of the sentence—See §§315, 317, 318, 320 *post*. The case of youthful offenders sentenced to whipping, with some other punishment in addition under §319 *post*, appear to fall under §§315, 317, 318 *post*.

Suggested amendments of the law.—

(*a*) The amendment of §19 of the Youthful Offenders Ordinance 1886, so as to include offences punishable with fine *and* imprisonment. See *Silva v. Albert* (1909) 3 *S.C.D.* 48. The law has now been amended by §2 of Ordinance No. 26 of 1928.

(*b*) The desirability of empowering Village Tribunals to inflict sentences of whipping. A lad aged twelve who commits a petty theft must be sent to prison if the fine is not paid. This amendment has been effected by §57 (4) of Ordinance No. 9 of 1924.

(*c*) The desirability of raising the age of youthful offenders to eighteen.—*Wickremasinghe v. Perera* (1913) 1 *B.N.C.* 29. "I will take this opportunity . . . of raising the question whether it would not be desirable that the age of 'juvenile offenders' should be increased from sixteen to at least eighteen years," *per* Wood Renton, C.J.

(*d*) The desirability of instituting "Children's Courts."—See *General Order* 915.

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§17 (*e*) The introduction of the Borstal System.—See *Sessional Paper IV. of* 1921.

Appeal.—*Punchi Banda v. Fernando* (1900) 4 *N.L.R.* 103.—Where a Magistrate convicted an accused on two counts and sentenced him to a fine of Rs. 25 on each count, *held*, that an appeal lay from the conviction, in view of §17 (2) of this code.

Imperial Statutes dealing with the capacity of Colonial Courts to try offenders.—

1. Admiralty Offences (Colonial) Act 1849 (12 & 13 *Vict. c.* 96) —Trial of offenders for treason, piracy, felony, robbery, murder, conspiracy, or other offence committed upon the sea or in any haven, river, creek or place, where the Admiral has jurisdiction.—§1. See 9 Halsbury p. 274 *note* (*r*); and p. 525 *note* (*q*). The trial of offences of murder or manslaughter, and persons abetting such offences, where the offence was committed on the sea, where the Admiral has jurisdiction—§2.

2. The Courts (Colonial) Jurisdiction Act 1874 (37 & 38 *Vict. c.* 27).—An Act to regulate the sentences imposed by Colonial Courts where jurisdiction to try is imposed by Imperial Acts. See 10 Halsbury p. 503 *note* (*b*).

3. The Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60)–§711. —Any offence under the Act shall, in any British Possession, be punishable by any Court or Magistrate by whom an offence of a like character is ordinarily punishable.

4. The Territorial Waters Jurisdiction Act 1878 (41 & 42 *Vict. c.* 73) §2.—An offence committed by a person, *whether he is a British subject or not*, on the open sea within the territorial waters of His Majesty's Dominions, is an offence within the jurisdiction of the Admiral, *although it may have been committed on board or by means of a foreign ship*, and the person who committed such offence may be arrested, tried and punished accordingly. See 9 Halsbury p. 293 *note* (*r*), p. 524 *note* (*o*) and §136 *post*.

5. The Army Act 1881 (44 & 45 *Vict. c.* 58), §144 (2), §168.

Miscellaneous.—

1. An application to the Supreme Court to enhance a sentence passed on an accused by a lower Court should be made by way of revision, and not by way of appeal.—*Attorney-General v. Samarakoon* (1910) 14 *N.L.R.* 5, and see *Corea v. Grigoris Appu* (1908) 11 *N.L.R.* 331.

2. In order to enable Judges of first instance to fix a punishment befitting the crime, it is competent to inquire, after the conviction of the accused, into the character and antecedents of the offender*.— *Attorney-General v. Kandaiya* (1911) 14 *N.L.R.* 211 ; *Nikapota v. Gunasekera* (1911) 14 *N.L.R.* 213. The Courts may also have regard to the character and prevalence of the offence itself in the district, and to the necessity or otherwise of an example being made.—*R. v. Clementu Appu* (1916) 2 *C.W.R.* 1. ; *Cornelis v. Perera* (1927) 28 *N.L.R.* 383. See also 2 *Leader Law Reports* 40, and *Appu Sinno v. Uduma Lebbe* (1913) 1 *B.N.C.* 33. The fact that an accused does not plead guilty and claims to be tried is no ground for enhancing sentence.—*Seyatu v. Appuwa* (1896) 2 *N.L.R.* 212. *The Police Officer, Dondra, v. Baban* (1923) 25 *N.L.R.* 156, *Sub-Inspector of Police, Kesbawa, v. William* (1928) 9 *C.L.Rec.* 116.

*This is irrespective of the provisions of Ordinance No. 2 of 1926, see §6 *ante*.

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3. A maximum penalty prescribed by law is only intended for the worst cases, and, although it is discretionary with the Court to determine to what extent in a particular case the punishment awarded should approach to or recede from the maximum limit, the Court should in the exercise of the discretion take into consideration such matters as the nature of the offence, the antecedents of the accused, his age and character, the existence of aggravating or extenuating circumstances, the fact that the particular offence is specially rife in the district or throughout the country, etc.—*per* Pereira, J. in *Spaar v. Podiya* (1914) 503 *P.C Hatton* 7264 (*S.C. M. June* 18, 1914).

4. *Inspector of the Local Board v. Peeris* (1920) 8 *C.W.R.* 53. Where the accused in contravention of the provisions of §6 (2) (*i*) of the Housing Ordinance 1915 constructed a partition inside his house without the sanction of the proper authority, and the latter after inspection ordered the accused to construct two additional windows, *held*, that the compliance of the order by the accused did not exempt him from criminal liability.

6. *Toussaint v. Chetty* (1920) 8 *C.W.R.* 121. A chetty, who, in violation of the quarantine regulations, went abroad and caused an epidemic of small-pox, was convicted by the Magistrate. *Held*, in revision (on an *ex parte* application and without notice to the Attorney-General or the Magistrate), that the sentence of imprisonment inflicted on the chetty should be set aside, as (i) he was ignorant of the law and (ii) because imprisonment would mean his "social degradation and complete ruin." Sentence of imprisonment set aside and fine enhanced *Sed. Qu.?*

Committing Magistrate not to try offenders in his capacity of District Judge without offenders' consent.

18. No District Judge shall, except with the express consent of the accused, try any case which he has committed for trial as Police Magistrate.

District Judge.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

Committal for Trial.—See §§12, 158, 165 *post.*

Other cases in which District Judges may not try.—See §§148 (1) (*c*), 384 *post.*

Capacity to try.—See §§9–12 *ante.*

Summary trial by Magistrate who is also a District Judge.—See §152 (3) *post.*

Summary trial by Magistrate with consent of accused.—See §166 *post.*

1. **Scope of the section.**—Section 18 is meant to prevent prejudice being caused to an accused by being tried by a District Judge who formally committed him for trial as Police Magistrate. It will be observed that the wording of the section is unhappy, because, while the officer who committed the accused for trial is expressly disqualified from trying the accused in the District Court, it is not expressly stated or made clear that an officer who hears evidence at the non-summary inquiry, but who does not actually commit the accused for trial, is also disqualified from trying the accused. In *R. v. Umerugatta* (1911) 14 *N.L.R.* 271, it was held that a Police

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§18 Magistrate who did not hold the non-summary investigation, and who did no more than commit the accused for trial to the District Court was disqualified from trying the accused without his consent. Wood Renton, J., in construing §18 said: "We must look to the language of the section itself. It recognises no exception in favour of a Police Magistrate who has not heard the evidence at a preliminary inquiry. It prohibits a Police Magistrate, who has ' committed ' an accused for trial as such, from trying him as District Judge. There was, therefore, here a clear irregularity." The question then arises whether a Magistrate who has heard the evidence during the non-summary investigation, but who did not actually commit the accused for trial, is disqualified from trying the accused as District Judge ? To permit such an officer to try a case in which he acted as investigating officer would amount to a genuine hardship. This question still awaits final decision. From the language used by Bertram, C.J., in *Fernando v. Anna Bai* (1918) 5 *C.W.R.* 184 it would appear that such an officer would be held to be disqualified from trying the case. " Speaking generally, it appears to be desirable that, if possible, when a Magistrate is holding non-summary proceedings in which, under the Criminal Procedure Code, he discharges the rôle of prosecutor, he should not be called upon to try in connection with the same facts another charge in a summary manner. *I do not lay this down as a general rule*, but I think that, if possible, this combination of functions should be avoided." *C. f. Jainadeen v. Geomonis* (1919) 21 *N.L.R.* 95. See Introduction to Chapter XIX. para 2 (*b*) *post.*

2. **Bias.***—The Supreme Court has always been careful to watch whether an accused has in any way been prejudiced by a bias of the judicial mind, whether actual or constructive. The following cases afford illustrations :—

Perera v. Carolis (1898) 1 *Tam.* 61.—*Held*, that it was contrary to justice to sustain a conviction for an offence against the revenue, where the Judge, being himself a revenue officer, had an official interest in the case.

Daniel v. Usoof (1899) 1 *Tam.* 60. *Koch* 25.—A Magistrate who is also a Superintendent of Police of the same district, is incompetent to try a case in which the prosecutor is a subordinate officer of Police under him.

Booth v. Ukkurala (1906) 5 *Tam.* 123.—When there is a suspicion of bias on the part of the tribunal, the person constituting such tribunal, if involved in the suspicion, ought not to act.

Thepanis v. Elaris Perera (1908) 2 *S.C.D.* 3.—A Magistrate who is also the Office Assistant to the Government Agent to whom a headman is responsible *can* try an accused for obstructing the headman in the discharge of his official duties.

Bogahalanda v. Poddi Sinno (1915) 1 *C.W.R.* 99.—Where a Magistrate remanded an accused to afford him an opportunity of calling evidence, but by a mistake the Magistrate signed an order committing him to prison as a convicted prisoner, and thereafter when the error was discovered, the accused was tried and convicted by the same Magistrate, Ennis, J., *held*, that the Magistrate may have been biassed against the accused by reason of what had transpired previously, and a new trial was ordered.

*See Dias on the Evidence Ordinance pp. 221–223.

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Carbery v. Wickremasinghe (1917) 4 *C.W.R.* 158.—Where certain Jail Guards were charged with negligently allowing some prisoners to escape and were tried and convicted by a Judge who was also the Assistant Superintendent of the Jail, *held*, that it would be absurd and mischievous in these circumstances to hold that the Judge was biassed against the accused. See *John v. Perera* (1913) 17 *N.L.R.* 189.

R. v. Podisinno (1912) 16 *N.L.R.* 16.—Where the Police acted on the orders of the Chief of Police for the district, who was also the District Judge, *held*, that the District Judge could not try the accused. See also Introduction to Chapter XIX. para 2 (*b*) *post*.

3. **Under §384 *post* no District Judge can try any person for any offence referred to in section 147, clauses (*b*) and (*c*), when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such District Judge in the course of a judicial proceeding, except as provided for in Chapter XXXIV. *post*.**

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§19

PART III.

CHAPTER III.

GENERAL PROVISIONS.

OF AID AND INFORMATION TO THE MAGISTRATES AND POLICE AND PERSONS MAKING ARRESTS.

Public when to assist Magistrates and Police.

19. Every person is bound to assist a Police Magistrate or a Peace Officer reasonably demanding his aid—

(*a*) In the taking of any other person, whom such Magistrate or Peace Officer is authorised to arrest ;

(*b*) In the prevention of a breach of the peace or of any injury attempted to be committed to any public property ;

(*c*) In the suppression of a riot or an affray.

Police Magistrate.—See §3 *ante.*

Peace Officer.—See §3 *ante.*

Arrest by Private Person.—See §35 *post.*

Peace Officer to prevent commission of offences.—See §115 *post.*

1. **Scope of §19.**—It is the duty of Magistrates (§§40, 41 *post*) and of Peace Officers (§§115, 117, 118 *post*) to prevent the commission of offences. In order to enable them to do this the law empowers them to call upon all members of the public to assist them in the lawful exercise of this duty. By §19 the obligation is cast upon every member of the public to assist Magistrates and Peace Officers, who reasonably demand their aid: (i) to make a lawful arrest of a third party; (ii) to prevent the commission of a breach of the peace, or threatened injury to public property, and (iii) to suppress a riot or an affray. Any person who neglects to come to the assistance of such officer when properly called upon to aid him, will be guilty of an offence under §184 of the Penal Code. *C. f.* §65 Police Ordinance 1865. See §20 *post*—aid to a person other than a Peace Officer in executing a warrant.

2. **Reasonably demanding his aid.**—Before the obligation to assist the public officer can arise, he must demand the aid, and the demand must be reasonable. Whether a particular demand was reasonable or not is a question of fact, and depends upon the circumstances of the case. See *R. v. Tajudeen* (1902) 6 *N.L.R.* 16.

3. **Authorized to arrest.**—(i) Arrest by Police Magistrate.—See §§40–41 *post;* (ii) Arrest by Peace Officer.—See §§32–34, 36 *post* and §51 Police Ordinance 1865. There are many Ordinances which confer the right of arrest upon Peace Officers. For examples see §§24, 32, 117 *post.* See also under " Cognizable Offence " §3 *ante.*

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4. **Breach of the peace.**—*e.g.*, (i) Chapter VI. Penal Code—Offences against the State ; (ii) Chapter VIII. Penal Code—Offences against Public Tranquility ; (iii) See cases noted under §§80, 81, 91 regarding offences which involve a breach of the peace.

5. **In the suppression of a riot or an affray.**—(i) Riot.—See §143 *et seq.* Penal Code ; (ii) Affray.—See §156 Penal Code ; (iii) Suppression of riots.—See Chapter VIII. *post* (§§99–103), and the Police Ordinance 1865, §§28, 69, 87.

6. **Section 19 is based on §42 of the Indian Act.**

Aid to person other than Peace Officer executing warrant.

20. When a warrant is directed to a person other than a Peace Officer, any other person may aid in the execution of such warrant if the person to whom the warrant is directed be near at hand and acting in the execution of his warrant.

Peace Officer.—See §3 *ante*.

1. This section is almost identical with §43 of the Indian Act.

2. **Scope of §20.**—§20 declares in effect that where a warrant has been directed to a person, who is not a Peace Officer, who by law is empowered to call upon the public to assist him to act under the warrant—§19 *ante*—such person to whom the warrant is directed may, for the purpose of executing the warrant, obtain the aid of any other person, and nothing done by the latter in the execution of the warrant is to be deemed to invalidate such execution, provided the person to whom the warrant is directed is at hand, and was at the time of its execution acting in the due execution of the warrant.

3. **Warrant.**—*e.g.*, (i) Warrants of arrest.—See §§50 *et seq.*, 62 *et seq.*, 327 (1) *post.* ; (ii) Search Warrants.—See §§68 *et seq.*, 72, 73, 78, 79 *post.*

Warrants of arrest are ordinarily directed to the Fiscal, and may be executed by all Fiscal's Officers, and Peace Officers within the limits of their several and respective jurisdictions, or in any part of the Island by any Police Officer—§52 (1) *post.* The Court issuing the warrant may direct it to any other person or persons by name or office, and such person or persons, or any Police Officer, may execute the same—§52 (2) *post.* When the warrant is directed to a Peace Officer by name it shall not be executed by another Peace Officer unless endorsed to him by name—§52 (3) *post.* When the warrant is directed to more persons than one, it may be executed by all or any one or more of them—§52 (4) *post.*

Search Warrants may be directed to anyone.—See §§68 (1), 69, 72, 73 *post.* A search warrant directed or endorsed to a Peace Officer may, if he is not able to proceed in person, be executed by any other Peace Officer—§78 (1) *post.* The Magistrate who issues a search warrant may attend the search and see that the warrant is duly executed—§79 (1) *post.*

4. **Any other person.**—*i.e.*, any person other than the person to whom the warrant is directed, whether the former is a Peace Officer or not.

5. **Aid.**—*e.g.*, See §§23 *et seq.*, 53, 54 *post.*

6. **The provisions of §20 are applicable to all search warrants issued under Chapter VI. *post*.**—See §73 *post.*

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§21 Public to give information of certain offences.

21. Every person aware—

(*a*) Of the commission of or the intention of any other person to commit any offence punishable under the following sections of the Penal Code, namely, 114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 296, 297, 371, 380, 381, 382, 383, 384, 418, 419, 435, 436, 442, 443, 444, 445 and 446 ;

(*b*) Of any sudden or unnatural death or death by violence, or of any death under suspicious circumstances, or of the body of any person being found dead without it being known how such person came by death ;

shall, in the absence of reasonable excuse—the burden of proving which shall lie upon the person so aware—forthwith give information to the nearest Police Court or to the Officer-in-charge of the nearest Police station or to a Peace Officer or the Headman of the nearest village of such commission or intention or of such sudden unnatural or violent death or death under suspicious circumstances or of the finding of such dead body.

Penal Code.—See §3 *ante*.

Police Court.—See §3 *ante*.

Police Station.—See §3 *ante*.

Peace Officer.—See §3 *ante*.

Offence.—See §3 *ante*.

Obligation of Peace Officers to give information.—See §22 *post*.

Preventive action by Peace Officers.—See §115 *et seq. post*.

1. §21 is based upon §44 of the Indian Act, but is more comprehensive in its terms than the Indian enactment.

2. **Scope.**—Both this section and that following, as well as §§115–118 *post*, have been designed to enable the authorities to detect and deal with crime in its inception. An obligation is, therefore, cast by §21 upon every single member of the public to give prompt information of certain facts, the existence of which, they are cognisant of. By §22 *post* a similar obligation is imposed upon Peace Officers. See Introduction to *Part V. post*.

§21 requires information to be given of two kinds of facts :—

(*a*) Information regarding the commission of, or of the intention of some other person to commit, certain specified offences. These offences are—(i) Certain offences against the State, *viz.*, §§114–122, 126 Penal Code ; (ii) Certain offences against the persons of individuals, *viz.*, §§296, 297 Penal Code ; (iii) and certain offences against property, *viz.*, §§371, 380–384 ; §§418, 419 ; and §§435–436, 442–446 Penal Code.

It should be borne in mind that many Ordinances cast a duty upon persons to report the commission of specified offences, and the giving

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of information by members of the public and public officers is sometimes encouraged by awarding "informers' shares" and the creation of "Reward Funds".*

(*b*). Information regarding any sudden or unnatural death or any death caused by violence, or of the finding of a dead body without it being known how such person came by his death. Thus, where a person has been found to have committed suicide, there is a duty to give information.—*Bucher v. Pusumba* (1916) 3 *C.W.R.* 118.

With regard to the giving of information of ordinary deaths.—See §24 Ordinance No. 1 of 1895.

N.B.—§9 *ante*—jurisdiction of Police Court to investigate the cause of any sudden death. See also §§362 (4), 363, 364 *post.* §362 *et seq.*—jurisdiction of inquirers into deaths to investigate the cause of sudden deaths.

Under §21 the information must be given forthwith to the nearest Police Court, or to the Officer-in-charge of the nearest Police station, or to a Peace Officer or the Headman of the nearest village. *C. f.* §22 *post.*

3. **Penalty.**—Unless the person, who is aware of the facts regarding which information has to be given has some reasonable excuse for not doing so, he must give information forthwith and in the manner indicated. The *onus* of proving the existence and the sufficiency of such reasonable excuse is on the accused. If he fails to prove that he had a reasonable excuse, he will be liable to conviction under the Penal Code—§§111–113, 174, 199, 289. In the case of *Bucher v. Pusumba* (1916) 3 *C.W.R.* 118 the facts were as follows. A person was found to have committed suicide, and the Magistrate charged the accused, in whose house the death took place, under §199 in that 'they having reason to believe that an offence had been committed on the body of one D. (the deceased) intentionally omitted to give information respecting that offence.' De Sampayo, J., in acquitting the accused, *held*, in these terms: "This is an impossible charge, inasmuch as it is necessary under the above section that an offence should in fact have been committed, and suicide is not an offence in the sense of that section . . . The appellants might, of course, have been dealt with otherwise . . . §21 (*b*) of the Criminal Procedure Code makes it obligatory on a person, who is aware of the body of any person being found dead under suspicious circumstances, or withou it being known how such person came by his death, to give information forthwith . . . and §289 of the Penal Code penalises any neglect or omission to perform such statutory duty. This was pointed out to the Magistrate . . ., but he refused to charge the appellants under §289 of

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* See *General Orders 956, 1032* and *Appendix Y* to the *General Orders;* also The Informers' Reward Ordinance No. 1 of 1914 (as amended by Ordinance No. 24 of 1928 and 25 of 1930.) Note also "*The Headmen's Reward Fund*"—*G.O.* 627; "*The Excise Reward Fund*"—*G.O.* 1420; "*The Police Reward Fund*"—Ordinance No. 16 of 1865 §§60 (4), 62. These funds have been recognised by the Legislature—See Ordinance No. 1 of 1914 §2A, 25 of 1909 §14A. The list of Ordinances in *Appendix Y* to *General Orders* needs revision, some of the Ordinances have been repealed and new enactments (*e.g.* Ordinance No. 9 of 1924 §71) have to be added to it. It can be urged that these reward funds are objectionable (I) because the public servants to be rewarded are already paid for the work they do, and (II) that these rewards may act as an incentive in some cases for the fabrication of false cases.

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§21 the Penal Code and *preferred to follow the misleading note* in the new edition of the Criminal Procedure Code, which referred to* §199 *for the penalty for failure to give information under* §21 (*b*)."

4. **"Forthwith."**—*Fernando v. Nikulan* (1920) 22 *N.L.R.* 1, 2 *C.L. Rec.* 135. *Held*, where an enactment directs that a thing shall be done "forthwith" the word is to be construed as meaning "in a reasonable time." What is reasonable must depend upon the circumstances of each case. *Soysa v. Anglo-Ceylon & General Estates Co.* (1916) 19 *N.L.R.* 374, 3 *C.W.R.* 281. *Held*, that "forthwith" meant "without any delay that can possibly be avoided."

5. **Every Person.**—See cases noted under "Every Peace Officer" under §22 *post*.

Peace officer bound to report certain matters.

22. Every Peace Officer shall forthwith communicate to the nearest Police Magistrate or Inquirer having jurisdiction or to his own immediate superior officer any information which he may have or obtain respecting—

(*a*) The commission of any offence within the local jurisdiction in which he is empowered to act ;

(*b*) The occurrence therein of any sudden or unnatural death or of any death under suspicious circumstances ;

(*c*) The finding of the dead body of any person without its being known how such person came by death.

Peace Officer.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

Inquirer.—See §3 *ante*.

Offence.—See §3 *ante*.

Obligation of public to give information.—See §21 *ante*.

Peace Officer to communicate information regarding designs to commit offences.—See §116 *post*.

1. §22 is based upon §45 of the Indian enactment, but the two sections are not identical in their terms.

2. **Scope of §22.**—While §21 dealt with the obligation laid upon the general public to give information with regard to certain facts, §22 casts a wider obligation upon all Peace Officers to communicate "forthwith" to the nearest Magistrate, or Inquirer having jurisdiction, any information they may have or obtain regarding—

(i) The commission of any offence within their local spheres of action. As will be noticed, this obligation is much wider than that imposed by §21 (*a*), and

(ii) The occurrence within their jurisdictions of any sudden or unnatural death, or any death under suspicious circumstances, or of the finding of any dead body without it being known how such person died. *C. f.* §22 (*b*) *ante*, and see §§9 *ante*, 115–119, 362 (4), 363, 364 *post*.

* The note referred to was to the effect that the penalty for a breach of the obligation created by §21 (*b*) was set out in §199 of the Penal Code.

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See also *R. v. Dassanaike* (1913) 2 *Crim. App. R. at p.* 46.—"A Peace Officer is bound to report the commission of any offence of which he has received information." See Introduction to Part V. *post*, and Appendix B.

3. **Penalty.**—A violation of the obligation to report is punishable under §§174, 199, 289 Penal Code. Where a Headman who had received information that A had committed a rape upon B, but omitted to give information to the nearest Police Magistrate of the fact, because he imagined that, as the parties were willing to get married, there was no obligation on his part to report the offence, *held*, that in the circumstances the punishment of the accused should be nominal.—*Balthazar v. Gunawardana* (1895) 1 *N.L.R.* 159.

4. **Forthwith.**—See *Fernando v. Nikulan* and *Soysa v. Anglo-Ceylon & General Estates Co.*, noted under §21 *ante*.

5. **Every Peace Officer.**—Where there are several persons, each of whom is under an obligation to convey information to a public officer, the purpose of the law will apparently be satisfied if such obligation is discharged by one of such persons. The following Indian cases illustrate this proposition—

R. v. Sashi Bhusan Chackrabutty (1878) 4 *Cal.* 623.—Where information has already been given, is it legally necessary for another to give the same information ? "Under these circumstances there was nothing to be gained by further information being given. All that the law intended to secure, namely, that these matters should not be concealed, had been secured . . ." *per* Ainslie & Broughton, J.J.

In re Nayak (1884) 7 *Mad.* 436.—A person legally bound to give information ought not to be prosecuted for omitting to give such information where the authority to whom such information should have been given is already aware of the facts.

R. v. Gopal Singhe (1892) 20 *Cal.* 316 (following *R. v. Sashi Bhusan Chuckrabutty supra*).—Where X, Y and Z were legally bound to give certain information to the Police with regard to a murder, and information of that fact had been duly given by X, *held*, that the omission of Y and Z to give information would not justify their being convicted under §176 of the Indian Penal Code (local §174). See §§115–117 *post*.

6. **General Order 885A.**—"In any cognizable case reported by a . . . Headman, in which no proceedings are instituted either by the reporting officer or by a complainant, if the Magistrate has reason to suppose that the matter has not been fully investigated, or that the true facts are not presented by the report, or that on any other grounds a personal investigation by the Magistrate is, in the interests of justice, desirable, he should send for the complainant and any other person whom he may think fit to examine, record their evidence, and proceed in accordance with Chapter XV."

7. **The Firearms Ordinance, No. 33 of 1916** §38 casts a duty on Peace Officers to give information.

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§23 CHAPTERS IV., V. AND VI. OF THE CRIMINAL PROCEDURE CODE PROVIDE THE GENERAL PROCEDURE BY WHICH PERSONS AND THINGS ARE PRODUCED BEFORE THE COURTS OF LAW.

CHAPTER IV.

OF ARREST, ESCAPE AND RETAKING

A.—Arrest Generally

Arrest how made.

23. (1) In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.

Resisting endeavour to arrest.

(2) If such person forcibly resist the endeavour to arrest him or attempt to evade the arrest, the person making the arrest may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death.

Arrest.—See §§24–25, 27–43, 118 *post.*

Offence.—See §3 *ante.*

1. §23 is based upon §46 of the Indian enactment, which the local section closely follows.

2. **Arrest defined.**—§23 (1) makes it clear that in order to constitute a lawful arrest one or more of three ingredients are necessary. The person to be arrested must either (i) submit to the arrest voluntarily, or (ii) the person arresting must actually touch or, (iii) confine the body of the person to be arrested. This is identical with the English law.—*Genner v. Sparks* (1704) 6 *Mod. Rep.* 173; *Sandon v. Jervis* (1858) *E.B. & E.* 935; *Russen v. Lucas* (1824) 1 *C. & P.* 153. The mere pronouncing of the words of arrest without touching the body of the person it is sought to arrest is not an arrest, unless the person submits to the process and goes with the arresting officer. If he does not submit, there can be no arrest, unless the officer lays hold of him.—*Horner v. Battyn* (1739) *Buller's Nisi Prius* 61. This question becomes one of great importance when a person is accused of escaping from lawful custody and the like.

Arrest without a warrant.—See §§32, 33, 35, 40–42 *post.*

Arrest on warrant.—See §§50–58 *post.*

3. **Rights and duties of arresting officer where arrest is resisted.**—If the person sought to be arrested resists a lawful arrest, the person attempting to make the arrest may use "all means necessary to effect the arrest."—See §23 (2). What are "necessary means" must depend on the circumstances of each case. See *Ossen v. Ponniah* (1932) 12 *C.L.Rec.* 35. If the person to be arrested turns upon or attacks the person seeking to arrest him, the latter may, in the exercise of the

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right of private defence, repel violence by violence, and, in proper circumstances, may even kill his assailant.—§93 Penal Code. Otherwise he may not, in attempting to arrest a person, cause the death of such person, even though such person might otherwise escape, except only where the person to be arrested is accused of an offence punishable with death *—§23 (3). Under the English law a person sought to be apprehended might be killed, if such person had committed a felony and resisted arrest or fled to avoid it, provided his arrest could not be effected by the use of milder means ; and the same rule applied, although the person suspected was innocent, and even where no felony had been committed, provided the person attempting the arrest was a constable acting under a warrant, or upon reasonable suspicion, or credible information. After the arrest the person arrested is not to be subjected to more restraint than is necessary to prevent his escape.—§28 *post*. In cases where an arrest can lawfully be effected without a warrant, a Peace Officer may pursue the accused to any part of the Island.—§34 *post*; but once the arrest has been made there must be no unnecessary delay in either releasing the accused on bail, or sending him before the Magistrate.—§36 *post* ; in no case may he detain the accused for more than twenty-four hours.—§37 *post*. §24

In cases where a private person arrests an accused without a warrant he must make over such person without delay to the nearest Peace Officer or Police Station.—§35 *post*. If any person who has been lawfully arrested, whether on a warrant or otherwise, escapes from custody he can be pursued and recaptured.—§42 *post*. In arresting persons under a warrant the procedure to be followed is set out in §§50–58 *post*.

4. **Search of arrested persons.**—See §§29, 30 *post*.

5. **Power to deprive arrested person of offensive weapons in his possession.**—See §31 *post*.

6. **"Attempt to evade arrest."**—Presumably these words apply to the case of a person, who, without resistance, flees to avoid arrest. Under the English law the same amount of violence might be used, if necessary, against a suspected person who flees, as against one who resists, although of course the burden of proving the necessity for using force would be heavier in such cases. See also §§42, 24, 25 and 27 *post*.

7. **Who are immune from liability to arrest ?**—The Code makes no provision on this point. By reason of the provisions of §6 *ante* the English law on the point must be deemed to apply in Ceylon. Accordingly the King and foreign Sovereigns are privileged from arrest.—See 9 *Halsbury's Laws of England p.* 309 para. 622. See also §§142, 469, 834 Civil Procedure Code.

Search of place entered by person sought to be arrested.

24. If any person acting under a warrant of arrest or having authority to arrest has reason to believe that any person to be arrested has entered into or is within any place, the person residing in or in charge of such place shall, on demand of such person acting or having

*See §§114, 129, 191, 296 and 299 Penal Code.

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§24 authority as aforesaid, allow him free ingress thereto and afford all reasonable facilities for a search therein.

Procedure where ingress not obtainable.

25. If ingress to such place cannot be obtained under the preceding section it shall be lawful in any case for a person acting under a warrant, and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape, for a Peace Officer to enter such place and search therein, and, in order to effect an entrance into such place, to break open any outer or inner door of any place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose and demand of admittance duly made he cannot otherwise obtain admittance.

Warrant of Arrest.—See §§50 *et seq. post.*

Peace Officer.—See §3 *ante.*

1. Sections 24 and 25 are based upon §§47 and 48 of the Indian Act. "Under the Indian Criminal Procedure Code the right to break open doors seems co-extensive with the right to arrest, whether with or without a warrant, and therefore to exist upon reasonable suspicion in case of serious crimes."—Mayne.

2. **Scope of §§24 and 25.**—These two sections refer to cases where either a warrant for the arrest of a person has issued, or wherever any person has the lawful right to arrest another, and the person to be arrested is found to be or to have taken refuge in a house or building. §74 *post* deals with the case where a search for any *thing* has to be conducted within a house or building, and §74 (2) makes the provisions of §25 applicable to such cases. Moreover, §43 *post* makes the provisions of §§24 and 25 applicable to arrests made under §42. It should be noted, however, that the powers conferred by §43 are wider than the powers set out in §25.—See §§42–43 para. 2 *post.*

3. **Person acting under a warrant of arrest.**—See §50 *et seq.*, §62 *et seq.* and §327 (1) *post.* In order to avail himself of the rights conferred upon him by law, the person acting under the warrant must be able to show that he was acting lawfully, and not in excess of his authority.

Person having authority to arrest.—*e.g.*, without a warrant. under §§32, 33, 35, etc., or in the circumstances referred to in §20 *ante.* Such person, too, must show that he was acting lawfully right through and not in excess of his powers.

4. **It is the duty of the person residing in or having charge of the house sought to be searched to allow such officer or person seeking to make the arrest free ingress to the house, and to afford him all reasonable facilities for a search therein.** A failure to do so will be punishable under §§183, 209, 220, or 220A Penal Code. See also §74 (1) *post.*

5. **When may the person making the search break into the house or forcibly enter such house?** The only persons, who may do so are (i) a person acting under a warrant—see para. 3 *supra*, or (ii) a Peace

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Officer, in cases in which a warrant might have issued but could not be obtained without affording the person to be arrested an opportunity of escape, provided always that before he forcibly enters the premises, or breaks into them, such person or Peace Officer notifies to the occupant the object he has in view, and his lawful authority for so acting, and demands from the resident or person in charge that free admittance be given him, and is refused, prevented from entering, or obstructed. *C. f.* §74 *post.*

"In any case in which a warrant may issue".—These words apparently mean: "In any case in which a warrant shall ordinarily issue in the first instance as shown in Column 4 of Schedule II. to this Code, and other cases where a warrant may lawfully issue," *e.g.*, §65 *post.*

6. **If the person seeking to make the arrest finds himself entrapped after entering the premises, he may forcibly break out therefrom.**—See §27 *post.*

7. **Place.**—See §3 *ante.* *C. f.* "House or Place" in §26 *post.* See §70 para. 4 *post.*

8. **Reason to Believe.**—See §62 para. 9, §68 para. 10 *ante.*

9. **R. v. Thankamma (1925) 26 N.L.R. 307.**—Where an Excise officer in executing a search warrant found it impossible to gain admission into the house and sent one of his officers to scale the roof and let himself down—*held*, that the method adopted was in violation of the terms of §25.

Search of persons in place searched under warrant.

26. Whenever a search for anything is or is about to be lawfully made in any house or place in respect of any offence, all persons found therein may be lawfully detained in such house or place until the search is completed, and they may, if the thing sought be in its nature capable of being concealed on the person, be searched for it by or in presence of a Police Magistrate or Inquirer or a Peace Officer not under the rank of Inspector, Korala, Muhandiram, or Udaiyar.

Offence.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

Inquirer.—See §3 *ante.*

Peace Officer.—See §3 *ante.*

Place.—See §3 *ante.*

1. **Scope of §26.**—It would seem that §26 should more logically have been placed under Chapter VI. in the group of sections entitled "General provisions relating to Searches," *viz.*, §§73–76. It is only in an incidental sense that §26 can be said to deal with the right to arrest or to detain persons. The section empowers all persons, who are lawfully entitled to search for *anything* in a house or place, to detain the inmates until the search is concluded. They also have the power to cause the persons of the inmates to be searched, if there is any suspicion or reason to believe that any things searched for are concealed upon their persons. The latter search may be conducted only in the manner

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§26 specified in §26, and not by any persons who happen to be present. In order to justify the detention of persons, or of any search of their persons under this section, all the conditions specified should be fulfilled.

It should be noted that there is no provision corresponding to §26 in the Indian Criminal Procedure Code. The headnote to §26 speaks of a search under a "warrant," but the section itself is silent on this point.

2. **"Anything".**—It is not clear whether by the use of this word and of the expression "if the thing sought" in §26, the Legislature intended to confine the operation of the section to searches for property only. Searches may lawfully be made for the discovering of persons accused of committing offences—*e.g.*, §24; or other persons—*e.g.*, §27; or of things—*e.g.*, §§68, 119, 124.

3. **"In any house or place".**—§26 applies only to searches made in "any house or place." "The word 'place' is generally found in conjunction with other words which give it a colour and is usually controlled by its context."—Stroud. *C.f.* "Place" in §§24 and 25 *ante*, and see *R. v. Careem* (1920) 7 *C.W.R.* 300, *Ferdinands v. Usoof* (1909)12 *N.L.R.* 24, and see §§70 para 4, 74 *post*.

4. **"Lawfully".**—The marginal note to section 26 declares that the section is to apply to searches of persons in places searched "under warrant." This is misleading. What the section actually enacts is "whenever a search for anything is or is about to be *lawfully* made . . ." A lawful search may be made under the sanction of a search warrant—*e.g.*, §§68, 69, 70, 72, 78; or without a search warrant, provided the law allows this being done—*e.g.*, §§79 (2), 124 *post*. Many Ordinances give persons the right to enter premises and to make searches. The following furnish examples:—

Enactment.	*Title*	*Section.*
Ordinance No. 18 of 1843 ..	Possession of Pearl Fishing Nets	2
,, No. 8 of 1844 ..	Lotteries	6
,, No. 3 of 1847 ..	Contracts with Indian Natives	3
,, No. 5 of 1861 ..	Wrecks	17
,, No. 7 of 1863 ..	Merchant Shipping ..	25, 59
,, No. 13 of 1864 ..	Sale of Bread	6
,, No. 6 of 1865 ..	Master Attendants ..	10
,, No. 16 of 1865 ..	Police	51, 59*
,, No. 17 of 1869 ..	Customs	23, 53, 91, 102, 111, 112
,, No. 3 of 1871 ..	Gas Meters	10
,, No. 3 of 1886 ..	Coastwise Passenger Trade	12
,, No. 6 of 1887 ..	Petroleum	16, 35
,, No. 13 of 1888 ..	Merchandise Marks ..	12 (1)
,, No. 17 of 1889 ..	Gaming	7†

* See *Binduwa v. Tyrell* (1913) 4 *C.A.C.* 1; *Michael v. Jamis* (1879) 2 *S.C.C.* 42; *Cornelis v. Cookson* (1902) 6 *N.L.R.* 40; *Gooneratne v. Abeyratne* (1879) 2 *S.C.C.* 89.

† See *Keegal v. Appu* (1897) 3 *N.L.R.* 76; *Police Sgt. v. Portherus* (1920) 22 *N.L.R.* 163 (8 *C.W.R.* 121, 2 *C. L. Rec.* 99); *Silva v. Silva* (1920) 22 *N.L.R.* 27 (7 *C.W.R.* 295); *S. I. Police v. Charles* (1916) 2 *C.W.R.* 98; *Kathir v. Mohideen* (1918) 5 *C.W.R.* 159; *Nugawela v. Sardura* (1898) 3 *N.L.R.* 121; *Hole v. Silva* (1901) 2 *Br.* 317.

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Enactment.	*Title.*	*Section.*
Ordinance No. 6 of 1890 ..	Salt	.. 20
,, No. 8 of 1893 ..	Pawnbrokers ..	.. 29
,, No. 5 of 1894 ..	Indian Native Passenger Ships ..	.. 9
,, No. 8 of 1902 ..	Explosives ..	.. 12, 27 (*e*)
,, No. 8 of 1904 ..	Cacao Thefts ..	.. 11, 16
,, No. 12 of 1905 ..	Old Metal ..	.. 3
,, No. 4 of 1906 ..	Passenger Ships	.. 12
,, No. 5 of 1906 ..	Town Schools ..	.. 12
,, No. 17 of 1906 ..	Pearl Fishery ..	.. 6
,, No. 28 of 1906 ..	Knives ..	.. 8
,, No. 5 of 1907 ..	Vagrancy ..	.. 6 (*a*)
,, No. 6 of 1907 ..	Plant Pests ..	.. 12
,, No. 8 of 1907 ..	Rural Schools	.. 40 (1)
,, No. 16 of 1907 ..	Forests ..	.. 27, 28
,, No. 11 of 1908 ..	Post Office ..	.. 97
,, No. 19 of 1908 ..	Dried Meat ..	.. 6
,, No. 21 of 1908 ..	Rubber Thefts	.. 10, 15
,, No. 35 of 1908 ..	Ceylon Telegraph	.. 41A
,, No. 38 of 1908 ..	Colombo Suburban Dairies and Laundries	.. 9
,, No. 22 of 1909 ..	Stamp ..	.. 81
,, No. 5 of 1910 ..	Opium ..	.. 22, 24 (3)
,, No. 6 of 1910 ..	Municipal Councils	..178, 204, 206, 229
,, No. 8 of 1912 ..	Excise ..	.. 32, 35, 36*
,, No. 10 of 1912 ..	Diseases (Labourers)	.. 5, 7 (2)
,, No. 20 of 1914 ..	Trading with the Enemy	3
,, No. 19 of 1915 ..	Housing and Town Improvement	.. 73
,, No. 33 of 1916 ..	Firearms ..	.. 37
,, No. 1 of 1920 ..	Education ..	.. 10 (1) (*h*), 35, 36, 39

N.B.—Clarke v. Chowdhry (1909) 36 *Cal.* 433.—When executive officers are vested with statutory powers of a special and drastic kind, they must strictly comply with the provisions of the Act before exercising such powers. A general search for arms would be governed rather by the provisions of the Indian Arms Act than by the provisions of the Criminal Procedure Code dealing with searches.—See §66 para. 3 *post.*

5. **The occupant of the house searched, or some person on his behalf, shall be allowed to attend during the search.—§76.** This is a very salutary provision, and is designed to prevent the suggestion from being made, subsequently, that any things found upon the premises were introduced there by the search-party. A list of everything found should be made, and it should designate the various places where each thing was found.—§§71, 75. In cases where the authorities desire to raise a presumption against the possessor of things found from the fact of possession under §114 ill.(*a*) of the Evidence Ordinance, particular care should be taken to note where exactly the things were found, whether

* See *Fernando v. Nadan* (1908) 3 *A.C.R.* 61; *Fernando v. Fernando* (1901) 2 *Br.* 249; *Silva v. Hendrick Appu* (1917) 4 *C.W.R.* 232; *Zilva v. Sinno* (1914) 17 *N.L.R.* 473.

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§26 they were in a receptacle or box which was locked, and, if so, the identity of the person who had the key or control of the box.

A copy of the list, duly signed by the person making the search, should be handed over to the occupant or the person representing him —§76.

6. **If the persons of the inmates have to be searched, this can only be done by or in the presence of the officers specified in §26.** In the case of the search of any female, the search can only be conducted by another female, and "with strict regard to decency."—§30.

7. **Detention of the inmates during search.**—The detention can only extend until the search is completed, unless any of the inmates are liable to be lawfully detained on other grounds, *e.g.*, under §70 (*e*). See *Gooneratne v. Abeyratne* (1879) 2 *S.C.C.* 89. See §42 para. 9 *post.*

8. **Forcible entry into premises to be searched.**—If ingress cannot be obtained it is the duty of the person making the search, upon demand made by the occupant of the premises, to "produce" his warrant, and thereafter a duty is cast upon the occupant to give the search party free ingress, and to afford it all reasonable facilities in making the search. —§74 (1). If ingress cannot be obtained in the manner stated, the premises may be entered by force in the manner provided by §25 *ante.* Apparently there can be no forcible entry in cases where the search party is not armed with a search warrant, except, of course, in cases where the law gives this right in any particular case.

9. ***C. f.*** **§124 (4)** ***post.*** Searches by Inquirers.

Power to break open doors and windows for purposes of liberation.

27. Any person authorized to make an arrest may break open any outer or inner door or window of any place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

1. §27 is based upon §49 of the Indian Enactment. It applies to all persons authorised to make an arrest and who, having lawfully entered a building in search of the persons wanted, are thereafter entrapped within the premises. All such persons are by this section empowered to break open any outer or inner door or window in order to liberate themselves.

2. **Authorised to make an arrest.**—*viz.*, either with or without a warrant. See §§24, 25 *ante.*

3. **Having lawfully entered.**—See §§24, 25 *ante* and *c. f.* §74 *post.*

4. If a person who has been arrested makes his escape or is rescued from lawful custody, he may be pursued and re-arrested in any place.—§42 *post.* By §43 the provisions of §27 are made applicable to arrests under §42, although the person making the arrest is not acting under a warrant and is not a Peace Officer having authority to arrest.

No unnecessary restraint.

28. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

1. §28 is based upon §50 of the Indian enactment and is designed for the protection of the person arrested. Having once been arrested

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he is not to be subjected to more restraint than is necessary to prevent his escape. The use of handcuffs would be justified if the offence for which the person was arrested was of a serious kind, *e.g.*, murder, or if such person resisted arrest and there is a likelihood that he might attempt to escape or resist the officers in charge of his person. *C. f. Perera v. Allis* (1891) 2 *C.L.Rec.* 39.

2. **Search of arrested person.**—See §§29, 30 *post.*

3. **Power to deprive arrested person of offensive weapons.**—See §31 *post.*

4. **Not only is the person arrested entitled to be subjected to no more restraint than is necessary to prevent his escape, but he is also entitled to claim that he be handed over to the higher investigating officers without unnecessary delay.** *e.g.*, see §§33, 35–37, 126A. Moreover, in certain cases he may obtain his liberty by giving security for his appearance before the proper authority when called upon to do so, *e.g.*, §§29, 33, 36, 39, 51, 54, 58, 126, 289, 394–396 *post.* *C. f.* §§129 (2), 289 (2), 293 *post.*

5. **Procedure on escape of accused.**—See §§42, 43 *post.*

Search of persons arrested.

29. Whenever a person—

(*a*) Is arrested by a Peace Officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail ; or

(*b*) Is arrested without warrant or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail ;

the Peace Officer making the arrest, or, when the arrest is made by a private person, the Peace Officer, to whom he hands over the person arrested, may search such person and place in safe custody all articles other than necessary wearing apparel found upon him ; and any of such articles which there is reason to believe were the instruments or the fruits or other evidences of the crime may be detained until his discharge or acquittal.

Peace officer.—See §3 *ante.*

Warrant which does not provide for . . . bail.—See §51.

1. §29 is based upon §51 of the Indian enactment and together with §30 deals with the powers of the person making an arrest to search the person of the party apprehended.

2. **Scope of §29.**—§29 deals with three classes of cases, *viz.*,

(*a*) Where the arrest is by a Peace Officer acting under a warrant which does not provide for the taking of bail—See §51 *post*;

(*b*) Where the arrest is by a Peace Officer under a warrant which provides for the taking of bail,—See §51 *post*, but the person apprehended is unable to furnish bail,

or (*c*) Where the person apprehended cannot be enlarged on bail or is unable to furnish security,—

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§29 in each of these cases the Peace Officer who effects the arrest, or, where the arrest is made by a private person, the Peace Officer, to whom the accused is handed over under §35 *post*, has the power to search the person of the accused, subject to the provisions of §30 *post*, and to take from him and place in safe custody all articles, other than necessary wearing apparel, found upon such person. He may also detain, whether they belong to the accused or not, all instruments used in the commission of the offence or the fruits of, or other evidence of the crime, until the accused is discharged or acquitted. Under §31 *post* he may be deprived of offensive weapons. Under §419 *post* it is the duty of the Peace Officer to report forthwith to the Police Magistrate the fact of the seizure of the articles found by him, and the Magistrate will make such order as he thinks fit. C. *f.* §413 as to the disposal of such things at the conclusion of the inquiry or trial. Should a list be made of the things found ? —See §75 *post*. See also *Costa v. Peris* (1933) 13 *C. L. Rec.* 73.

3. **Warrant which provides for the taking of bail.**—*e.g.*, see §§51, 54, 58 (1),(3) *post*.

4. **Cannot legally be admitted to bail.**—*e.g.*, see §§33 (1), 36, 39 *post*.

5. **In safe custody.**—These words apparently mean that the Peace Officer is by law held personally responsible for all things taken charge of by him under §29 until he hands them over to the higher investigating officers. *C. f.* §§31, 419 *post*.

6. **All articles other than necessary wearing apparel.**—*R. v. O'Donnell* (1835) 7 *C. & P.* 138. A constable who arrests an accused has no right to take away from him any money which he may have, unless it is in some way connected with the offence charged, as by so doing he may deprive the accused of the means of making his defence. *C. f. R. v. Burgiss* (1836) 7 *C. & P.* 489, and *R. v. Rooney* (1836) 7 *C. & P.* 515.

7. **Search of the persons of females.**—See §30 *post*.

8. **Impounding of documents or things.**—See §§77, 413 *post*.

Mode of searching women.

30. Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency.

1. §30 is based upon §52 of the Indian enactment and calls for no special comment.

2. **Whenever it is necessary.**—*e.g.*, see §§ 26, 29 *ante* and §31 *post*.

3. *C. f.* §124 (4) *post*. Searches by Inquirers.

Power to seize offensive weapons.

31. The person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person and shall deliver all weapons so taken to the court or officer before which or whom the person making the arrest is required by law to produce the person arrested.

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This Code.—See §1 *ante*.

1. §31 is based upon §53 of the Indian enactment and is merely an amplification of the powers of search conferred upon persons making arrests by §§26, 29 *ante*. §31 appears to have been designed to protect the person effecting the arrest from violence at the hands of the accused. *Leigh v. Cole* (1853) 6 *Cox.* 329 *at p.* 332.

2. **By §419 *post* it is directed that the officer making a search under §29 *ante* shall forthwith report the fact of the seizure of the articles found to the Magistrate, who will then make such order as he thinks fit regarding them.**

By §31 it is provided that, in the case of offensive weapons taken from an accused, the person making the arrest is to deliver them over to the court or officer before which or whom the arrested person is required by law to be produced. *C. f.* §75, 127 (1) *post*.

3. **Court or officer before which or whom the person making the arrest is required by law to produce the person arrested.**—*e.g.*, see §§33, 35, 36, 37, 54, 58, 126A, 129 *post*.

4. ***R. v. Tajudeen* (1902) 6 *N.L.R.* 16.** When a person charged with an offence has in his hands dangerous weapons, it is the right of the persons arresting him to remove them from him.

5. **Impounding of documents or things found.**—See §§77, 413 *post*.

6. ***C. f.* §124 (4) *post*.** Searches by Inquirers.

B.—ARREST WITHOUT A WARRANT

When Peace Officers may arrest without warrant.

32. (1) Any Peace Officer may, without an order from a Magistrate and without a warrant, arrest—

(*a*) Any person who, in his presence, commits any breach of the peace;

(*b*) Any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned ;

(*c*) Any person having in his possession, without lawful excuse (the burden of proving which excuse shall lie on such person), any implement of house-breaking ;

(*d*) Any person, who has been proclaimed as an offender ;

(*e*) Any person in whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing ;

(*f*) Any person who obstructs a Peace Officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody ;

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§32 (*g*) Any person reasonably suspected of being a deserter from Her Majesty's army or navy ;

(*h*) Any person found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence ;

(*i*) Any person who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of this Island, which, if committed in this Island, would have been punishable as an offence and for which he is under any law relating to extradition or under "The Imperial Fugitive Offenders Act, 1881," or otherwise liable to be apprehended or detained in custody in this Island.

(2) Nothing in this section shall be held to interfere with or modify the operation of any enactment empowering a Peace Officer to arrest without a warrant.

Peace Officer.—See §3 *ante*.
Police Magistrate.—See §3 *ante*.
Cognizable Offence.—See §3 *ante* and Column 3 of Schedule II. *post*.
Cognizable Case.—See §3 *ante* and Column 3 of Schedule II. *post*.
Arrest.—See §23 *ante*.
Other cases where an arrest can be made without a warrant.—See §§33, 35, 40–42, 102–103, 117 *post*.
Arrest on warrant.—See §§50–58 *post*.
Compensation for groundless arrest.—See §253 C *post*.

1. §32 is based upon §54 of the Indian enactment, but the two differ in material respects.

2. **Scope of §32.**—It will be observed at the outset that §32 does not confer the right of arrest in cases of threatened offences ; it is only when an offence has been committed, or when there is reason to believe that an offence has been committed, that §32 applies. The same applies in the case of §§33, 35, 40 and 42. Where it is feared that an offence will be or is likely to be committed, the law provides the necessary procedure under §§81, 82, 83, 115, 116, 117, 118 *post*.

Sub-section (1) of §32 enumerates the cases in which a Peace Officer is entitled to arrest a person accused of committing certain kinds of offences without a warrant or order from a Magistrate. Sub-section (2) draws attention to the fact that there are many legal enactments, other than §32, which empower Peace Officers to arrest accused persons without warrants of arrest.

§32 (1) applies only to "Peace Officers," *i.e.*, Police Officers, and Headmen appointed by a Government Agent in writing to perform Police duties.—See §3 *ante*.

3. **Without an order from a Magistrate.**—*e.g.*, see §§19 *ante* and 40, 41, 115, 117–118 *post*.

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4. **Arrest.**—The definition of a legal " arrest " is to be found in §23 *ante*. In the case of *R. v. Madar* (1885) *A.W.N.* 59, the Full Court laid down the law in these terms : " This is not the first by a score of times that we have found this course of conduct pursued by the Police, (*i.e.*, keeping a person for days in a condition of restraint without formally arresting him) and one of the main objects of the Division Bench in referring this appeal to the Full Bench was that once and for all it should be declared in no uncertain tones, not only that such procedure is illegal, but that it is a gross and unwarrantable breach of the powers entrusted to Police Officers . . . . It is intolerable that the Police should pursue the investigation of crime, by defying all the provisions of the law for the protection of the subject, under the colourable pretention that no actual arrest has been made, when, to all intents and purposes, a person has been in their custody . . ." See *Gooneratne v. Abeyratne* (1879) 2 *S.C.C.* 89, where Phear, C.J., made a similar observation.

N.B. §36.—An accused who has been arrested without a warrant must be let out on bail or taken " without unnecessary delay " to the Magistrate having jurisdiction in the case.

N.B. §37.—No accused who has been arrested without a warrant is to be detained in the custody of the officer making the arrest for more than twenty-four hours.

Arrest by Peace Officer in non-cognizable cases.—See §33 *post.*

Arrest by private persons in non-cognizable cases.—See §35 *post.*

Arrests by Police Magistrates.—See §§40, 41 *post.*

Arrests in the case of riots, etc.—See §§102–103 *post.*

Arrests of an accused who has escaped from custody.—See §§42, 43 *post.*

Other powers relating to arrests.—See §§34, 36, 38, 39 *post.*

5. **§32 (1) (a).**—There is no provision corresponding to this sub-section in §54 of the Indian Criminal Procedure Code.

Breach of the peace.—As to what offences involve a breach of the peace,—see §§9, 19 (*b*), (*c*), 80–81, 84 *post.* Most of the decided cases will be found cited thereunder.

Wickremasinghe v. Coore (1916) 19 *N.L.R. at p.* 100.—During the period of martial law the Officer Commanding the Troops had issued orders to the Police to practise his men in the drill prescribed for " street blocking." In the course of such drill the defendant's constables entered upon the land of the plaintiff, who requested them to leave his premises. A struggle ensued, whereupon the defendant arrested the plaintiff and took him to the Police station. *Held*, " . . . The Police were . . ., in my opinion, justified in entering on the respondent's compound by the direction of the military authorities, and were therefore not trespassers and the respondent had no right to eject them, and the act which he himself admits he committed in pushing the *tat* against constable M. was both a *breach of the peace* and an act of *obstruction* of the Police in the exercise of their duty, which justified his immediate arrest under §32 (1) of the Criminal Procedure Code . . ." *per* Shaw, A.C.J.

In his presence.—It is only when the breach of the peace is committed in the presence of the Peace Officer that he has the power of arrest under this sub-section. See §35 para. 3 *post.*

6. **§32 (1) (b).**—This sub-section is identical in its terms with Clause 1 of §54 (1) of the Indian Code.

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§32

Cognizable offence.—See §3 *ante* and Column 3 of Schedule II. *post.*

Since the Schedule declares that the offence of affray (§157 Penal Code) is cognizable, it would appear that the old case of *Jayen v. Allosinno* (1893) 2 *S.C.R.* 78 cannot be regarded as sound law under this Code.

Reasonable complaint.—*R. v. Behary* 7 *W.R.* 3. "What is a *reasonable complaint* or *suspicion* must depend on the circumstances of each particular case ; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not mere vague surmise or information. Still less have the Police any power to arrest persons . . . merely on the chance of something being hereafter proved against them . . ." *per* Markby, J. See *Appu v. Hamy* (1900) 1 *Br.* 34.

Credible information.—*R. v. Amarsang* 10 *Bom.* 506 *at p.* 511. "The law . . . authorizes the arrest, not only of persons against whom a reasonable complaint has been made, or a reasonable suspicion exists of their having been so concerned, but also of persons against whom '*credible information*' to that effect has been received." Thus, in *Cornelis v. Cookson* (1902) 6 *N.L.R.* 40, it was held, where a Police officer had received information, whether true or false, which led him to think that a person was a receiver of stolen property, and whereupon a watch was set on the premises, and it was found that an habitual criminal went into the house with a parcel, that this amounted to *credible information*, and that no action lay against the Police Officer for wrongful arrest.

Reasonable suspicion.—See *R. v. Behary* (*supra*). In the case of *Bhawoo v. Mulji Dayal* (1888) 12 *Bom.* 377, the accused was a Police Officer who was on duty in the market place. He noticed the complainant carrying a number of things under his arm, and, it being early in the morning, he suspected that the things were stolen property and questioned the complainant. The answers not proving satisfactory, an altercation ensued and the accused arrested the complainant. *Held*, that the conviction of the accused in these circumstances was bad, inasmuch as in making the arrest he was actuated by a "*reasonable suspicion*" that the things were stolen property. See §32 (1) (*g*) *infra* and §70 *post.*

If the information is that a person is about to commit a cognizable offence the Peace Officer may act under §117 *post.*

7. **§32 (1) (c).**—This sub-section is identical in its terms with Clause 2 of §54 (1) of the Indian Code.

§449 of the Penal Code makes it an offence for any person to have in his custody or possession any instrument of house-breaking without lawful excuse. §32 (1) (*c*) of this Code gives a Peace Officer the right to arrest such person without a warrant, or order of a Magistrate.

Burden of proof.—See §105 Evidence Ordinance.

Possession.—Does this word mean actual *de facto* possession, or does it include such constructive possession as is specified in §25 of the Penal Code ? The term "possession" is not defined by this Code and §3 (1) *ante* provides that all words and expressions "used herein and defined in the Penal Code and not hereinbefore defined" shall be deemed to have the meanings respectively attributed to them by that Code. It is, therefore, possible to argue that the word is used here in the larger

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sense, so that where a man's wife is found to be in possession of an implement of house-breaking, under circumstances which show that she had them on account of her husband, this would justify the arrest of the husband under the provisions of this sub-section.

8. **§32 (1) (d).**—This sub-section is almost identical with Clause 3 of §54 (1) of the Indian Code.

Proclaimed as an offender.—See §59 *et seq. post.*

9. **§32 (1) (e).**—This sub-section is based upon Clause 4 of §54 (1) of the Indian Code.

Stolen property.—Defined §393 Penal Code. All property obtained by extortion, robbery, forgery, cheating, criminal misappropriation, or criminal breach of trust fall within the designation of stolen property. See §413 para. 11 *post* and §70 *post.*

Reasonably be suspected of having committed an offence with reference to such thing.—See under §32 (1) (*b*) *supra.*

And.—Should this word be construed in its conjunctive sense or in its disjunctive sense as meaning " or ? " It would appear that the former is the meaning which the Legislature intended it to have.

Possession.—See §32 (1) (*c*) *supra.*

Cornelis v. Cookson (1902) 6 *N.L.R.* 40.—See §32 (1) (*b*) *supra.* *Nawana v. Fernando* (1908) 11 *N.L.R.* 276.—See §32 (1) (*h*) *infra.*

The articles taken possession of from the accused must be dealt with in the manner provided by §§29, 31 and 419.

10. **§32 (1) (f).**—This sub-section is identical in its terms with Clause 5 of §54 (1) of the Indian Code.

Obstructs a Peace Officer while in the execution of his duty.—See §§149, 182, 183, 219, 220, 220A, 323, 324, 344 Penal Code.

Wickremasinghe v. Coore (1916) 19 *N.L.R. at p.* 100.—See §32 (1) (*a*) *supra. R. v. Fernando* (1930) 7 *T.L.R.* 132. *VanCuylenberg v. Fernando* (1930) 32 *N.L.R.* 45.

Bhawoo v. Mulji Dayal (1888) 12 *Bom.* 377.—See §32 (1) (*b*) *supra. Held further,* that the arrest of the complainant was lawful under §54 Clause 5 of the Indian Criminal Procedure Code of 1882, as there was an obstruction of a Police Officer in the execution of his duty.

Escape from lawful custody.—See §§218, 219, 220, 220A and 221 Penal Code. See also under §32 (1) (*h*) *infra.*

May a person who rescues another from lawful custody be arrested without a warrant ? As such conduct would amount to an " obstruction " of the exercise of the rights of a Peace Officer it would appear that such a person can be lawfully arrested.

11. **§32 (1) (g).**—See §82 (*a*) *post.* This sub-section is based upon Clause 6 of §54 (1) of the Indian Code.

Deserter.—See §154 Army Act (*Manual of Military Law p.* 515 and Imperial Statutes applicable to Ceylon p. 115). Officers and men of the local Defence Forces when duly called out on ' active service ' or when undergoing drill, exercise, training, inspection, or voluntarily doing any duty with any regular forces are liable to the provisions of the Army Act.—See Ordinance No. 8 of 1910, §§13, 19. See also §9 of the Naval Deserters Act 1847 (10 & 11 *Vict. c.* 62) reproduced at p. 110 in the Imperial Statutes applicable to Ceylon.

Reasonably suspected.—See §§32 (1) (*b*) *supra.*

Reason to believe.—See §62 para. 9, §68 para. 10 *post.* See also §116 *post.*

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§32

12. §32 (1) (h.)—This sub-section has no counterpart in the Indian Code, but *c. f.* §55 (1) (*a*) of the Indian Act, and §82 (*a*) *post.*

Reason to believe.—*C. f.* §32(1)(*b*)(*g*) *supra*, and §62 para. 9, §68 para. 10 *post.*

In the case of *Nawana v. Fernando* (1908) 11 *N.L.R.* 276 it was laid down, where an accused was arrested upon *mere suspicion* and he escaped from custody, that the offence under §219 of the Penal Code was not committed. This decision led to the addition of §220A to the Penal Code, under which such conduct as was proved in *Nawana v. Fernando* would now be punishable.

Cognizable offence.—See §3 *ante.*

13. §32 (1) (i).—This sub-section closely follows Clause 7 of §54 (1) of the Indian Act which superseded the case of *In re Mukund* (1894) 19 *Bom.* 72. This case decided that §54 of the Indian Criminal Procedure Code 1882 did not empower the arrest, without a warrant, of a British subject in India for an offence committed outside India.

Reasonable complaint.—See §32(1)(*b*) *supra.*
Credible information.—See §32(1)(*b*) *supra.*
Reasonable suspicion.—See §32(1)(*b*) *supra.*

This sub-section is intended to supplement the provisions of the Fugitive Offenders Act 1881, and the Extradition Acts of 1870—1906. The normal method of apprehending the accused is by moving the local Courts upon *prima facie* evidence, whereupon the Court orders the arrest of the person wanted. This sub-section appears to have been designed to meet a case where the accused arrives in Ceylon in advance of the evidence necessary to move the Court, with the possibility that he may have left the Colony by the time the evidence reaches this country. —See *Dias on the Law of Extradition* p.p. 13, 27, 59. See also Ordinance No. 10 of 1877.

14. §32 (2).—There are many enactments* creating offences which declare that such offences shall be deemed to be " cognizable " or which expressly confer the right to arrest without a warrant. These laws are saved by §32 (2). The following furnish examples :—

Enactment.	*Title.*	*Section.*
Ordinance No. 16 of 1865 ..	Police ..	.. 51, 53, 59, 60 (2)† 73A (2), 86
,, No. 8 of 1866 ..	Contagious Diseases	.. 7
,, No. 17 of 1869 ..	Customs ..	.. 102A
,, No. 1 of 1873 ..	Lunacy ..	.. 19, 20, 21
,, No. 5 of 1873 ..	Tramways ..	.. 9
,, No. 1 of 1886 ..	Youthful Offenders	.. 39
,, No. 1 of 1889 ..	Courts ..	.. 35
,, No. 7 of 1889 ..	Vagrancy ..	.. 2‡
,, No. 17 of 1889 ..	Gaming ..	.. 6 (but see §§7, 9)
,, No. 6 of 1890 ..	Salt	.. 19, 20
,, No. 15 of 1890 ..	Fortifications and Official Secrets ..	.. 10
,, No. 19 of 1891 ..	Jaffna Markets..	.. 13

* See list given under "cognizable offence" in §3 *ante.*

† See the old case of *Thiedman v. Fernando* (1896) 2 *N.L.R.* 149, and *Saffar v. Siriwardana* (1909) 13 *N.L.R.* 20.

‡ See *Weerakoon v. Mendis* (1925) 27 *N.L.R.* 340.—§184 para. 14 *post.*

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Enactment.	*Title.*	*Section.*
Ordinance No. 8 of 1893 ..	Pawnbrokers	21
,, No. 3 of 1897 ..	Quarantine and Prevention of Diseases ..	8 (1)
,, No. 15 of 1898 ..	Criminal Procedure ..	3 (1), column 3 of Schedule II.
,, No. 9 of 1902 ..	Railways	38*
,, No. 8 of 1904 ..	Cacao Thefts Prevention ..	17 (2)
,, No. 5 of 1907 ..	Vagrancy	10
,, No. 16 of 1907 ..	Forests	48
,, No. 25 of 1909 ..	Cattle Disease	13
,, No. 5 of 1910 ..	Opium	22, 24 (3)
,, 1 & 2 Geo. V. c28	Official Secrets Act 1911 ..	6
,, No. 8 of 1912 ..	Excise	33, 34†
,, No. 24 of 1914 ..	Aerial Navigation ..	8
,, No. 33 of 1916 ..	Firearms	36
,, No. 14 of 1917 ..	Supervision of Aliens ..	7
,, No. 19 of 1919 ..	Former Enemy Aliens ..	4 (3), 6
,, No. 20 of 1923 ..	Ceylon Passport ..	4 (1)

15. **All the rights, obligations, and duties attending arrests arise wherever a lawful arrest is effected without a warrant.**—See §23 *note* 3 *ante*.

16. **Immunity from arrest.**—See §23 para. 7 *ante*.

17. **Power of Inquirers to arrest.**—See §128 *post*.

Powers of arrest in non-cognizable cases.

33. (1) When any person in the presence of a Peace Officer is accused of committing a non-cognizable offence and refuses, on the demand of such Peace Officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such Peace Officer in order that his name or residence may be ascertained, and he shall, within twenty-four hours from the arrest, exclusive of the time necessary for the journey, be taken before the nearest Police Court unless before that time his true name and residence are ascertained, in which case such person shall be forthwith released on his executing a bond for his appearance before a Police Court if so required.

(2) When any person is accused of committing a non-cognizable offence and a Peace Officer has reason to believe that such person has no permanent residence in the Colony and that he is about to leave the Colony, he may be arrested by such Peace Officer and shall be taken forth-

*See *Jayawardena v. William* (1920) 21 *N.L.R.* 379; 7 *C.W.R.* 146.

†See *R. v. Careem* (1920) 7 *C.W.R.* 300. *C.f. Ferdinands v. Usoof* (1909) 12 *N.L.R.* 24—See §70 *post*.

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§33 with to the nearest Police Magistrate, who may either require him to execute a bond with or without a surety for his appearance before a Police Court or may order him to be detained in custody until he can be tried.

Peace Officer.—See §3 *ante.*

Non-cognizable offence.—See §3 *ante.*

Arrest.—See §23 *ante.*

Police Court.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

Arrest without a warrant.—See §§32 *ante.*, 35, 40 – 42 *post.*

Arrest on warrant.—See §§50–58 *post.*

Bail.—See §§35, 36, 39, 51, 63, 65, 126 – 127, 394 – 400, 410 – 412, 436.

1. §33 (1) is based upon §57 (1), (3) of the Indian Code, whereas §33 (2) does not appear to have been based upon any specific provision of that enactment.

2. **Scope of §33.**—When any person is accused of committing a non-cognizable offence in the presence of a Peace Officer, such officer may demand the person accused to furnish him with his name or residence. If the accused refuses to comply with the request, or if the Peace Officer has reason to believe that the information supplied is false, he may arrest the accused for the purpose of ascertaining his correct name and address. When this has been obtained the accused is entitled to be released forthwith on his executing a bond to appear in Court when ordered to do so. See §36 *post* and *R. v. Fernando* (1930) 7 *T.L.R.* 132. If, however, the information is not supplied, or if the accused is unable to give security for his appearance, it is the duty of the Peace Officer to send him within twenty-four hours of the arrest to the nearest Police Court.—§33 (1). Moreover, if the Peace Officer has reason to believe that such person has no permanent residence in Ceylon, and that he is about to leave the Island, he can be arrested, but in such a case he must be taken forthwith to the nearest Magistrate, who may either order him to give security for his due appearance in Court, or may order his detention pending trial.—§33 (2). See *Attorney-General v. Skinner infra.*

2A. **"Reason to believe."**—See §62 para. 9 and §68 para. 10 *post.*

3. **"Forthwith."**—This word means " within a reasonable time." *Fernando v. Nikulan Appu* (1920) 22 *N.L.R.* 1, 8 *C.W.R.* 65, 2 *C.L.Rec.* 135. In the case of *Soysa v. Anglo-Ceylon & General Estates Co.* (1916) 19 *N.L.R.* 374, 3. *C.W.R.* 281, it was construed to mean "without any delay that can possibly be avoided." See *Gunasekera v. Arsekularatne* (1924) 5 *C.L.Rec.* 201; *Weerakoon v. Fernando* (1924) 30 *N.L.R.* 342, 9 *C.L.Rec.* 77. See also §§42–43 para. 5 *post.*—" *Immediately,* " and §§60 (7), 71 *post.*

4. **Non-cognizable offence.**—This expression is defined in §3 *ante.* Column 3 of Schedule II. *post* shews what offences under the Penal Code are non-cognizable. With regard to other laws, the schedule enacts that such offences are non-cognizable if they are punishable with imprisonment for less than three years, or punishable with a fine only. To this rule various ordinances create special exceptions by declaring that such offences shall be cognizable or non-cognizable as the case may be.—See §3 *ante.*

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5. ***Attorney-General v. Skinner (1912) 15 N.L.R. 222, 1 C.A.C. 61.***—Two warrants were duly issued by a Police Court for the arrest of H. in respect of a non-cognizable offence. H. was arrested by the Police, who, at the time of the arrest, were not in possession of either warrant. The officer who made the arrest released H. on a Police bail bond to which S. signed as surety. The Magistrate held that inasmuch as H. was arrested without a warrant, the bail bond for his release was invalid. *Held per* Lascelles, C.J.: "The question seems to turn upon the construction of §33 of the Criminal Procedure Code and §55 of . . . the Police Ordinance. Under the former section it is provided by sub-section (2) that if a Police officer has reason to believe that a person who is accused of committing a non-cognizable offence is about to leave the Colony, he may be arrested by the Police officer, and thereupon he may be taken forthwith to the nearest Police Magistrate, who may either require him to execute a bond with or without a surety, or may order him to be detained in custody until trial. Now, if the Police . . . had acted under sub-section (2) of §33 of the Criminal Procedure Code, their action would have been beyond question. H., on arrest, would have been immediately taken before the Police Magistrate . . . But the Police have not conformed to the procedure prescribed by the sub-section . . . It is contended that the arrest, and therefore the bail bond, is valid under §55 of the Police Ordinance. But this section seems to me to apply only to cases where a person is lawfully taken into custody by a Police officer without a warrant. These cases are detailed in §33 of the Criminal Procedure Code, and it seems to me that §55 must apply to cases of this character. Otherwise there would be a serious discrepancy between §55 and §33 of the Criminal Procedure Code. It is urged that there is a distinction between the two sections, on the ground that §33 deals with Peace Officers, and §55 refers only to Police Officers of the regular Police. But as the term "Peace Officer" in the Code includes all Police officers, I do not see that anything can be based on this distinction . . ." Had the accused been taken before the Magistrate and had the bond been duly executed under §33 (2) no difficulty would have arisen.

6. ***Hatton v. Treeby (1897) 2 Q.B.D. 452.***—A constable who sees a person riding a bicycle at night without a light, contrary to the local lighting regulations, has no power to stop him for the purpose of ascertaining his name and address. See *VanCuylenberg v. Fernando* (1930) 32 *N.L.R.* 45.

7. **All the rights, obligations, and duties attaching to arrests arise whenever an arrest is lawfully made under this section over and above the special procedure prescribed in the section itself.**—See §23 *note* 3 *ante.*

8. **Powers of private persons to arrest conferred by other laws.**—*e.g.*, §86 Police Ordinance 1865; §21 Pawnbrokers Ordinance 1893. The Botanic Gardens Ordinance 1928 §4 (2) (3).

9. **Take.**—See §35 para 4; §§36–37 para. 5 *post* and §54 para. 10 *post.*

10. **Immunity from arrest.**—See §23 para. 7 *ante.*

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§34

Pursuit of offenders into other jurisdictions.

34. For the purpose of arresting any person whom he has power to arrest without a warrant a Peace Officer may pursue any such person into any part of this Island.

Peace Officer.—See §3 *ante.*

Arrest.—See §23 *ante.*

Power to arrest without a warrant.—§§32–33 *ante*, 40–42 *post.*

Re-arrest of arrested person who makes good his escape.—See §42 *post.*

Arrest outside jurisdiction on a warrant.—See §§55–58.

1. §34 is based upon §58 of the Indian Code.

2. **Scope of §34.**—This section forms part of a number of sections which deals with certain incidental matters connected with the law relating to the arrest of persons, *e.g.*, §§19, 23–25, 27–31 *ante*, 35–43 *post.* §34 gives any Peace Officer, who has the right to arrest any person without a warrant, the power to pursue such person into any part of the Island for the purpose of effecting the arrest. If an accused who has been arrested makes good his escape he can be pursued and re-arrested.—§42 *post.*

3. ***Gressy v. Perera (1901) 5 N.L.R. 116.***—Police Constables are Peace Officers and they have power to perform their duties over the whole Island. If an accused who has been lawfully arrested by a Police Constable makes his escape, it is the duty of the Police to pursue and arrest him on the original charge.—See §42 *post.*

Arrest by private persons. Procedure on such arrest.

35. Any private person may arrest any person who, in his presence, commits a cognizable offence or who has been proclaimed as an offender, or who is running away and whom he reasonably suspects of having committed a cognizable offence, and shall without unnecessary delay make over the person so arrested to the nearest Peace Officer or in the absence of a Peace Officer take such person to the nearest Police station. If there is reason to believe that such person comes under the provisions of section 32 a Peace Officer shall re-arrest him. If there is reason to believe he has committed a non-cognizable offence and he refuses, on the demand of a Police Officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false or is a person who such officer has reason to believe is about to leave the Colony, he shall be dealt with under the provisions of section 33. If there is no reason to believe that he has committed any offence he shall be at once discharged.

Arrest.—See §23 *ante.*

Cognizable offence.—See §3 *ante.*

Non-cognizable offence.—See §3 *ante.*

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Proclamation of accused.—See §59 *post.*

Powers regarding escaping accused.—See §§34, 42.

Peace Officer.—See §3 *ante.*

Police Station.—See §3 *ante.*

Police Officer.—See §3 *ante.*

Cases where Peace Officer may arrest without a warrant.—See §§32–33 *ante.*

Arrest by Inquirer.—See §128 *post.*

Arrest by Magistrate.—See §§40–41 *post.*

Duty of private persons to aid Peace Officers and Magistrates.—See §19 *ante.*

Penalty for causing Peace Officer to arrest without good cause.—See §253C *post.*

1. §35 is based upon §59 (1), (2) and (3) of the Indian Code, which it closely follows.

2. **Scope of §35.**—§§32–33 dealt with the right of a Peace Officer to arrest persons without a warrant. §35 deals with the right of private persons, *i.e.*, persons who are neither Peace Officers nor Magistrates, to take persons into custody without a warrant. §§40–41 deal with the right of arrest by Police Magistrates.

A private person may only arrest a person without a warrant, if such person—

(i) actually commits (*c. f.* §33 *ante*) a cognizable offence in his presence, or

(ii) if the accused is a proclaimed offender (see §59 *post*), or

(iii) if the accused is "running away," and who it is reasonably suspected has committed a cognizable offence.

Except in the cases (ii) and (iii) *supra*, it would appear that under no circumstances would a private person be justified in arresting a person on mere suspicion or information. The accused must be found committing a cognizable offence in the presence of such person.—*Reg. v. Potadu* (1888) 11 *Mad.* 480. See *Peiris v. Anderson* (1928) 6 *T.L.R.* 49, 9 *C.L.Rec.* 199, 30 *N.L.R.* 118.

In order to effect a lawful arrest, under §35, all the powers, rights and duties relating to arrests attach to the private person making the arrest.—*e.g.*, see §§23–25, 27–31 *ante* and §42 *post.* Over and above these, he is to "make over" the accused without "unnecessary delay" to the nearest Peace Officer, or if there is no such Peace Officer, to the nearest Police station. If the Peace Officer or Police officer to whom the accused is made over has reason to believe that the accused has committed an offence for which such Peace Officer or Police officer could have arrested the accused under §32 *ante*, it is his duty to re-arrest him. This provision is enacted so as to prevent the legality of the arrest of the accused being questioned subsequently.

If, however, there is reason to believe that the accused has only committed a non-cognizable offence, the provisions of §33 would come into play, inasmuch as the accused would in such a case be "in the presence of a Peace Officer" accused of committing a non-cognizable offence. §35 draws attention to this fact. Where, however, the person refuses to give his name or address, gives a false name or address, or is suspected to be about to leave the Colony, §35 departs from the terms of §33 by declaring that in such cases §33 is to apply when the demand for the name or address has been made, not by a Peace Officer, but by a *Police*

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§35 *officer.* The section is silent as to what is to happen where the demand is made by a headman, or where a headman has reason to believe that the accused is about to leave the Colony. In such cases the safest course would be for the headman to take the accused within twenty-four hours before the nearest Police Magistrate.—See §33 *ante.* See *Knatchbull v. Fernando* (1906) 9 *N.L.R.* 223.

If there is reason to believe that the accused has committed no offence, he shall at once be discharged. *C. f.* §39 *post.* Under the Indian Code the word " released " has been substituted for " discharged."

3. **In his presence commits.**—See *Reg. v. Potadu* (1888) 11 *Mad.* 480.

Kalai v. Kalu Chowkiddar (1900) 27 *Cal.* 366.

Dew v. Angamuttu (1896) 2 *N.L.R.* 184.—A private person in whose view a theft was committed, so long as he keeps the accused in sight, may pursue and arrest him. See §42 *post.*

4. **Make over . . . to a Peace Officer . . . or take . . .''—**

Reg. v. Potadu (1888) 11 *Mad.* 480.—The accused was lawfully arrested under §59 of the Indian Code (*local* §35). The person who made the arrest, handed the accused over to a servant for conveyance to the Police station. During transit, the accused escaped from the custody of the servant. *Held*, " The direction (in §59 of the Indian Code) that he shall ' make over ' the person to a Police officer (*local*—" Peace Officer ") . . . is sufficiently complied with by his being forwarded in the custody of a servant . . . The intention (of §59 of the Indian Code) is to prevent arrests by a private person on mere suspicion or information, and not to impose on him the obligation of taking the party arrested in person to the Police station . . ." *Per* Muttusami Ayyar & Parker, J.J.

R. v. Parsiddhan Singh (1907) 29 *Alla.* 575.—A private person arrested a thief while committing theft, and made him over to the village *chowkiddar* to be taken to the nearest Police station. On the way the accused seized the *chowkiddar* and the thief managed to escape. *Held*, that the accused were rightly convicted under §225 of the Indian Penal Code (*local*—§220). *Reg. v. Potadu* and *dictum* in *R. v. Johri* approved.

R. v. Johri (1901) 23 *Alla.* 266.—*Obiter.* " The question raised by the . . . appeal as to whether a qualified person having made an arrest and having then handed over the person arrested to the custody of an agent, such custody continues to be what it was originally, a lawful custody, is one which I should be disposed to answer in the affirmative in accordance with the ruling in *Reg. v. Potadu* if it were necessary to do so . . ." *Per* Blair, J. See also §§36–37 para. 5 *post.*—" Take or send."

5. **A Peace Officer shall re-arrest him.**—It would appear that a Peace Officer can re-arrest the accused under §35 regardless of the fact that the original arrest by the private person was illegal.

Kalai v. Kalu Chowkiddar (1900) 27 *Cal.* 366.—S, who was alleged to have committed theft, was arrested by a private person and made over to the custody of the village *chowkiddar. Held*, that as the arrest was not committed in the view of the private person, the arrest was not lawful. *Held further*, that the *chowkiddar* was not a " Police officer " within the meaning of §59 of the Indian Code (*local*—" *Peace Officer* "). Had the *chowkiddar* been a " Police officer " the arrest by him would have been held to have been lawful.

6. **Reasonably suspects.**—See §32 (1) (*b*) *ante.*

7. **Reason to believe.**—See §62 para. 9, and §68 para. 10 *post.*

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8. **Unnecessary delay.**—Whether any delay can be called "unnecessary" is a question of fact, depending upon the circumstances of each case. In the case of *Wright v. Court* (1825) 4 *B. & C.* 596, it was held that a delay of three days was too long. See §§36, 37, 54, 131 *post.*

9. **Bail.**—See §§33, 36–37, and §§39, 51, 55, 63, 65, 126–127, 394–400, 410–412, 436 *post.*

10. **Immunity from arrest.**—§23 para. 7 *ante.*

11. **Make over.**—See §§33, 36, 38, 54, 58.

How person arrested is to be dealt with.

36. A Peace Officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Police Magistrate having jurisdiction in the case.

Person arrested not to be detained more than twenty-four hours.

37. No Peace Officer shall detain in custody a person arrested without a warrant for a longer period than, under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Police Magistrate.

Peace Officer.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

Arrest by Peace Officer without a warrant.—See §§32, 33, 35.

Bail.—See §§33, 35, 39, 51, 55, 63, 65, 126–127, 436, 394–400, 410–412 *post.*

1. §36 is based upon §60 and §37 on §61 of the Indian Code, which they follow closely.

2. **Scope of §§36–37.**—These two sections form part of a group of sections which deal with incidental matters connected with the law relating to arrests.—see §§23–25, 27–35, 38–39, 42, &c.

Where a Peace Officer makes an arrest without a warrant, "subject to the provisions herein contained as to bail," he shall "without unnecessary delay take or send" the accused before a Police Magistrate having jurisdiction in the case.—see §36. §37 explains what is meant by the expression "unnecessary delay." See §§126A, 127, 129 (2) *post.*

3. **Unnecessary delay.**—See §35 para. 8 *ante*, and *c. f.* §102A. Ordinance No. 17 of 1869.

In the case of arrests without warrants by Peace Officers, §37 provides that the accused is not to be detained for a longer period than "under all the circumstances of the case is reasonable," and such period is not to exceed twenty-four hours, exclusive of the time necessary to take the accused from the place of arrest to the Magistrate. *C. f. Mudalihamy v. Malhamy Aratchchi* (1879) 2 *S.C.C.* 120.

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§37

R. v. Suprosunno 6 *W.R.* 88.—" The pleader for the prisoner lays stress upon §152 (*now* §61—*corresponding to* §37 *of the local enactment*) of the Indian Criminal Procedure Code, as giving a Police officer (*local—Peace Officer*) power to detain an accused person for a period not exceeding twenty-four hours without question. But we read the section differently. We are of opinion that in no case is a Police officer justified by that section in detaining a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case. It is for the prisoner (*i.e.*, the Police officer or Peace Officer) to show that he had reasonable grounds, and he failed to do so ; whereas it is clear that he could have sent the accused party before the Magistrate at once . . ."

Every inquirer and officer-in-charge of a Police station holding an investigation under *Chapter XII. post*, has the right to detain the accused during the investigation, subject to the provisions of §37.—See §129 (2) *post* and §126A(1) *post*.

C. f. §§33 (1) " Within twenty-four hours ; " §§28 and 54.

Under §55 of the Police Ordinance 1865, every person taken into custody without a warrant by a Police officer is to be delivered " forthwith " over to the officer-in-charge of the station.

" For a longer period than under all the circumstances of the case is reasonable."—See *R. v. Suprosunno* (*supra*).

4. **Subject to the provisions herein contained as to Bail.**—§39 provides that no person who has been arrested by a Peace Officer shall be discharged except on his own bond, or on bail, or under an order in writing from the Magistrate. §39, however, does not appear to be an enabling section conferring power upon Peace Officers to take security or to grant bail ; it merely forbids, in emphatic terms, the irregular release of arrested persons. Where then are to be found " the provisions *herein* contained as to bail ? " It is submitted that the section in this Code, which confers this power upon all Peace Officers is §397 *post*. *C. f.* §§51 and 55 *post*. §397 is placed in *Chapter XXXVI.* which deals with the law relating to bail, and provides that " before any person is released on *bail*, or released on his *own bond*, a bond for such sum of money as the *officer* or Court *as the case may be* thinks sufficient, shall be executed by such person . . ." See also §436 *post*. §397 appears to be a general section, and which provides the necessary legal machinery for the taking of security by Peace Officers under §36. It would appear that the words " officer " and " as the case may be " as used in §397 clearly show that the section contemplates the taking of security both by the Courts as well as by Peace Officers. Hence, whenever bail or security is to be taken as directed by §§33 (1), 35, or 39, the procedure is to be found in §397*. See also §§55–58 Police Ordinance 1865.

It is also to be observed that the law draws a distinction between Peace Officers who are Police officers and those who are not. Thus, while §33 deals with all kinds of Peace Officers, §35 draws a distinction between Peace Officers and Police officers. The Code further, gives certain special powers to Police officers as to the release on security of arrested persons.—*e.g.*, see §§126, 126A, 127 *post*. Under the Police Ordinance, 1865, special provisions are made as to the procedure to be followed when a Police officer arrests a person without a warrant, *viz.*,

* See Form No. 5 Crim. P. C. §33 (F. 4*). As to the release on bail of persons arrested by a Magistrate—see §40 *post*.

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§§55–58. In the case of an arrest without a warrant by a Police officer §§32–33, 35, 36 and 37 of this Code must be read and construed together with §55 of the Police Ordinance. If the Police officer detains the accused for " the mere purpose of ascertaining his name and address " (see §33 (1) *supra* and §55 Police Ordinance) he shall take the accused before the nearest Police Court within twenty-four hours, but even in this case §38 *post* shows that it is the duty of such officer to notify the officer-in-charge of the station, who in turn has to report the arrest to Court. In all other cases where a Police officer makes an arrest without a warrant, *e.g.*, in offences declared to be ' cognizable,' under §§32, 33 (2), 35 &c., §36 declares that the accused is to be taken or sent without unnecessary delay before a Magistrate, subject to the provisions of law as to the taking of bail. §55 of the Police Ordinance, on the other hand, enacts that the Police officer shall forthwith deliver such accused into the custody of the officer-in-charge of a Police station " in order that such person may be secured until he can be brought before a Magistrate to be dealt with according to law, or may give bail for his appearance before a Magistrate, *if the officer-in-charge* shall deem it prudent to take bail . . . provided . . . that where bail is not taken, the prisoner shall be brought before a Magistrate within twenty-four hours, unless circumstances render delay unavoidable." In the case of Police officers it will be seen that it is possible to construe §§36 and 37 of this Code together with §55 of the Police Ordinance. See §38 *post*. §38

5. **Take or send.**—*i.e.*, either take the accused himself or hand him over to another for the purpose of being taken. Under §33 *ante* the word used is " take," similarly under §35 *ante*, the private person making the arrest is to " make " over the accused to a Peace Officer, or failing that " to take " him to the nearest Police station. In construing the word " take " as used in §59 of the Indian Code (*local*—§35) the Indian Courts have held (see §35 para. 4 *ante*) that there was nothing illegal in the person making the arrest handing the accused over to a servant or agent for the purpose of being taken to the Police station. Under §19 *ante* a Peace Officer, who desires to make a lawful arrest, may summon to his aid any member of the public. In view of the *obiter dictum* of Blair, J., expressed in the case of *R. v. Johri* (§35 para 4 *ante*) it is submitted that §36 by the use of the words " take or send " clearly contemplates cases where the Peace Officer may have to hand over the accused to another for the purpose of being conveyed before the Magistrate. See also §§33, 35, 54, 58, 126A and §79 Ordinance No. 9 of 1924 (as amended by §7 of Ordinance No. 10 of 1927.)

6. **§126A *post* creates an exception to the rule set out in §37.** See also §129 (2) *post*.

7. **By §4 (2) of the Ceylon Passport Ordinance No. 20 of 1923 a person arrested under §4 (1) of the Ordinance must be dealt with as provided by §37 of this Code.**

Police to report arrests.

38. Officers-in-charge of Police stations shall report to the Police Courts of their respective districts the cases of all persons arrested without warrant by any Police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

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§38

Police Station.—See §3 *ante.*

Officer-in-charge of a Police station.—See §3 *ante;* and see §§121, 124, 127, 131 *post* and §55 Police Ordinance 1865.

Police Court.—See §3 *ante.*

Police Officer.—See §3 *ante.*

1. §38 is based upon §62 of the Indian Code.

2. **It is the duty of all Officers-in-charge of Police stations to keep themselves posted as to what their subordinate officers are doing.** §38 provides that whenever it is reported to them that a Police officer attached to their stations has made an arrest without a warrant, or when such a person is brought to the station, such officer is required to report to the Police Court of the district (i) the fact of such arrest and (ii) whether such person has been admitted to bail or otherwise.

It is to be observed that §38 is only concerned with Police officers and not with Peace Officers generally. §§33 (1),(2), 35 and 36, show that as a general rule a Peace Officer making an arrest without a warrant must send the person arrested before the Magistrate. In the case of similar arrests by Peace Officers, who are also Police officers, these sections must be read and construed together with §55 of the Police Ordinance 1865.—See §§36–37 para. 4 *ante.* See also §§121, 126A, 127 131 *post.*

3. **Police Officer making an arrest without a warrant.**—See §§32, 33, 35 *ante* and §3 " cognizable offence " *ante.*

4. **Bail.**—See §§36–37 para. 4 *ante.*

Discharge of person arrested.

39. No person who has been arrested by a Peace Officer shall be discharged except on his own bond or on bail or under the special order in writing of a Police Magistrate.

Peace Officer.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

1. §39 is based upon §63 of the Indian enactment, which it follows closely.

2. **Scope of §39.**—From the language used by the draftsman in framing §39 it would seem that the section is applicable both to arrests with warrants as well as to arrests without warrants. However, as the section is placed in that group of sections which deal with arrests without warrants, it can be contended that §39 applies only to arrests made without warrants. *C. f.* §§51, 55 *post.*

§39 does not appear to be an enabling section, it merely forbids in distinctive terms the irregular release of arrested persons.—See §§36–37 para 4 *ante.* The sections which enable a Peace Officer to admit an arrested accused to bail are §§397 *post* and §§51 and 55 *post.* An accused who has been arrested by a Peace Officer without a warrant can only be discharged by such officer (i) on his own bond, (ii) on bail or (iii) under a special order in writing by a Magistrate ordering his release. See §§126, 127 *post.*

3. **On his own bond or on bail.**—See §§33, 35, 36 *ante;* and §§51, 55, 126–127, 394–400, 410–412, 436 *post.* It is to be observed that §39 makes no reference to offences which are " bailable " or to those which are not.

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4. **Discharged.**—*C. f.* the word as used in §35 *ante*. It is to be noted that under the Indian Code, whereas in §59 (*local*—§35), the word used is " released," in §63 (*local*—§39), the word used is " discharged." See §126 *post* and the definition of "discharge" in §3 *ante*.

5. **Bond of person for whose appearance or arrest a summons or warrant might have issued.**—See §63 *post*.

6. **Arrest on breach of condition in bond to appear.**—See §65 *post*.

Offence committed in Magistrate's presence.

40. When any offence is committed in the presence of a Police Magistrate within the local limits of his jurisdiction he may himself arrest or order any person to arrest the offender and may, thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Arrest by or in presence of Magistrate.

41. Any Police Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Offence.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

Arrest.—See §23 *et seq. ante*.

Public bound to assist Magistrate.—See §19 *ante*.

Bail.—See §§394–396 *post* and see §§33, 35, 36, 38, 39 *ante*.

Warrant.—See column 4, Schedule II. *post;* and see §§50 *et seq. post*.

In the presence of.—*C. f.* §§32 (1) (*a*) 35 *ante* and §128 (*a*) *Chapter XXXIV. post*.

1. §§40 and 41 are almost identical with §§64 and 65 of the Indian Act in their terms.

2. **Scope of §§40–41.**—§40 deals with the right of a Magistrate to arrest or direct the arrest of an offender who commits *any* offence, provided the offence is committed *in the presence of the Magistrate*, and provided also that the offence was committed "within the local limits of the jurisdiction " of the Magistrate. After the arrest the Magistrate can " commit the offender to custody," subject to the provisions in the Code which entitle the accused to claim his release on bail.

§41, on the other hand, deals with cases which do not fall within the purview of §40, *e.g.*, where the Magistrate wants to arrest an offender who did not commit the offence in the presence of the Magistrate.

In such cases the right to arrest depends on whether the Magistrate was competent " at the time and circumstances to issue a warrant " for the apprehension of the accused. If this condition is satisfied, the arrest may lawfully be made either by the Magistrate himself, or by another, provided the arrest is made (i) in the presence of the Magistrate, and (ii) within the jurisdiction of the Magistrate. *C. f.* §79 *post* and see §§117, 128, 147(3), 380, *et seq. post*.

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§41

3. **Committed in the presence of.**—See §35 para. 3 *ante*. See also §32 para. 5 *ante*.

4. **Within the local limits of his jurisdiction.**—*C. f.* §135 *post*.

5. **Bail.**—See §§394 *et seq. post*. *C. f.* §§33, 35–36, 38–39 *ante*.

6. **Warrant.**—See §§50–58, *post*, and see column 4, Schedule II *post*.

7. **Arrest by, or in the presence of a Magistrate.**—*R. v. Fernad* (1907) 31 *Bom. at p.* 445. "Where the Gaming Act has provided for the manner or place of investigating or inquiring into any offence, its provisions must prevail, and the Criminal Procedure Code must give way. Accordingly, no provision of the Code as to the authority empowered to issue a warrant for arrest or search, or the persons to whom and the conditions under which such warrant may be issued can apply for the purposes of §7* of the Gaming Act. The authority, the persons and the conditions, must be respectively those specifically mentioned in §6† of the Act and no other. But otherwise, the special provision in §6 would still be subject to the general provisions of §§65 (*local*—§41) and 105 (*local*—§79) of the Code . . . " *per* Chandavarkar, J. In this case, an Inspector of Police heard that gaming was in progress in the house of the accused, and communicated the information to the Magistrate, whom he met on the road. The Magistrate directed the officer to wait before the house and to enter the place and arrest the accused as soon as the Magistrate came on the scene ; and this was done. *Held*, that this arrest was bad.

R. v. Kazim (1901) *Alla. W.N.* 35. See §63 *post*.

8. **Immunity from arrest.**—See §23 para. 7 *ante*.

9. **Arrest by Peace Officer without a warrant and without orders from a Magistrate.**—See §117 *post*.

10. **Arrest by Inquirers.**—See §128 *post*.

Power on escape to pursue and retake.

42. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place, either within or without the jurisdiction where he was so in custody, and deal with such person as he might have done on the original taking.

Provisions of sections 24, 25 and 27 to apply to arrests under section 42.

43. The provisions of sections 24, 25 and 27 shall apply to arrests under section 42, although the person making the arrest is not acting under a warrant and is not a Peace Officer having authority to arrest.

Peace Officer.—See §3 *ante*.

Lawful custody.—See §§23, 26, 32–33, 35, 40–41 *ante*.

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* §7 of Act IV of 1887 declares that where certain appliances used for gaming are found in any premises "entered under warrant issued under" §6, this fact is to be evidence that the place is a common gaming house.

† §6 empowers *inter alia* certain Magistrates "to give authority by special warrant under his hand, when in his discretion he shall think fit, to any inspector, or . . . other . . . officer . . . of police" to enter the premises, to arrest persons found there, to search the premises, to seize all instruments of gaming, etc.

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Restraint to be placed on arrested person not to be excessive. —See §§28, 36, 37 *ante*. **§43**

Pursuit to effect arrest.—§§32 (*f*), 34, 35.

Immediately.—§§71, 72 *post*.

1. §§42 and 43 are based upon §§66 and 67 of the Indian Code, but the terms of the local sections are not identical with the sections in the Indian Code.

2. **Scope of §§42–43.**—See §309 (*g*), 320 *post*. Whenever a person, who has been lawfully arrested by anyone, escapes or is rescued from lawful custody, §42 gives the person who had custody of that person the right *immediately* to pursue and re-arrest him in any place, whether within or without the jurisdiction, where the person had been lawfully detained, and to deal with him as he might have done on the original arrest. §43 declares that for the purposes of the pursuit and re-arrest the provisions of §§24–25 and 27 are to apply "although the person making the arrest is not acting under a warrant and is not a Peace Officer having authority to arrest."

§24.—Power to demand free ingress into premises for the search and arrest of persons.

§25.—Power to effect forcible ingress. *N.B.*—§42 amplifies the provisions of §25 inasmuch as under §42 any person can act as provided by §25.

§27.—Power of person seeking to effect arrest and who is trapped to liberate himself.

It is curious that §43 makes no reference to the important provisions of §23, but it would seem that this omission does not mean that the legislature intended no provisions other than §§24–25 and 27 to apply to arrests under §42.

§42 clearly lays down that an escaping accused may be pursued and "arrested." The word "arrest" as used in §42 brings into operation §23. Similarly, the words "deal with such person as he might have done on the original taking," bring into force various other sections of the Code which are not mentioned in §43.

The wording of §§42–43 are wide enough to include cases where the escape was from a custody which was effected either with or without a warrant.

3. **Escape or rescue from lawful custody.**—Both the accused as well as those who rescue him will be guilty of offences under §§219–221 Penal Code.

4. **Recapture of convicts who effect their escape from prison.**—See Prisons Ordinance, 1877, §§63, 64 (11), 72, and the Rules made thereunder. (See Ordinance No. 17 of 1916 §2 (2)).

5. **Immediately.**—"Where a statute requires anything to be done, 'Immediately,' that is the same thing as 'Forthwith,' and implies speedy and prompt action and an omission of all delay. In other words, the thing to be done should be done as quickly as is reasonably possible" —*Stroud*. See §71 *post* and §33 para. 3 *ante*. "*Forthwith*" and §§96–97 para. 4 *post*.

6. **Although the person making the arrest is not acting under a warrant and is not a Peace Officer having authority to arrest—**

(i) Arrests without a warrant.—See §§32, 33, 35, 40–42 *ante* and 102–103 *post*.

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§43 (ii) Peace Officer having authority to arrest.—See §§19–20, 24–27, 32–34.

(iii) Arrests by private persons.—See §§19–20, 24–25, 27, 35.

(iv) Arrests under a warrant.—See §§50 *et seq. post.*

7. ***Gressy v. Perera (1901) 5 N.L.R. 116.***—See §34 para. 3 *ante.*

8. ***Dew v. Angamuttu (1896) 2 N.L.R. 184.***—See §35 para. 3 *ante.*

9. ***Gooneratne v. Abeyratne (1879) 2 S.C.C. 89.***—See §26 para. 7 *ante.*

§§44 *et seq.* deals with the legal procedure provided for the compelling of the attendance of persons and for the production of things before the Courts. The methods provided for this purpose are :—

1. **Summons.**—See §§44–49, 64, 84–85 ; 156 (4), 282, 270.
2. **Warrants.**—See §§50–58, 62, 64, 65.
3. **Proclamations and attachments.**—See §§59 *et seq.*
4. **Summons to produce.**—See §§66–67.
5. **Search Warrants.**—See §§68–71, 73–76, 78–79.
6. **Special provisions relating to the discovery of persons wrongfully confined.**—See §§72, 438.

Cornelis v. Cookson (1902) 6 *N.L.R. at p.* 42. *Held*, that *Chapters IV.* and *V.* of the Criminal Procedure Code did not supersede §59 of the Police Ordinance, 1865.

7. **Extradition and the procedure for the surrender of fugitive offenders**—see *Dias on the Law of Extradition.*

CHAPTER V.*

OF PROCESSES TO COMPEL APPEARANCE

A.—Summons

Form of summons.

44. (1) Every summons issued by a Court under this Code shall be in writing in duplicate and signed in the case of the Supreme Court by the Registrar and in the case of a District Court by the Secretary and in the case of a Police Court by a Police Magistrate or such other officer as the Governor may from time to time appoint, and shall be in the prescribed form.

(2) If the person summoned is a native, who is believed not to be able to read English, one of such duplicates shall, if he is a Sinhalese, be in Sinhalese, and, if he is a Tamil, Moorman, or Malay, one of such duplicates shall be in Tamil.

Prescribed.—See §3 *ante.*
Writing.—See §3 *ante.*
Signed.—See §3(2), *ante.*

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* This chapter applies to Maintenance proceedings—see Ord. No. 19 of 1889 §15 and Ord. No. 15 of 1921 §9. It also applies to proceedings under the Dangerous Animals Ordinance No. 38 of 1921.

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Supreme Court.—See §3 *ante.*
Registrar.—See §3 *ante.*
District Court.—See §3 *ante.*
Police Court.—See §3 *ante.*
Police Magistrate.—See §3 *ante.*
Irregularities in Summons.—See §425 *post.*
Power to compel attendance of witness.—See §282 *post.*

1. §44 is based upon §68 of the Indian Act.

2. **Differences between a Summons and a Warrant.**—(i) A summons as a rule is never signed by the Judge. It is usually signed by the Registrar of the Supreme Court, the Secretary of the District Court, and in Police Courts " by a Police Magistrate or such other officer as the Governor may appoint."—See §44 (1). In the case of warrants, on the other hand, they must always be signed by the Judge of the Court which issues them.—§50 (1).

(ii) A summons must always be issued in duplicate—See §44 (1), and if the person summoned is a Ceylonese, one duplicate must be in the vernacular—§44 (2). See *Cornelis v. Uluwitike* (1895) 1 *N.L.R.* 248, *Surian Pulle v. Silva* (1906) 9 *N.L.R.* 80. In the case of warrants these formalities are not required.

(iii) In the case of a summons it is the duplicate which is served —§45 (2); in the case of a warrant the officer to whom it is given has to execute it.—§§50(2), 52 *et seq.*

(iv) In the case of a summons, substituted service is under certain circumstances permissible.—§§46–47. There is no such provision in the case of a warrant.

(v) As a general rule a summons has to be served in the manner indicated by §§45 (1), 48. In the case of a warrant it has to be executed in the manner provided by §§52 *et seq.*

By §64 (3) *post*, the provisions regarding the direction and execution of warrants under *Chapter V.* of this Code are to apply " as near as may be to summonses." See also Ordinance No. 38 of 1921 §4 (1).

3. **Requisites of a valid summons.**—(*a*) It must be in the prescribed form.

Forms 1 and 7 in *Schedule III. post*, set out the prescribed forms in the case of a summons to an accused and a witness.—See §442 *post. General Order* 899 draws attention to other prescribed forms which are to be found enumerated in *Appendix L.* to the *General Orders.*

(*b*) The summons to an accused must contain a statement of the particulars of the offence with which he is charged, and it must require him to attend with his witnesses (if any) to answer the charge.—§151 (3) *post.* See also *Form* 1 in *Schedule III. post. C. f.* §85 *post.*

R. v. Ram Saran (1882) 5 *Alla.* 7.—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day, and the time of the day when the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without permission, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned. See *R. v. Kisan Bapu* para. 10 *infra.*

In the case of a summons issued on an accused a Magistrate may, in summary cases, dispense with his personal attendance.—See §154 *post.*

(*c*) The summons must be in duplicate.—§44 (1), and if the person summoned is one who is unable to read English it must be in the verna-

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§44 cular.—§44 (2). *Victoria v. Attorney-General* (1920) 22 *N.L.R. at p.* 38, 2 *C.L.Rec.* 140. (*Full Court*). " . . . . It is quite true that under §44 of the Criminal Procedure Code, where the summons is spoken of as being in duplicate, it is contemplated that one of the duplicates may be in another language. That arises on the express terms of that section. I do not think that the word " duplicate " in §59 (of the Civil Procedure Code) should be construed in any other than in its natural sense." See §50 para. 7 (iii) *post.*

(*d*) The summons is to be signed by certain officers, or in the case of Police Courts, by " such other officer as the Governor may from time to time appoint." In the case of *Sederis v. Juderis* (1895) 3 *N.L.R.* 126, the summons was signed by some person who purported to sign " for the chief clerk " of the Police Court. It was held that this was irregular and that the summons was therefore bad. In view of the express terms of *General Order* 883, which draws attention to *Notification No.* 321, which is published in the *Government Gazette* of September 3, 1915, any summons issued by a Police Court may be signed by the chief clerk of the Court, or in his absence, by the person who is acting for him. This *Notification* amounts to an appointment by the Governor in terms of §44 (1) of this Code.

(*e*) The summons must be " signed." Therefore, a facsimile of the proper officer's signature affixed to the summons by means of a rubber stamp will not do.—See §3 (2) *ante* and the cases noted thereunder.

(*f*) If the summons is for service outside the limits of the jurisdiction of the Court which issues it, it should have endorsed upon it the words " for service out of the jurisdiction."—§64 *post.*

(*g*) Convictions are not to be set aside for mere irregularities in the summons.—See §425 *post.*

4. **Either side in a criminal case has the right to ask for process to compel the attendance of witnesses or the production of documents or other things.**—It is the duty of the Magistrate to issue such process unless, for reasons to be recorded by him, he deems it unnecessary to do so.—§282 (1). If the Magistrate has reason to believe that process is being asked for, for the purpose of vexation or delay, he can require the applicant to satisfy him as to the *bona fides* of the application.—§282 (2). If a Magistrate arbitrarily refuses process on an accused, a *mandamus* will lie to compel him to issue process.—§337 *post.*

5. **Service of summons.**—The summons is to be served by a Fiscal's officer, a Peace Officer, or some other person who has been directed by the Court to effect the service—§45 (1). As a general rule the service should be made personally on the person summoned. In the case of a Company or other fictitious person, the summons is served upon the secretary or other like officer—§45 (3). In case of natural persons, the summons is served by delivering to him or tendering to him one of the duplicates of the summons, and if the person served is a Ceylonese who is unable to read English, such duplicate should be in the vernacular —§45 (2). If the person to be served is a Government servant the Court issuing the summons forwards it in duplicate to the head of the department in which the person is employed, and such officer causes one of the duplicates to be served lawfully as required by law upon the person wanted, and returns the other to the Court with an endorsement that it has been duly served—§48 *post.* See §270 *post* as to service of summons on jurors.

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If personal service cannot be effected by the exercise of due diligence, substituted service may be resorted to. This may be done in one of two ways. The person effecting service may leave one of the duplicates with some adult member of the family of the person wanted, or with a servant who resides with him—§46, or he may affix one of the duplicates to some conspicuous part of the house in which the person summoned ordinarily resides. It is to be noted that the latter method of substituted service is only to be resorted to, if the former mode of substituted service cannot be effected—§47 *post.*

A summons may also be served outside the jurisdiction of the Court which issues it—§64 *post.*

The provisions relating to the direction and execution of warrants, *viz.*, §§52–58 *post* are, by §64 (3), made applicable 'as near as may be' to summons.

6. **Proof of service.**—When the summons is served a return has to be made to the Court showing that service has been effected. The methods of doing this are set out in §49 *post* and are as follows:—(i) an affidavit stating that service has been effected and purporting to have been made before an officer authorised to administer an oath or affirmation—§49 (1). Any person appointed by the Governor "in that behalf" is by §49 (3) authorised to administer such oath or affirmation. The law was brought into its present form by an amendment of §49 effected by §3 of Ordinance No. 31 of 1919 rectifying an ommission in the law. §49, as it originally stood, declared that an affidavit of service might be sworn before an officer duly *authorised* to administer oaths, but contained no provision for making such authorization. The law, as amended, empowers the Governor to make appointments for the purpose. (ii) By a report of the service purporting to be made by a Peace Officer, and (iii), in the case of service on Government servants, by an endorsement by the head of the department as is provided by §48 *post.* Every person who makes a report or endorsement regarding service is legally bound to state the truth in such report or endorsement —§49(2) *post.*

7. **Issue of summons in proceedings under §§80–83 post.**—See §§84–85 *post.*

Summons for appearance of first offenders.—See §327 (1) *post.*

8. **When may a warrant be issued instead of a summons?**—See Column 4, *Schedule II. post* and §§62, 151 *post.* See also §50 para. 2 *post.*

9. **Stamp duty on summons.**—See *Schedule B.* of the Stamp Ordinance, 1909.

10. ***R. v. Mukerjee (1897) 24 Cal. 320.***—A Magistrate cannot issue a summons ordering a person to appear before the Police, it must be a direction to appear before his Court. *R. v. Kisan Bapu* (1885) 10 *Bom.* 93.—A person who appears before a Court in obedience to a summons, cannot leave the Court if he finds that the Judge is not present. He should wait for a reasonable time before so doing. If he leaves without so waiting, he will be guilty of an offence under §174 (*local* —§172) of the Indian Penal Code. See *R. v. Ram Saran* para. 3 *supra.*

11. **As to summonses issued by Village Tribunals.**—See §§54, 73 *et seq.* Ordinance No. 9 of 1924.

12. **The summoning of Assessors and Jurymen.**—See §200 para. 3, §207 para. 3 and §§269–270 *post.* Penalty for non-obedience to summons, by Assessor or Juryman.—See §280 *post.*

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§45 Summons how served.

45. (1) The summons shall ordinarily be served by a Fiscal's officer or a peace officer, but the court issuing the same may, if it see fit, direct it to be served by any other person.

(2) It shall, if practicable, be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons which, in the case of a Sinhalese, Tamil, Moorman, or Malay, shall be the duplicate in the vernacular.

(3) In the case of a company or association of persons, whether incorporated or not, the summons may be served on the secretary or other like officer of the same.

Service when person summoned cannot be found.

46. When the person to be summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family or with his servant residing with him.

Procedure when personal service cannot be effected.

47. If the service prescribed in sections 45 and 46 cannot, by the exercise of due diligence, be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and in such case the summons, if the court, either before or after such affixing, so directs, shall be deemed to have been duly served.

Service on Government servant.

48. Where the person summoned is in the active service of the Government the court issuing the summons shall ordinarily send it in duplicate to the head of the department or office in which such person is employed; and such head shall thereupon cause one of the duplicates to be served in manner provided by section 45 and shall return the other to the court with an endorsement of service.

Summons.—See §44 *ante.*
Peace Officer.—See §3 *ante.*
Court.—See Supreme Court, District Court and Police Court, §3 *ante.*

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If practicable.—See §106 (1) *post.*

Duplicates of the summons.—See §44 *ante.*

Summons not issued by a Court.—*C. f.* §§121 (3), 127 (3).

1. §45 is based upon §69 of the Indian Code, §46 upon §70 and §47 upon §71, but the Indian law differs widely from our law in many respects.

2. **This group of sections is concerned with the manner in which the service of summons is to be effected.** §45 (1) lays down the rule as to the persons by whom summons are to be served. §45 (2) provides that wherever possible service is to be effected personally, in the case of natural persons, and indicates the method to be employed for such service. §45 (3) creates an exception in cases where service has to be effected on a fictitious or juristic person. §48 creates a further exceptional mode of service in cases where the person to be served is a public servant.

In cases where personal service, as is indicated by §45 (2), cannot be effected by the exercise of "due diligence," §§46 and 47 provide two modes of substituted service.

3. **Ordinarily be served.**—See §45 (1). *C. f.* §§52, 56, 135 *post.*

4. **Fiscal's officer.**—See §45 (1). See Fiscal's Ordinance, 1867, §§4, 8.

5. **If practicable.**—§45 (2), *i.e.*, when by the exercise of due diligence (see §§46–47) the person wanted can be found. See the cases quoted under para. 6 (iii) *infra* and see §56 (2) *post.*

Due diligence.—See §337 Civil Procedure Code.

6. **Service of Summons.**—(i) *Personal service.*—See §§44 para. 5 *ante.*

Tendering.—A mere tendering of the summons amounts to sufficient service if the person to be served refuses to accept it. *R. v. Ganga* (1886) *A.W.N.* 93. In order to amount to a valid tender under §45 (2) the person seeking to effect service should offer the summons to the person wanted.

(ii) *Exceptional modes of service.*—See §§45 (3), 48.—See §44 para. 5 *ante.*

(iii) *Substituted service.*—See §§46–47.—See §44 para. 5 *ante. C. f.* §§60–61 Civil Procedure Code.

As to substituted service on jurors.—See §273 (1) *post.*

Cannot be found.—*Cohen v. Anddy* (1892) 19 *Cal. at p.* 202.—"It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and, if necessary, follow him. You should make enquiries to find out when he is likely to be at home, and go to his house at a time when he can be found. Before service like this (*i.e.*, substituted service) can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country, to go to his house in a perfunctory way, and, because, he has not been found there, to affix a copy of the summons on the outer door of his house . . ." *per* Petheram, C.J.

Pillai v. Ayyar (1897) 21 *Mad.* 419.—Mere temporary absence of a person to be served does not justify substituted service of summons.

Fernando v. Fernando (1903) 9 *N.L.R.* 325.—Substituted service cannot be allowed unless the officer entrusted with the service of summons

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§48 has made reasonable exertions to effect personal service. This case was followed in *Palaniappa Chetty v. Arnolishamy* (1920) 2 *C.L.Rec.* 194.

Ordinarily resides.—See *de Soysa v. Perera* (1921) 22 *N.L.R.* 465, *Sanyal v. Jan Meah* (1898) 26 *Cal. at p.* 102 and see §59 (2) (*a*), (*b*) *post.*

(iv) *Service of summons outside the jurisdiction of the Court which issues it.*—See §64 *post* and §44 para. 5 *ante.*

7. **Proof of service.**—See §§48–49 *post* and §44 para. 6 *ante.*

8. **By §64 (3) *post* the provisions of the Code regarding the direction and execution of warrants are to apply 'as near as may be' to summonses.** The sections thus brought into play are §§52–58 *post.*

9. **Offences.**—(i) Absconding in order to avoid being served with a summons.—§170 Penal Code.

(ii) Preventing the personal service of summons or the effecting of substituted service.—§171 Penal Code.

(iii) Non-attendance in obedience to a summons.—§172 Penal Code.

10. **All orders and notices made or issued under *Chapter IX.* **post* "shall, if practicable," be served on the person against whom they are made or to whom they are issued in the manner provided for the service of a summons.**—§106 *post.*

11. **Service of summons on jurors.**—See §270 *et seq. post.*

Assessors are summoned by the District Court under the provisions of *Chapter V.* upon the orders of the District Judge.

Proof of service.

[§3, 31 *of* 1919.]

49. (1) When a summons issued by a court is served, an affidavit of such service purporting to be made before an officer duly authorized to administer an oath or affirmation, or a report of such service purporting to be made by a Peace Officer, or, in the case mentioned in section 48, the endorsement therein mentioned, shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) Every person making such report or endorsement, as in this section mentioned, shall be legally bound to state the truth in such statement or endorsement.

[§3, 31 *of* 1919.]

(3) Any person appointed by the Governor in that behalf is hereby authorized to administer the oath or affirmation which is requisite to the making of the affidavit mentioned in sub-section (1) of this section.

Summons.—See §44 *ante.*

Court.—See Supreme Court, District Court, Police Court, §3 *ante.*

Service of summons.—See §§45–48 *ante.*

* Public nuisances.

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Peace Officer.—See §3 *ante.*

Endorsement of service.—§48 *ante.*

Summons not issued by a Court.—*C.f.* §§121(3), 127(3).

1. §49 is based upon §74 of the Indian Act.

2. **Scope and effect of §49.**—See §44 para. 6 *ante.*

3. **Every person . . . shall be legally bound to state the truth in such statement or endorsement.**—A person who, in an *affidavit* of service, makes any false statement of fact would be liable to be punished for perjury—§§179, 196 Penal Code. In view of the provisions of §49 (2) any person who makes a false statement in any *report* (see §49 (1)) or *endorsement* (see §48) reporting service of summons brings himself within the purview of the criminal law. By §188 of the Penal Code it is provided that " whoever . . . being *bound by law* to make a declaration upon any subject, makes any statement which is false, or does not believe to be true " shall be deemed to give " false evidence." This means that persons making false statements in reports and endorsements of service, render themselves liable to the penalties set out in the latter part of §190 of the Penal Code. They would also be liable, as in the case of persons who make false affidavits, to the penalties set out in §§191, 193, 194, &c., of the Penal Code.

The following are the facts of a case which actually occurred. A process server, who was entrusted with a summons for service, made a false return to Court. The process server, however, made no affidavit, but merely sent in a report. In view of the provisions of §49 (1) it would appear that such person cannot be charged for making a false return. He was not a Peace Officer, and, therefore, could not send in a report. It is obvious that he could not make an endorsement of service. It was his duty to swear an affidavit, which he was careful not to do. On the analogy of *R. v. Fernando* (1893) 2 *S.C.R.* 46 it would seem that the process server might have been dealt with as for a contempt of Court, but not for making a false return.

4. **An officer duly authorised to administer an oath or affirmation.**—Before §49 was amended by §3 of Ordinance No. 31 of 1919 an anomalous state of affairs existed. While §49 (1) declared that an affidavit of service could only be made before an officer *authorised* to administer oaths, it contained no provision for making such an authorization. Moreover §49 (1), as it existed, did not contain the words " *or affirmation.*" The law has now been amended in both these respects. Under §49(3) " any person appointed by the Governor *in that behalf* is hereby authorized to administer the oath or affirmation " referred to in §49(1). See also §428 para. 2 *post.*

Any person appointed in that behalf.—These words refer to persons authorized to administer an oath or affirmation under §49(1).

5. **Report of such service.**—See *Jayatilleke v. Jayasekera* (1910) 5 *Bal.* 78 *at p.* 79.

6. **Purporting to be made.**—It is sufficient if the affidavit or report of service purports to have been made before an authorised officer or by a Peace Officer respectively. This raises a *prima facie* presumption in favour of the genuineness of the service, and it is for the person attacking the accuracy of the return to show that it was not correctly made.

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§50

B.—Warrant of Arrest

The following group of sections deals with the procedure regulating the issue and execution of warrants of arrest. The law relating to the arrest of persons without a warrant is to be found in §§32–43 *ante*.

(i) When may a Court issue a warrant of arrest ?—See Schedule II. Column 4 *post*., §§62, 65, 84, 151, 400 (2), 399 *post*.

(ii) The form and contents of warrants of arrest.—§§50, 51, 52, 56 57 *post*.

(iii) The duration of a warrant when once issued.—§50 (2) *post*.

(iv) The execution of the warrant of arrest.—§§53–58 *post*.

(v) Bail.—§§51, 54, 58 *post*.

(vi) Other provisions relating to warrants of arrest—(*a*) assistance to be given to persons executing the warrant.—§§19 (*a*), 20 *ante*; (*b*) search of premises where the person to be arrested has taken refuge.—§§24–25 *ante*; (*c*) search of persons arrested.—§§29–31 *ante*.

(vii) Search warrants.—§§9, 26 *ante*, 68–70 *post*.

(viii) Warrants in proceedings to keep the peace, etc.—§§84–85 *post*.

(ix) Warrants for the arrest of first offenders.—§327 (1) *post*.

(x) Procedure where an accused is brought before a Magistrate upon a warrant.—§58 (2) *ante* and 187 *post*.

(xi) Convictions are not to be set aside solely on the ground that there is an irregularity in the warrant.—§425 post.

(xii) Other warrants—(*a*) warrant issued by inquirer.—§121 (3), 127, 128 *post*; (*b*) warrant of the Attorney-General directing a Magistrate to hold an investigation.—§148 (1), (*e*). (*c*); warrants of commitment.—§§309–314, 324 *post*; (*d*) warrants of arrest under Civil process. —See Civil Procedure Code, §§298 *et seq*., 650, 794.

Form of warrant of arrest.

50. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed, in the case of the Supreme Court, by the Chief Justice or a Judge thereof, in the case of a District Court, by a Judge thereof, and in the case of a Police Court, by a Magistrate thereof, and shall be in the prescribed form.

Continuance of warrant of arrest.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it or until it is executed.

Court.—See Police Court, District Court and Supreme Court.
This Code.—See §1 *ante*.
Writing.—See §3 *ante*.
Signed.—See §3(2) *ante*.
Supreme Court.—See §3 *ante*.
District Court.—See §3 *ante*.
Police Court.—See §3 *ante*.
Chief Justice.—See §3 *ante*.
Judge.—See §3 *ante*
District Judge.—See §3 *ante*.
Police Magistrate.—See §3 *ante*.
Prescribed Form.—See Forms 3 – 4, Schedule III. *post* and §442 *post*.

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§50

Execution of Warrant.—See §§52 – 58 *post.*

1. §50 is based upon §75 of the Indian Code, but the two provisions are not identical in their terms.

2. **Differences between a summons and a warrant.**—See §44 para. 2 *ante.*

When may a Court issue a warrant for the arrest of any person?—

(*a*) Arrest of an accused.—See *Schedule II., column* 4 *post.*, §§62, 65, 84, 151(2), 399, 400(2).

(*b*) For the arrest of " any person other than a juror or assessor".—See §62 *post.*

(*c*) Warrant of arrest on breach of condition in bond for due appearance.—See §65 *post.* See also §§399, 400 *post.*

N.B.—§50 applies to warrants issued " by a Court," and to warrants issued " under this Code."

3. **Scope of §50.**—Every warrant of arrest issued by Courts of law under this Code must conform to certain legal requirements laid down by law.

(i) The warrant must be in writing. " Writing " is defined by §3 *ante.*

(ii) It must be signed as required by §50(1).—If the warrant is issued by the Supreme Court, it must be signed by the Chief Justice or a Judge thereof. A Commissioner of Assize is a " Judge of the Supreme Court " within the meaning of §50(1).—See §25 Courts Ordinance, 1889. In the case of warrants issued by District Courts and Police Courts, they are to be signed by the District Judge and Magistrate respectively.—See *R. v. Abdul Caffoor* §53 para. 7 *post.*

(iii) The warrant must be in the prescribed form—see para. 6 *infra.*

(iv) The warrant must be directed for execution to some specified person or persons.—See §§52, 56 – 57 post.

(v) The warrant must be in a language recognised by the Court and must contain certain particulars—see para. 7 *infra.*

(vi) The person executing the warrant should be furnished with a copy of the warrant signed by the person who issues it.—See §53 *post.*

(vii) In the case of a warrant which is issued for the arrest of an accused, a Police Court which issues such a warrant " *shall* " if the offence charged is *bailable*, and " *may* " if the offence charged is *non-bailable*, endorse a direction on the warrant that, if after the arrest, the accused executes a bond with sufficient sureties (the number of sureties being stated in the warrant), to appear before the Court within a stated period, the officer to whom the warrant is directed is to take such security and release the accused.—See §51(1)(2). It is to be observed that §51 only refers to Police Courts. If no endorsement as to bail is made on the warrant, the person effecting the arrest cannot himself admit the accused to bail. He must either produce the accused in custody before the Court which issued the warrant, or if the arrest was effected outside the jurisdiction of such Court he must act as provided by §58 *post.*—See §51 para. 3 *post.*

It is to be noted that the provisions of §50 apply to the case of search warrants.—See §73 *post.*

4. **Issued by a Court.**—*e.g.*, §§50 – 52, 62 – 65, 84, 151, 327(1), 399, 400(2) and other Ordinances which authorise Courts to issue warrants. Note the words " Police Court " in §51(1).

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§50 **Warrants not issued by a Court.**—*e.g.*, see §16 Road (Amendment) Ordinance No. 31 of 1884, as explained in *Hassen v. Ibrahim* (1917) 3 *C.W.R.* 311.

5. **Signed.**—See §3(2) *ante*, and *R. v. Abdul Caffoor* §53 para. 7 *post*.

Writing.—See §3 *ante*.

6. **Prescribed form.**—*C.f.* §44 para 3 (*a*) *ante*, and see §§441, 442 *post* and *General Order* 899, and *Appendix L.* thereto. Forms 3 and 4 in *Schedule III. post*, reproduce two forms of warrants prescribed by this Code.

7. **Contents of warrant.**—

(i) It must contain a statement of the particulars of the offence charged.—See §151(3) *post*, and para. 7 (iv) *infra*.

(ii) It must be in writing, and signed by the Judge of the Court which issues it—para (3)(i),(ii) *supra*. It must be in the prescribed form—para 3 (iii) *supra*. See Forms 3 and 4 in *Schedule III.* and *R. v. Manikam* (1931) 33 *N.L.R.* at p. 154. It should be directed to some specified person or persons for execution—para 3 (iv) *supra*—and such person or persons should be furnished with a " copy " of the warrant—para 3 (vi) *supra*. In the case of bailable offences the warrant must contain an endorsement as to the release of the accused on bail—para 3 (vii) *supra*.

(iii) The warrant must be in some language which is officially recognised by the Court.

The warrant must be in the English language.—*Cornelis v. Uluwitike* (1895) 1 *N.L.R.* 248.—There is no authority in our law for the issue of process in a " foreign language." The language of the Ceylon Courts is the English language, and a warrant of arrest which is drafted in Sinhalese is invalid.

Thuraisamy v. Sellachi (1902) 6 *N.L.R.* at p. 29.—" I have not been able to find it expressly provided that no language but English can be admitted in any form in this Court . . ." *per* Moncreiff, C.J.

N.B.—This was a civil case, and the learned Judge was construing the *Civil* Procedure Code.

Surianpulle v. Silva (1906) 9 *N.L.R.* 80.—Though English is the undoubted language of the Courts in Ceylon, yet there may be cases in which process may be issued in the language of the person against whom it is directed, provided the Judge who issues it is acquainted with the language of the document which he signs. The fact that the Code lays down that certain forms of process are invariably to be in the English language (*viz.*, §§40, 75, 169, 186, 374, and 758 *Civil* Procedure Code) seems to imply that other forms might possibly be in the language of the person upon whom they have to be served. In this case the warrant emanated from a *civil* Court, and the document was written in Sinhalese. The accused obstructed the process server executing the warrant and was charged and convicted. This case does not expressly decide that warrants issued under the *Criminal* Procedure Code may be in a language other than English. At the same time it would appear that this was apparently the view taken by the Judges who decided the case. *Cornelis v. Uluwitike* was cited, but except that it is referred to in the judgment of Middleton, J., nothing further is said about it—See §44 para. 3 (*c*) *ante* and §53 para 4 *post*.

(iv) The warrant must contain certain particulars.

The offence charged should be sufficiently particularized.—*Alisandry v. Brampy* (1896) 2 *N.L.R.* 182.—A warrant in these terms is defective:

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§50

" Whereas B. of Weligama stands charged with the offence of criminal trespass, theft, and voluntarily causing hurt, you are hereby directed to arrest the said B., etc." Such a warrant neither sufficiently particularizes the offences referred to, nor does it specify the sections of the law relating to such offences.—*C.f.* §§167 *et seq. post.*

R. v. Sirimati 9 *B.L.R. App.* 129.—Where the warrant did not properly state the offence, *i.e.*, only mentioned " abduction," which is no offence *per se*, and did not specify the intention, which is necessary to make an abduction a criminal offence, *held*, that the warrant was defective.

R. v. Podibaba (1895) 1 *N.L.R.* at p. 24.—" . . . The warrant, it was urged, does not particularize with sufficient certainty the offence with which the person to be arrested under it stands charged, and it does not disclose the district over which the signing Magistrate has jurisdiction. In addition to these defects this warrant was not properly directed," *per* Withers, J.

R. v. Hastings 9 *B.H.C.* 154.—A warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended. See *Kalu Banda v. Irulandi* (1907) 1 *Leader* 38. —See §58 (2) *post.*

R. v. Debi Singh (1901) 28 *Bom.* 399.—A warrant of arrest which contains a wrong description of the accused is not a valid warrant. The burden of proof is upon the prosecution to show that the accused is the person who was wanted; it is not for the accused to show that he is not.—See §§58(2) and 85 *post.*

8. **Duration of warrant of arrest.**—*R. v. Pareed* (1927) 9 *C.L. Rec.* at p. 45 ; 5 *T.L.R.* 91, 29 *N.L.R.* 204. §50(2) seems to embody the ordinary principle that a warrant ceases to be in force either when it is cancelled by a Court for some reason, or it is executed, or by the extension of time fixed by a Court for its duration, when it should be returned to the Court.

Shall remain in force.—*R. v. Raushan* 13 *C.W.N.* 1091.—Where a warrant, by endorsement under §§76(1) and 76(2) (*c*) of the Indian Criminal Procedure Code (*local*—See §§51(1), 51(2) (*c*)) fixes a date for the appearance of the accused, and the date passes without the accused having been arrested, *held*, that the direction to take bail lapsed, the fixed date having lapsed, but that the warrant itself did not lapse. *C.f. In re Bera* (1883) 10 *Cal.* 18.

Until it is cancelled by the Court.—*R. v. Gurucharun* 1 *C.W.N.* 650.—A warrant which is cancelled cannot be reissued.

Amsa v. Sinnadi (1931) 11 *C.L.Rec.* 92.—Where a warrant was issued for the arrest of S., but before the warrant could be executed and before the returnable date, S. voluntarily surrendered to the Court, and later S. was arrested on the warrant and he resisted arrest. Held that S. was guilty under §220 of the Penal Code. A warrant remains in force until it is cancelled by the Court which issued it or until it is executed. There was neither of these acts in this case and the warrant was in force at the time the accused was arrested thereunder. *C. f.* §836 Civil Procedure Code.

Until it is executed.—See §§53 – 58 *post.* It has been held in India that the force of the warrant ends when the person arrested is brought before the Court.—*R. v. Chunder* 13 *W.R.* 1, *Nobin v. Surrendero* 13 *W.R.* 27; 5 *B.L.R.* 274. As to the procedure for bringing the accused before the Court, see §§54, 58 *post;* and for the procedure to be followed after the accused has been produced before the Court.—See §§155, 187 *post.* *C.f.* §68(2) *post.*

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§51

9. **A Magistrate instead of issuing a warrant may either arrest the person wanted himself, or direct another to effect the arrest in his presence.**—See §§40 – 41 *ante.*

10. **The provisions of Chapter V. of this Code relating to the direction and execution of warrants are to apply "as near as may be to summonses."**—See §64(3) *post.*

11. **As to warrants issued by a Village Tribunal.**—See §74 *et seq.* Ordinance No. 9 of 1924.

Court may direct security to be taken.

51. (1) A Police Court issuing a warrant for the arrest of any person may, in the case of any non-bailable offence, and shall, in the case of a bailable offence, direct by endorsement on the warrant that if such person execute a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(*a*) The number of sureties ;

(*b*) The amount in which they and the person for whose arrest the warrant is issued are to be respectively bound ;

(*c*) The day and hour at which he is to attend before the Court.

(3) Whenever security is taken under this section the officer to whom the warrant is directed shall forward the bond to the Court.

Police Court.—See §3 *ante.*

Warrant of arrest.—See §50 *ante.*

Non-bailable offence.—See §3 *ante.*

Bailable offence.—See §3 *ante.*

Offence.—See §3 *ante.*

Court.—See §3 *ante.*

1. §51 is based upon §76 of the Indian Code.

2. **Scope of §51.**—This section deals with the release on bail of persons, who are arrested on warrants. It is to be noted that the section is only concerned with Police Courts, and the only kind of warrants specified are those issued for the arrest of accused persons. In the case of warrants of arrest issued by Courts other than Police Courts, there is no need for special provisions such as are contained in this section. In these cases the accused has either been regularly committed for trial, or enlarged on sufficient bail by the committing magistrate, so that if by any chance a warrant has to be issued by the Court of trial for the arrest of the accused, the question of bail does not arise. Again, no question as to bail arises in the case of warrants, other than warrants for the arrest of accused persons, whether issued by a Police Court or a higher Court. If, for example, a Court issues a warrant for the arrest of an absent witness, the question of bail does not arise. The person

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wanted is arrested and is produced before the Court. §51 is designed to apply to cases where a Magistrate issues a warrant for the arrest of an accused against whom a charge is made. If the offence charged is bailable, he must make an endorsement upon the warrant directing the officer executing it to release the accused on bail if he gives sufficient security for his due appearance. In the case of non-bailable offences, it is discretionary with the Magistrate whether he is to make such an endorsement or not.—See §51(1) and §58(2) *post*. If no endorsement as is specified in §51 has been made on the warrant, the person executing it has no alternative but to keep the accused in custody.—See §397 *et seq. post*.

§51(2) draws attention as to what are the requisites of the endorsement, which is made under §51(1), while §51(3) lays down the rule that whenever the person executing a warrant admits an accused to bail, he is to forward the bond to Court. *C.f.* §58(2) *post*.

3. **The officer to whom the warrant is directed.**—See §§58 (3), 52 and §397 *post*. In cases where the warrant is executed within the jurisdiction of the Court, which issues the warrant.—See §54 *post*. In cases where the warrant is executed outside the jurisdiction of the Court issuing the warrant.—See §58 *post*.

Can a private person to whom a warrant is directed enlarge the accused on bail ?—See §§29(*b*) *ante* and 397 *post*.

4. **Bond with sufficient sureties.**—*C.f.* §39 *ante*.

The endorsement should state the number of sureties required.—See §51(2)(*a*). *C.f.* §369 *post*.—" Sufficient security."

See also §§397 – 400, 411, 436 *post*.

5. **For his attendance before the Court at a specified time and thereafter until otherwise directed by the Court.**—See §51(2)(*c*). The endorsement on the warrant is to specify " the day and hour at which he is to attend before Court," and see *R. v. Raushan* 13 *C.W.N.* 1091, §50 para. 8 *ante*.

6. **Shall release such person from custody.**—See §§33, 35, 36, 39, 54, 58, 398.

7. **Shall forward the bond to the Court.**—See §58(2) *post*.

8. **Whenever a person is arrested, the person making the arrest may search the person arrested as is provided by §§29 –30** *ante*.

9. **As to warrants issued by Village Tribunals.**—See §74 Ordinance No. 9 of 1924.

Warrants to whom directed.

52. (1) A warrant of arrest shall ordinarily be directed to the Fiscal of the province wherein the Court issuing such warrant is sitting, and may be executed by all Fiscals, Deputy Fiscals, Fiscals' Officers and Peace Officers within the limits of their several and respective jurisdictions, or in any part of this Island by any Police Officer.

(2) The Court issuing the warrant may direct it to any other person or persons by name or office, and such person or persons or any Police Officer may execute the same.

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§52 (3) When the warrant is directed to a Peace Officer by name, it shall not be executed by another Peace Officer unless endorsed to him by name.

(4) When the warrant is directed to more persons than one it may be executed by all or any one or more of them.

Warrant of arrest.—See §50 *ante*.

Ordinarily.—See §§45, 56(1), 135.

Fiscal.—See Ordinance No. 4 of 1867 and §57 *post*.

Court.—See §3 *ante*.

Peace Officer.—See §3 *ante*.

Police Officer.—See §3 *ante*.

§52 to apply as near as may be to summonses.—§64(3).

1. §52 is based upon §77 of the Indian Code.

2. **Scope of §52.**—This section draws attention to the officers or persons to whom warrants of arrest may be directed for the purpose of being executed. The general rule is that warrants should ordinarily be issued for execution to the Fiscal of the province wherein the Court issuing the warrant is sitting.—See §52(1). When this has been done, the warrant may lawfully be executed by all Fiscals, Deputy Fiscals, Fiscals' Officers and Peace Officers "within the limits of their several and respective jurisdictions, or in any part of the Island by any Police Officer." If the warrant has to be executed outside the Fiscal's province, he will endorse it over as is provided by §57 *post*. If the warrant is for execution beyond the jurisdiction of the Court which issues it, §56 (1) provides the ordinary procedure. There is nothing, however, to prevent the Court from issuing the warrant to persons other than Fiscals. The warrant may be directed to any person or persons by name or office (see *Banda v. Irulandi*, *infra*), in which case, all or any one of them, or any Police Officer may execute the warrant.—See §52(2)(3) and *Mutaliph v. Fernando* (1923) 5 *C.L.Rec.* 80; 2 *T.L.R.* 11. It may also be directed to a Peace Officer by name, in which case no other Peace Officer can execute the warrant, unless the warrant has been endorsed over to the latter by name.—See §52(3). This endorsement may be made by the Peace Officer to whom the warrant was issued.—*C. f.* §78 *post*.

The provisions of §52 are by §73 made applicable to search warrants.

3. **Kalu Banda v. Irulandi (1907) 1 Leader 38 (Two Judges).**—In this case the Police Magistrate of Kegalle issued warrants for the arrest of certain accused. The warrants were directed to the Deputy Fiscal of Matale, and were forwarded by the Magistrate to the Police Magistrate of Matale, who endorsed them over to the Deputy Fiscal as directed, and the latter further endorsed them in favour of his subordinate officers. "It was contended that under §52(1) it was practically imperative that the warrants should be endorsed to the Fiscal of the province, that here they were endorsed to the Deputy Fiscal under §52(1), that the Deputy Fiscal had no power to endorse under §57, that the Matale Magistrate had no greater power under §56(2) than the original Magistrate had under §52, and that the endorsement by the Fiscal's Marshal to the two Fiscal's peons had no authority from the Police Magistrate of Matale to execute them . . . The original court should ordinarily under §52(1) direct the warrant to the Fiscal of the Province, but under §52(2) it may be directed to any other person by name or office, *i.e.*, a Deputy Fiscal . . . Now, it is clear to my mind that the warrants were originally issued and directed under §52(2), which would enable the Deputy Fiscal or any Police Officer to execute them within

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the local jurisdiction of the Court issuing them. They were forwarded under §56(1), not under §57, to another province, as they were required to be executed in the same province, but in a different Magisterial jurisdiction. Under §56(2) the Magistrate shall endorse his name on the warrant, and if practicable, cause it to be executed within the local limits of his jurisdiction. The Magistrate endorsed them and forwarded them to the Fiscal's office for execution, which seems to me the only practicable way of causing them to be executed. There are no limiting words as in §83 of the Indian Criminal Procedure Code, and the Magistrate under §56(2) has a discretion given to him by the words 'cause it to be executed.' His endorsement, in my opinion, gives the necessary authority to execute within the local limits of his jurisdiction to the persons entrusted by law with the execution of process in that jurisdiction. He is not directed to endorse it to the Fiscal or Deputy Fiscal, but to cause it to be executed if practicable. §52 applies, in my opinion, to the original issue of the warrant only. §9 of Ordinance No. 4 of 1867 gives the Fiscal power to appoint marshals for the execution of process . . . §12 enables the marshal to appoint process servers for his division and makes the marshal . . . responsible for the acts and omissions of the process servers . . . Under §27 the process to be executed and served in a marshal's division may be transmitted to him by the Fiscal or Deputy Fiscal . . . Here the question is whether the warrants were on the face of them legal, and in my opinion they were, for the reasons I have set out" *per* Middleton & Grenier, J.J. See *R. v. Podi Baba* (1895) 1 *N.L.R.* at p. 24 and *Mutaliph v. Fernando* (1923) 5 *C.L.Rec.* 80; 2 *T.L.R.* 11; and §53 *post.* §52

4. **Execution of warrants of Arrest.—**

(i) If the arrest is to be effected *within the local limits* of the Court, which issues the warrant no difficulty can arise. The Court issues the warrant in due form, and it is executed as is provided by §§53 – 54.

(ii) When the warrant has to be executed *beyond the local limits* of the jurisdiction of the Court which issues it, §56 (1) provides that ordinarily it should be forwarded to the Police Court within the local limits of the jurisdiction of which it is to be executed. Thereupon, the magistrate of the latter Court acts as provided by §56(2). There are, however, alternative methods of procedure. If, owing to reasons of delay or inconvenience, the Magistrate issuing the warrant does not propose to act under §56(1) he may specially direct the warrant to any person or persons.—See §52(2),(3),(4), and such person or persons may without any further formalities execute the warrant anywhere within the Island. —See §§56(3), 55 *post.*

It would also appear from the terms of §52(1) that whenever a warrant is directed to the Fiscal of a province, such Fiscal, his officers and Peace Officers may execute the warrant "within the limits of their several and respective jurisdictions." The legal effect of this provision is not very clear. A province may cover a larger area than the extent over which the Police Court which issues the warrant has jurisdiction. Can Fiscal's Officers and Peace Officers acting under §52(1) execute warrants within their several and respective jurisdictions within the province, although the place where the warrant is to be executed is beyond the local limits of the jurisdiction of the Police Court ?

It would appear that the answer to this question is in the affirmative although there are *dicta* in *Kalu Banda v. Irulandi* which appear not to support this view. The language used in §52(1) is wide enough to support the view expressed above, and it is further supported by the fact

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§53 that §52(1) goes on to provide that any warrants directed to the Fiscal of a province may be executed anywhere in the Island by any Police Officer.—See *Gressy v. Perera* (1901) 5 *N.L.R.* 116.

In the case of *Kalu Banda v. Irulandi* (*supra*), the warrants were for execution within the province although outside the jurisdiction of the Magistrate who issued them, and he took the precaution of acting under §56, so that the point now raised did not arise in that case.

If the Fiscal to whom a warrant is directed under §52(1) finds that it has to be executed outside his province, *e.g.*, by reason of the escape of the person to another province, he merely endorses it over to the Fiscal of the province in which it is to be executed.—See §57 *post*. When this has been done the legal effect of the endorsement is to vest the latter Fiscal with all powers he would have had, had the warrant originally been directed to him.

A person making an arrest under a warrant within the jurisdiction of the Court which issued it, has to comply with the provisions of §§53 – 54 *post*; if such an arrest is made outside the jurisdiction of the Court, he must act as is provided by §§53, 58 *post*.

5. **Or in any part of the Island by a Police Officer.**—See para 4 *supra*, and §§55, 56(2), 64 *post*.

6. **The Court may direct the warrant to any person or persons by name or office.**—See *Kalu Banda v. Irulandi*, *Mutaliph v. Fernando*, and para. 3 *supra*. Whenever a warrant is so "specially directed" it may be executed anywhere in the Island.—See §56(3) *post*. Such a warrant may also be executed anywhere by any *Police Officer*, although no endorsement to that effect has been made.—See §52(2); but if the special endorsement is made in favour of a particular *Peace Officer* by name, another Peace Officer cannot execute the warrant until it is endorsed over to him by name.—See §52(3) and see para. 2 *supra*. Where a warrant is endorsed over to several persons, it can lawfully be executed by all or anyone of them.—See §52(4).

7. **Bail.**—See §51 *ante*.

Can a private person to whom a warrant has been directed for execution admit the accused to bail ?—See §51 para. 3 *ante*.

8. **Aid and assistance to be given to persons acting under warrants of arrest.**—See §§19(*a*), 20 *ante*.

9. **The provisions of §52 are to apply 'as near as may be' to summonses.**—See §64(3) *post*.

10. **As to warrants issued by Village Tribunals.**—See §74 Ordinance No. 9 of 1924.

Notification of substance of warrant.

53. The person executing a warrant of arrest shall notify the substance thereof to the person arrested, and if so required shall show him the warrant or a copy thereof signed by the person issuing the same.

Person arrested to be brought before court without delay.

54. The person executing a warrant of arrest shall (subject to the provisions of section 51 as to security) without unnecessary delay bring the person arrested before the Court, before which he is required by

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law to produce such person, and he shall endorse on the warrant the time when and the place where the arrest was made. §55

Where warrant may be executed.

55. A warrant of arrest may be executed at any place in this Island.

Warrant of arrest.—See §50 *ante.*

Other formalities regarding the execution of warrants of arrest—See §§52, 55 - 58.

Copy.—*C. f.* " Duplicate of the summons " §§44 *et seq. ante.*

Signed.—See §3(2) *ante.*

Court.—See §3 *ante.*

Execution of warrant beyond jurisdiction.—See §§52, 56 - 58.

§§53-55 are to "apply as near as may be" to summonses.—See §64(3).

1. §§53 and 54 are based upon §§80 and 81 of the Indian Code, but the provisions of the latter are different from the terms of the local enactment. §55 is based upon §82 of the Indian Code, and the terms of the two sections are almost identical.

2. **Scope of §§53-55.**—These three sections lay down in general terms the procedure to be observed whenever a warrant of arrest is executed, and irrespective of whether the warrant is executed within or without the jurisdiction of the Court which issues it.

The person executing the warrant—

(i) must first effect the arrest of the person wanted—see §23 *ante;*

(ii) he must then notify the substance of the warrant to the person arrested; and, if so required, show him the warrant or a copy thereof signed by the person who issued the original—see §53 ;

(iii) if there is a direction on the warrant that the person arrested is to be enlarged on bail (§51 *ante*), this direction must be observed and the bail bonds forwarded to Court—see §51(3), §58 and §397 *et seq. post*;

(iv) if the person arrested cannot be enlarged on bail, he must, "without unnecessary delay", be brought before "the Court before which he is required by law to produce such person"—see §54;

(v) the person effecting the arrest must make an endorsement upon the warrant as to the time and place of arrest.—See §54 *C. f.* §319 Civil Procedure Code.

§55 provides in general terms that a warrant of arrest may lawfully be executed at any place in the Island. This section, however, must be read in the light of other sections, *viz.*, §§52, 56 - 58.

Execution of civil warrants.—See *Chapter XXIII.* Civil Procedure Code.

3. **Execution of warrant.**—(*a*) within jurisdiction.—See §52 para. 4(1) *ante* ; (*b*) outside jurisdiction.—See §52 para. 4 (ii) *ante.*

As to the execution of warrants issued by Village Tribunals.—See §74 *et seq.* Ordinance No. 9 of 1924.

4. **Copy of warrant.**—See §44 para. 3(*c*) *ante*, and §50 para. 3(v), and para. 7(iii) *ante.* See *R. v. Dalip* (1896) 18 *Alla.* at p. 248.

5. **The person executing the warrant must have it with him.** —*R. v. Amar Nath* (1883) 5 *Alla.* at p. 321.—" Now under the Indian Criminal Procedure Code . . . it is necessary that the person executing a warrant of arrest should have the warrant in his possession at the

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§55 time of arrest ; otherwise, he would not be in a position to ' notify the substance thereof to the person to be arrested ' and, if so required, to show him the warrant . . . " *per* Tyrrell, J.

R. v. Dalip (1896) 18 *Alla.* 246.—A Magistrate had issued a warrant for the arrest of the accused. The warrant had been directed to and sent to the officer who was in charge of a particular *thana* for execution. This officer handed over the warrant to a particular constable to be executed. After this constable had left the *thana* with the warrant, it was discovered that the accused was in a different village. Accordingly, the officer in charge of the *thana* made out a copy of the warrant and directed it in the names of certain other constables, whom he ordered to proceed and arrest the accused. *Held*, that the arrest of the accused by the latter officers was illegal.

Munasinghe v. Sinappu (1908) 3 *A.C.R.* 153—where a constable, who was not in uniform and had not the warrant of arrest in his possession, proceeded to arrest X, who was thereupon rescued by Y, *held*, that Y could not be convicted under §183 of the Penal Code.

N.B.—§§53 – 54 refer to " the person executing the warrant." *C.f.* " The officer to whom the warrant is directed."—See §51(1).

6. **Arrest.**—See §§19 – 20, 23 – 25, 42 – 43 *ante.*

7. **Notification of the substance of the warrant to the person arrested.**—C.*f.* §92 *explanation* 2 Penal Code, and see *R. v. Podi Baba* (1895) 1 *N.L.R.* 23.

Kalu Banda v. Irulandi (1907) 1 *Leader* at p. 40.—(See §52 para. 3 *ante*) " . . . As regards the (point taken that the) substance of the warrants not having been communicated to the coolies who were arrested, there is no evidence that any objection was taken by them, or that the substance of the warrants was not notified to them . . . The presumption under §114 of the Evidence Ordinance is that the necessary official acts under §53 were performed . . . In my opinion this objection cannot be supported." *Per* Middleton & Grenier, J.J. *R. v. Abdul Caffoor* and *Rai v. Singh* considered and distinguished.

R. v. Abdul Caffoor (1896) 23 *Cal.* 896.—A warrant of arrest was not signed by the person who issued it (see §50 *ante*), and the person executing it did not notify its substance to the person arrested. *Held*, that the arrest was illegal. This case was considered and distinguished in *Kalu Banda v. Irulandi* (*supra*).

Rai v. Singh (1899) 26 *Cal.* 748.—When a warrant of arrest was executed without notifying its substance to the person arrested, *held*, that the arrest was unlawful. This case was considered and distinguished in *Kalu Banda v. Irulandi* (*supra*).

8. **Signed.**—See §3(2) and §50 *ante.*

9. **Unnecessary delay.**—See §§35 – 37 *ante* and §131 *post.* *C.f. Perera v. Allis* (1891) 2 *C.L.R.* 39 and §28 *ante.* See also the provisions of §§56 – 58 *post.*

10. **Bring.**—*C.f.* §33—" Taken " ; §35—" Make over " ; §36—" Take or send " ; §§58(1), 70 —" Carried."

11. **Before the Court before which he is required by law to produce such person.**—Where the arrest is made within the jurisdiction of the Court which issued the warrant, the person arrested will be produced before such Court. If the warrant is executed outside the jurisdiction of the Court which issued the warrant, the Court before which the accused must be produced is specified in §58 *post.*

When the person arrested has been duly produced before the proper Court, such Court will, if it is not the Court which issued the warrant,

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make an order for the removal of the person before the Court which issued the warrant or admit him to bail.—See §58(2) *post*. If or when the accused is produced before the Court which issued the warrant, such Court will then proceed as provided by §§155, 187 *post*. §56

12. **Court.**—*R. v. Mukerjee* (1897) 24 *Cal.* 320—where a Magistrate issued a warrant for the arrest and production of a witness, *not before himself*, but before a Police Officer, in order to enable such Police Officer to investigate an offence, *held*, that such order was *ultra vires*. See §122(3) *post*.

13. **Security.**—See §§51 and 58, and *C.f.* §§29, 33, 35 – 36, 38 – 39, 51 – 55, 63 – 65, 126 – 127, 394 – 400, 410 – 412, 436.

14. **A warrant of arrest may lawfully be executed at any place in this Island.**—See para 2 *supra*. *C.f.* §§42 and 64.

15. **Aid and assistance to be given to persons lawfully executing warrants of arrest.**—See §§19 – 20 *ante*.

16. **Other powers of persons executing warrants of arrest.**—See §§23 – 25, 27 – 31, 42 *ante*.

17. **The provisions of §§53-55 are to apply "as near as may be" to summonses.**—§64(3) *post*.

Warrants for execution outside jurisdiction.

56. (1) When a warrant of arrest is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court shall ordinarily forward the same by post or otherwise to the Police Court within the local limits of the jurisdiction of which it is to be executed.

(2) A Magistrate of the Police Court to which the warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed within the local limits of his jurisdiction.

(3) Whenever there is reason to believe that the delay or publicity occasioned by obtaining the endorsement of the Magistrate within the local limits of whose jurisdiction a warrant is to be executed will prevent such execution, the Court issuing the warrant may direct the warrant specially to any person ; and a warrant so specially directed shall have effect and may lawfully be executed by such person without such endorsement as aforesaid anywhere within the Island. Provided always that upon the execution of such warrant the provisions of section 58 shall apply.

Warrant of arrest.—See §50 *ante*.

Execution of warrant.—See §§52 – 55, 57 – 58.

Ordinarily.—See §§45, 52 *ante*, and §135 *post*.

Police Court.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

By post or otherwise.—*C.f.* §57 post.

1. §56 is based upon §83 of the Indian Code, but the two provisions are not identical in their terms. This fact has been adverted to in *Kalu Banda v. Irulandi* (1907) 1 *Leader* at p. 39.

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§56

2. **Scope of §56.**—Assuming that the Police Magistrate of Colombo desires to have a warrant of arrest executed at Kandy, there are three methods under which he may proceed :—(i) he may issue the warrant to the Fiscal of the Western Province, who may, under §57, endorse the warrant over to the Fiscal of the Central Province ; (ii) he may send the warrant by post or otherwise to the Police Magistrate of Kandy, and the latter will endorse the warrant "and if practicable cause it to be executed within the local limits of his jurisdiction."—See §56(1)(2) ; or (iii) he can specially direct the warrant to any particular person or persons (§52(2),(3),(4)) and such person or persons can execute the warrant without any further formalities.—See §§55, 56(2).

Ordinarily, whenever a warrant has to be executed outside the local limits of the jurisdiction of the Court which issues the warrant, the Court should act as in (ii) *supra*, *i.e.*, as provided by §56(1),(2)—See *Kalu Banda v. Irulandi* §52 para. 3 *ante*. It is to be noted that §56 is subject to the provisions of §58 *post*.

By §*73 post*, the provisions of §56 are made applicable to search warrants. See §77 Village Communities Ordinance No. 9 of 1924.

3. **Execution of warrants of arrest.**—See §52 para. 4 *ante*.

4. **R. v. Kattayan (1897) 20 Mad. 235.**——*Held*, that §83 of the Indian Criminal Procedure Code (*local*—§56) applied to warrants issued under laws other than the Criminal Procedure Code. See also *R. v. Muthayya* (1897) 20 *Mad.* 475, and *Shankar v. Prasad* (1897) 20 *Alla.* 124.—See §57 para. 8 and §58 para. 2 *post*.

5. **Ordinarily.**—See §§45, 52 *ante*. See the *dicta* in *Kalu Banda v. Irulandi* as to the normal procedure a Magistrate is expected to follow when issuing a warrant.—See §52 paras. 3 and 4 *ante*.

6. **Outside the local limits of his jurisdiction.**—See §56(1); Courts Ordinance 1889, *Schedule II*. Village Communities Ordinance 1924 §77 and §§58, 135 - 136 *post*.

7. **By post or otherwise.**—See §57 *post*. §56(3) provides a still speedier method than that indicated in §56(1).

8. **Endorse.**—*i.e.*, sign his name.

Sign.—See §3(2) *ante*, and see §§51, 52(3), 54, 57, 58(2).

Under the Fugitive Offenders Act 1881 (44 & 45 *Vict. c* 69) provision has been made for the endorsement of warrants issued abroad and intended for execution within the Island.

9. **If practicable cause it to be executed.**—See §45(2) para. 5 *ante*.

Kalu Banda v. Irulandi (1907) 1 *Leader* 38. Under §56(2) a Magistrate has a discretion as to the method of getting a warrant endorsed by him executed. He is not bound under §52 to direct it to the Fiscal. All that he has to do is to cause it to be executed, if this can be done. See §52 para. 3 *ante* and §57 *post*. When the person has been arrested the procedure outlined in §58 must be observed.

10. **Whenever there is reason to believe.**—See §§59(1), 62 *post*, and see §62 para. 9, §68 para. 10 *post*.

C.f. **Credible information.**—See §32(1)(*b*).

Reasonable suspicion.—See §32(1),(*b*),(*e*).

Reason to believe.—See §§32 (1),(*g*),(*h*), 33(2), 35, 56(3).

11. **Direct the warrant specially to any person.**—*i.e.*, as provided by §52(2),(3),(4) *ante*.

A specially directed warrant can be executed anywhere.—See §§55, 56(3), subject to the provisions of §52(3) *ante*. When a

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person has been arrested under a specially directed warrant the procedure outlined in §58 *post* must be followed. §57

12. **Aid and assistance to be rendered to persons executing warrants.**—See §§19 – 20 *ante*.

13. **Other powers of persons making arrests under warrants of arrest.**—See §§23 – 25, 27 – 31, 42 *ante*.

14. **Applicability of §56 to the service of summons.**—See §64(3) *post*.

15. **As to the execution of warrants issued by a Village Tribunal.**—See §74 *et seq*. Ordinance No. 9 of 1924.

Warrant directed to Fiscal for execution outside jurisdiction.

57. When a warrant directed to a Fiscal is to be executed outside the province of such Fiscal he shall endorse it to the Fiscal of the Province within which the warrant is to be executed and shall thereupon forward the same by post or otherwise to such Fiscal, who upon receipt thereof shall cause such warrant to be executed in the same way as if it had been originally directed to him.

Warrant of arrest.—See §3 *ante*.

Execution of warrant.—See §§52 – 56, 58.

Endorsement of warrant.—See §§51, 52(3), 54, 56(2).

Fiscal.—See §52 *ante* and Ordinance No. 4 of 1867.

By post or otherwise.—*C. f.* §56 *ante*.

1. §57 is based upon §84 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §57.**—See §56 para. 2 *ante*. Whenever it is discovered that a warrant, which under §52(1) *ante* has been directed to the Fiscal of a province, has to be executed outside such province, the Fiscal to whom the warrant is directed can, under §57, endorse the warrant over to the Fiscal of the Province within which the warrant is to be executed, and forward it by post or otherwise to the latter Fiscal, who, upon receipt of the warrant, "shall cause the warrant to be executed in the same way as if it had been originally directed to him." *i.e.*, the latter becomes vested with all the powers the former Fiscal possessed under §52(1) *ante*.

When the warrant has been executed the procedure outlined in §58 must be followed.

By §73 *post* the provisions of §57 are made applicable to search warrants.

3. **Shall endorse.**—See §56 para. 8 *ante*. See *R. v. Podi Baba* (1895) 1 *N.L.R.* at p. 24.

4. **By post or otherwise.**—See §56 para. 7 *ante*.

5. **Shall cause such warrant to be executed.**—See §56(2) *ante*. When the person has been arrested, the procedure set out in §58 must be followed.

6. **In the same way as if it had been originally directed to him.**—*i.e.*, the Fiscal to whom the warrant has been endorsed over under §57, becomes vested with all the powers possessed by the Fiscal to whom the warrant had originally been directed.—See §52(1) *ante*.

7. **Kalu Banda v. Irulandi (1907) 1 Leader 38.**—See §52 para. 3 *ante*.

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§58

8. **Does §57 apply only to warrants issued under the Criminal Procedure Code ?**—See §56 para. 4 *ante*.

9. **Applicability of §57 to the service of summons.**—See §64 (3) *post*.

Procedure on arrest of person against whom warrant is issued.

58. (1) When a warrant of arrest is executed outside the local limits of the jurisdiction of the Court by which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Police Court within the local limits of the jurisdiction of which the arrest was made, or unless security be taken under section 51, be carried before such last-mentioned Police Court.

(2) Such latter Police Court shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such last-mentioned court ; provided that if the offence be bailable and the person arrested be ready and willing to give bail to the satisfaction of the court before whom he shall have been brought, or a direction has been endorsed under section 51 on the warrant, and such person is ready and willing to give the security required by such direction, such last-mentioned court shall take such bail or security as the case may be, and forward the bond to the Court which issued the warrant.

(3) Nothing in this section shall be deemed to prevent a Peace Officer from taking security under section 51.

Warrant of arrest.—See §50 *ante*.

Execution of warrant.—See §§52 – 57 *ante*.

Execution of warrant outside the jurisdiction of the Court.—§§52, 55, 56, 57 *ante*.

Court.—See §3 *ante*.

Police Court.—See §3 *ante*.

Security.—See §51 *ante*.

Bailable offence.—See §3 *ante*.

Peace Officer.—See §3 *ante*.

Place of arrest.—*C. f.* §54 *ante*.

1. §58 is based upon §§85–86 of the Indian Code, but they are not identical in their terms.

2. **Scope of §58.**—This section is in the nature of a proviso, both to §56 and to §57 *ante;* and it would also appear that its provisions would govern any arrest under a warrant not issued under this code and where the arrest is effected beyond the limits of the jurisdiction of the Court which issued the warrant.—See §56 para. 4 *ante*.

Whenever a warrant is executed beyond the local limits of the jurisdiction of the Court which issued the warrant, the person arrested shall—

(*a*) liberate the person arrested on bail, if security under §51 *ante* can be taken—see §58(1),(3);

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(*b*) if no security can be taken, then (i) if the Court which issued the warrant is within twenty miles of the place of arrest, the person is to be taken before that Court ; (ii) if the Court which issued the warrant is in fact closer to the place of arrest than the Police Court having jurisdiction over that place, in that case too, the person is to be taken before the Court which issued the warrant ; or (iii) if the Court which issued the warrant is more than twenty miles distant from the place of arrest, or if the Police Court having jurisdiction over the place of arrest is closer to that place than the Court which issued the warrant, in either case the person " shall be carried " before the Police Court having jurisdiction over the place of arrest.

§58(2) only applies to the cases described in (iii). When the person who has been arrested is produced before the Police Court, and the Court is satisfied that the person produced is the person whose arrest was desired, the Court—

(i) will direct his removal in custody to the Court which issued the warrant ; but

(ii) if the offence with which he is charged is bailable, and the person arrested is ready and willing to give bail to the satisfaction of the Police Court, or if there is an endorsement on the warrant under §51 *ante* that bail may be taken, and the person arrested is ready and willing to give the required bail, the Police Court must take the bail, release the person arrested, and forward the bail bonds to the Court which issued the warrant.

§58(3) emphasises the provision contained in §§51 and 58(1). §58 must be read and construed in the light of §54 *ante*. *C.f.* §71 *post.*

2. **Outside the local limits of the Court.**—See §56 para. 6 *ante.*

3. **Court.**—Note the use of the words " Court " in contradistinction to " Police Court." The former obviously refers to all Courts, *i.e.*, the Court from which the warrant emanated.

4. **If the person arrested appears to be the person intended.**—See *R. v. Hastings* and *R. v. Debi Singh* §50 para. 7 *ante.* It would appear that the person effecting the arrest should also be prepared to prove the identity of the person arrested, if called upon to do so.

5. **Shall forward the bond to Court.**—See §51(3) *ante.*

6. **§58(1) should be read in the light of §54 *ante*.**—The person arrested must be taken before the proper Court " without unnecessary delay."

7. **Carried.**—See §§53 - 55 para 10 *ante.* The use of this word is peculiar.—See §73(*e*) *post.*

8. **Applicability of §58 to the service of summons.**—See §64 (3) *post.* *C.f.* §71 *post.*

9. **Direct his removal.**—*C.f.* §128(*b*) *post.*

10. **As to warrants issued by Village Tribunals.**—See §74. Ordinance No. 9 of 1924.

C.—Proclamation and Attachment.

Proclamation for person absconding.

59. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such

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§59-61 Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :—

[§ 4, 31 *of* 1919.] (*a*) It *or a translation in Sinhalese or Tamil* shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

[§ 4, 31 *of* 1919.] (*b*) It *and a translation in Sinhalese and Tamil* shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; **and**

[§ 4, 31 *of* 1919.] (*c*) A copy *and a translation in Sinhalese and Tamil* thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day.

Attachment of property of person absconding.

60. (1) The Court may, after issuing a proclamation under the last preceding section, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person.

(2) Such order shall authorize the attachment of any property belonging to such person within the local jurisdiction of the Court by which it is made, and it shall authorize the attachment of any property belonging to such person without such jurisdiction when endorsed by a District Judge or a Police Magistrate within whose jurisdiction such property is situate.

(3) If the property ordered to be attached be debts or other movable property, the attachment under this section shall be made—

(*a*) By seizure ; or

(*b*) By the appointment of a receiver ; or

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(*c*) By an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(*d*) By all or any two of such methods as the Court thinks fit.

[§ 3, 24 *of* 1906.] (4) If the property ordered to be attached be immovable, the attachment under this section shall be made through *the Government Agent or the Assistant Government Agent of the province or district in which* such property is situate—

(*a*) By taking possession; or

(*b*) By the appointment of a receiver; or

(*c*) By an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(*d*) By all or any two of such methods as the Court thinks fit.

(5) The powers, duties, and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed in a civil proceeding.

(6) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of the Governor, but it shall not be sold until the expiration of six months from the date of the attachment, unless it is subject to speedy and natural decay or the court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

(7) Notice of every such order of attachment of immovable property shall be forthwith given by the Court making the same to the Registrar of Lands for the district in which such property is situate, who shall forthwith register the same, and no such order shall take effect until the same is registered under the provisions of section 16 of "The Land Registration Ordinance, 1891.*"

[§ 3, 24 *of* 1906.] (8) In the case of the sale of immovable property the conveyance to the purchaser shall be executed by *the Government Agent or the Assistant Government Agent of the province or district in which* such property is situate, and a conveyance so executed shall vest such property in the purchaser in like manner as if such conveyance had been executed by the proclaimed person.

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*See Ordinance No. 23 of 1927.

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Restoration of attached property.

61. If, within one year from the date of the attachment, any person whose property is or has been at the disposal of the Governor under the last preceding section appears voluntarily or is apprehended and brought before the Court by whose order the property was attached and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

Court.—See §3 *ante.*
Warrant.—See §50 *ante.*
Warrant has been issued.—See §§50 – 58 *ante.*
Execution of warrant.—See §§52 – 58 *ante.*
Written.—See §3 ante.
Translation.—*C. f.* §§44(2), 45(2), 53 *ante.*
Ordinarily resides.—See §47 *ante.*
Conclusive evidence.—See §4 Evidence Ordinance 1895.
Attachment.—See §111 *post.*
Within or without the local jurisdiction of the Court.—See Courts' Ordinance 1889, Schedule III. and §§135 – 136 *post.*
District Judge.—See §3 *ante.*
Police Magistrate.—See §3 *ante.*
Government Agent.—See §3 *ante.*
Assistant Government Agent.—See §3 *ante.*
Governor.—See §3(6) Interpretation Ordinance 1901.
Forthwith.—See §§33, 42 – 43 *ante.*

1. §§59 – 61 are based upon §§87 – 89 of the Indian Code and to a very great extent the two provisions are similar in their terms.

2. **Scope of §§59 – 61.**—Whenever *any* Court finds that *any* person, for whose arrest a warrant has been issued by that Court, has absconded or is in concealment so that the warrant cannot be executed, such Court (see *Nonchi Hamy v. Christian* (1896) 2 *N.L.R.* 211) is by §59(1) empowered, whether after taking evidence or not, to "proclaim" such person.

Such proclamation must be in writing, and must require the person proclaimed to appear at a specified place and at a specified time, which shall not be less than thirty days from the date the proclamation was "published." The legal results which arise out of such a proclamation are (i) that any Peace Officer may arrest the person proclaimed without a warrant—§32 (1) (*d*) *ante;* and (ii) that the movable and immovable property of the person proclaimed become liable to be "attached" and sold by the Crown unless he surrenders or purges his default.

§59(2) lays down the rules for the "publication" of a proclamation.* The terms of this sub-section should be carefully followed, because it is

C. f §4(2) Ord. No. 38 of 1921.

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the " publication " of the proclamation which forms the foundation for the subsequent procedure. §59(3) creates a conclusive presumption in favour of due publication, provided a statement or minute to that effect has been entered on the record by the Judge of the Court which issued the proclamation. It is, therefore, the duty of such Judge, before making such a statement or minute, to satisfy himself that all the provisions of §59(2) have been faithfully observed.

After a proclamation has issued, the Court may order the " attachment " of any property, whether movable or immovable, belonging to the person proclaimed.—§60(1). Such order shall authorise the attachment of property situate within the jurisdiction of the Court making the order, and it shall authorise the attachment of property situate beyond the jurisdiction of such Court, when such order is endorsed by the District Judge or Magistrate within whose jurisdiction such property is situate.—§60(2).

§60(3) enumerates the modes by which movable property and *choses in action* may be attached ; while §60(4) lays down the methods by which immovable property can be attached. Whenever immovable property is attached, notice of this fact must be given forthwith to the local Registrar of Lands.—§60(7).

§60(5) invites attention to the fact that the powers, duties and liabilities of a receiver appointed under §§60(3)(*b*) and 60(4)(*b*) are the same as those of a receiver appointed in a *civil* proceeding.

If the person proclaimed does not appear within the time specified in the proclamation, the attached property automatically becomes liable to be disposed of by the Governor.—§60(6). Such property, however, cannot be sold until the expiration of six months from the date of the attachment, except in cases (i) where it is subject to speedy and natural decay, or (ii) where the Court considers that a sale would be beneficial to the owner. In either of these cases, the Court may cause the property to be sold *whenever* it thinks fit. When any immovable property is sold, whether on the orders of the Governor or on the orders of the Court, the conveyance in favour of the purchaser is to be executed by the local Government Agent or Assistant Government Agent, and such a conveyance vests *dominium* in the purchaser.—§60(8).

If, within one year from the date of the attachment, "any person whose property is, or has been at the disposal of the Governor" under §60(6) appears voluntarily, or is apprehended and brought before the Court by whose order his property was attached, and proves to the satisfaction of such Court (i) that he did not abscond or conceal himself for the purpose of avoiding the execution of the warrant *and* (ii) that he had no notice of the proclamation as to enable him to attend within the time specified, then in such case the property attached, or, if it has been sold, the net proceeds of the sale, or, if a part has been sold, and a part unsold, the net proceeds of the sale and the balance of the property unsold, shall be delivered back to him, after deducting all costs incurred in consequence of the attachment.—§61.

Proclamation and sequestration of property under the Civil Procedure Code.—§§131 – 132 Civil Procedure Code.

3. **Any Court.**—*Nonchi Hamy v. Christian* (1896) 2 *N.L.R.* 211.—" It is clear from the language of the section, that the only Court competent to order . . . a written proclamation to be published, is the Court which has issued the warrant of arrest. It is that Court which has to satisfy itself whether or not the person against whom it issued a warrant of arrest has absconded or is concealing himself . . ." *per* Withers, J.

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In this case the Magistrate of the Itinerating Police Court of Colombo issued a warrant for the arrest of the accused, and the Police Magistrate of Colombo ordered the proclamation of the accused. *Held*, that the latter order was *ultra vires*. See para. 13 *infra*.

4. **Has reason to believe.**—See §56(3) para. 10 *ante* and §62 *post*. See *R. v. Sirinivasa* (1881) 4 *Mad.* 393,—paras. 7 and 8 *infra*.

The Court may, under §59(1), proclaim a person without recording evidence, but the Court must be satisfied that the absence of the person is due to the fact, that he has absconded or has concealed himself for the purpose of evading arrest.—See *R. v. Ramkishore* 10 *Beng. L.R.*94.—*General Order* 884 directs Magistrates, in cases where an *accused* against whom a warrant has issued, has *absconded*, that they should not content themselves with merely re-issuing the warrant, but promptly publish a proclamation and order attachment.

5. **Any person.**—*i.e.*, whether an accused person, a witness, or otherwise. See §§50, 62, 151(2).

6. **Against whom a warrant has been issued.**—The " reason to believe " must apparently be based on something that has been brought to the knowledge of the Court, subsequent to the issue of the warrant. " A person cannot evade a direction which has not been given . . . It is not . . . sufficient to show that a person apprehending that a process will be issued, has absconded. He may do so in the hope that his absence will deter the Court . . . from issuing the process."—*R. v. Sirinivasa* (1881) 4 *Mad.* at p. 397.

Farzand v. Hanuman (1896) 19 *Alla.* 64—*Obiter*.—The High Court referred with disapproval to the conduct of a Magistrate who issued a proclamation without waiting for the return to the warrant.

7. **Has absconded.**—*C.f.* §170 Penal Code. *R. v. Sirinivasa* (1881) 4 *Mad.* at p. 397.—" . . . The term ' abscond ' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself ; and it matters not whether a person departs from a place or remains in it if he conceals himself ; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has issued, he absconds . . ." *per* Turner, C.J. & Muttusamy Ayyar, J. Note the use of the words " has absconded or is concealing himself " in §59(1) and §61. The same words appear in §§87(1) and 89 of the Indian Code.

8. **So that such warrant cannot be executed.**—Under the Indian Criminal Procedure Codes of 1861 and 1872, the words used were " for the purpose of avoiding the service of the warrant." Hence, we find in *R. v. Sirinivasa* (1881) 4 *Mad.* at p. 397, the Judges holding that " the absconding must be with a purpose. This in our judgment implies that the absconder knows, or at least has reason to believe, the process has issued." The section as now framed considers the result rather than the intention of the absconding.

9. **A specified time not less than thirty days from the date of publication of the proclamation.**—*R. v. Naicken* (1907) 17 *Mad. L.J.* 438.—A proclamation issued under §87 of the Indian Criminal Procedure Code (*local*—§59) against an absconding person should allow at least thirty days' time to such person for his appearance, and, if the judge fixes a lesser period, the proclamation is void in law.

R. v. Subbarayar (1895) 19 *Mad.* at p. 4.—" The proclamation requiring the petitioner to appear on the 11*th December*, was issued on the 6*th November*, and on that day affixed to the Court house. It was

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not published in the village in which the petitioner resides till the 15*th November*. Clearly, therefore, there was a failure to comply with the provisions of the section. The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation (*publication*?) in the village." *per* Shephard & Best, J.J. See para. 10 *infra*.

10. **Publication of the proclamation.**—*R. v. Subbarayar* (1895) 19 *Mad.* at p. 5.—" §87 (*local*—§59(1), (2)) prescribes certain rules with regard to time and with regard to place. In respect of these matters the section is imperative, and the neglect of the rule with regard to time is no more excusable than would be the neglect of the rule requiring publication in two places. Suppose that the petitioner had, in consequence of his failure to attend in obedience to the proclamation, been charged under §174 of the Indian Penal Code (*local*—§172), could it be said that he was legally bound to attend in obedience to the proclamation when it appeared that the proclamation had not been duly made and published under §87 of the (Indian) Procedure Code ? Clearly not . . ." *per* Shephard & Best J.J. See also para. 9 *supra*.

It will be observed that under §59(2) the proclamation must be published in three ways, *viz:*—

(*a*) The proclamation **or** a translation shall be publicly read in some conspicuous place of the town or village in which the person wanted ordinarily resides ;

(*b*) The proclamation **and** a translation shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides, **or** to some conspicuous place of such town or village, and

(*c*) A **copy** of the proclamation **and** a translation of it shall be affixed to some conspicuous part of the Court house.

It will be noted that §59(2) has recently been amended by §4 of Ordinance No. 31 of 1919. The words italicised in §59(2), as it appears at the commencement of this commentary, show the amendments which were effected. These amendments were rendered necessary in view of the fact that process servers and other persons interested in such proclamations, were generally persons unable to read and understand the English language.

Ordinarily resides.—See §47 para. 6(iii) *ante*.

Translation.—*C.f.* §44(2) paras. 2(ii), 3(*c*), §45(2), §53 *ante*.

11. **Proof of publication.**—" Conclusive evidence "—*i.e.*, as soon as the Court which issues the proclamation makes a minute on the record to the effect that the proclamation was duly published, an irrebuttable presumption arises that all the requirements of §59(2) have been duly fulfilled—see §4 Evidence Ordinance. It is, therefore, the duty of every Judge to satisfy himself that the terms of §59(2) have been strictly observed, before making a minute under §60(3).

12. **Form of proclamation.**—(i) It must be in writing—§59(1). (ii) It must require the person proclaimed to appear at a specified place and time not less than thirty days from the date the proclamation is published—§59(1). (iii) Form 5 in *Schedule III post*, gives the form to be used in the case of accused persons. See also *General Order* 899 and *Appendix L.* thereto.

13. **Attachment.**—The attachment of property is one of the legal consequences arising out of the proclamation of a person.—See para. 2 *supra*.

§60(1) lays down the circumstances under which an order of attachment may be made. It is to be noted that under the corresponding

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§59-61 section of the Indian Code—§88(1)—the wording used is "The Court issuing a proclamation under §87 (*i.e., local*—§59) may *at any time* order the attachment, etc. . . ." The words which are italicised are new in the Code of 1898. Our law follows the wording of the older Act of 1882. It would, therefore, appear that an order of attachment cannot be made simultaneously with the issue of the proclamation. In *Farzand v. Hanuman* (1896) 19 *Alla.* at p. 67 Banerji & Aikman, J.J., held, as follows :—"On the 20th of May, the Magistrate, without waiting for the return of the warrant, directed the issue of a proclamation . . . *and at the same time ordered the attachment of . . . the accused's property. Such an order for attachment, we may observe, cannot be made until after the proclamation is issued.*" This apparently means that an order of attachment could not be made until the lapse of the time stated in the proclamation. Under §88(1) of the Indian Code, as it exists to-day, it is clear that proclamation and attachment may, if the Court sees fit, issue simultaneously.—see *R. v. Chowdhry* (1902) 29 *Cal.* at p. 418. From the terms of *General Order* 884, it would appear that the intention of Government is that proclamations and orders of attachment should issue simultaneously. It is, therefore, desirable that §60(1) of this Code should be amended so as to bring it into line with the Indian Code.

In re Pandya Nayak (1884) 7 *Mad.* 436.—The fact that a proclamation has issued cannot be presumed from the fact that an order of attachment has been made.

Nonchi Hamy v. Christian (1896) 2 *N.L.R.* 211.—See para. 3 *supra.* An order for attachment can only be made by the Court which issued the proclamation.

14. **Belonging to the proclaimed person.**—See §§60(1), 61 and para 18 *infra.*

R. v. Rai (1884) 6 *Alla.* 487.—There is no provision of law requiring a Magistrate who has attached property under §88 of the Indian Criminal Procedure Code (*local*—§60) to investigate the claims of third persons as to the ownership of such property. The proceedings of a Magistrate under §88 are not "Judicial proceedings" within the meaning of §4(*d*) of the Code (*local*—§3(1) *ante*).

R. v. Goudan (1896) 20 *Mad.* 88.—When a claim is made to property which has been attached, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit, and not by way of revision under this Code.

Secretary of State v. Dassi (1901) 28 *Cal.* 540.—This was a civil action instituted by A. against the Secretary of State and X. to recover certain lands. It was alleged that X. instituted criminal proceedings against Y, who not having appeared, the land in question was attached as the property of Y, and that, although A. had claimed the same, it had not been released. *Held*, that the land being proved to be the property of A, X. was liable in damages to A.

Golam v. Bera (1883) 9 *Cal.* 861.—A, who was an accused, absconded, and his property was on 7th August, 1878, attached by the Magistrate. While the property was under attachment, it was seized by B. in execution of a judgment debt against A. and sold on 15th January, 1879, B. being the purchaser. On the 21st of April the Magistrate sold the property to C. It did not appear whether the time fixed by the proclamation for A's. appearance had expired at the date of the sale to B. *Held*, that as against B. and C, C's. title was superior to that of B. *Semble*,

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that after the date of the attachment and during its continuance no title could be conferred by seizure and sale made subsequently in execution of a judgment debt.

R. v. Din 9 *P.R.* 1908.—A land subject to a lease must be attached and sold subject to the lease.

The Code apparently does not lay down any procedure for inquiry by the Court with a view to satisfying itself that the property which it proposes to attach is actually the property of the person absconding. It is the duty of those who proceed to attach the property to satisfy themselves, in the first instance, that the property is owned by the person proclaimed.—See §§60(1)–(4).

15. **Modes of attachment.**—These are set out in §60(3) and (4):

(*a*) If the property to be attached be movable property or *choses in action*, the attachment is to be effected by all or **any two** of the following methods as the Court thinks fit :—

(i) By seizure ;

(ii) By the appointment of a receiver ;

(iii) By an order in writing prohibiting the delivery of such property to the person proclaimed or to anyone on his behalf ;

(*b*) If the property to be attached is land, the attachment is to be effected through the Government Agent or the Assistant Government Agent of the province or district in which the property in question is situate. The attachment is to be effected by all or **any two** of the same modes of attachment prescribed in case of the attachment of movable property.

Seizure.—*C. f.* §§227 – 229, 232, 234 – 237 Civil Procedure Code.

Receiver.—See §§671 – 675 Civil Procedure Code. By §60(5) of this Code, the powers, duties, and liabilities of a receiver appointed under §60 are declared to be the same as those of a receiver appointed in a civil proceeding.

Prohibitory order in writing.—*C. f.* §§229, 235, 237, 278, 279 Civil Procedure Code.

16. **Shall be at the disposal of the Governor.**—If the proclaimed person does not appear within the time limit fixed by the proclamation, all property which has been attached automatically becomes placed at the disposal of the Governor. The property, however, may not be sold until six months have elapsed *from the date of the attachment*, unless (i) such property is subject to speedy and natural decay, or (ii) the Court considers that a sale would be for the benefit of the owner.—§60(6). In either of these cases the Court may cause the property to be sold " whenever it thinks fit," *i.e.*, even before the expiration of the six months. See para 18 *infra*.

The information to the Governor that the property under attachment is at his disposal should be conveyed to him through the Attorney-General.—*General Order* 885(i).

17. **Notice of attachment.**—Whenever the attachment of immovable property is ordered, notice of this fact shall be given " forthwith " to the local Registrar of Lands, who is required to register the same " forthwith." No order of attachment regarding land is to take effect until it has been duly registered.—§60(7). See *General Order* 885(ii).

Forthwith.—See §33 para. 3, §§42 – 43 para. 5, §71 para. 6 *post*.

18. **The conveyance of attached lands which have been sold.**—The conveyance is to be executed by the Government Agent or the Assistant Government Agent—§60(8), and is to be in a certain pres-

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§62 cribed form.—*General Order* 885(iii). Such conveyance passes title to the vendee as if it had been executed by the proclaimed person himself. Therefore, if the land sold does not belong to such proclaimed person, apparently no title can pass—see para. 14 *ante* and §411A, 312(2) *post.*

19. **Restoration of attached property to the person proclaimed.**—See para. 2 *supra.*

Within one year.—Under §89 of the Indian Code the time is fixed at two years. Computation of time—see *Wickremasooriya v. Appusinno* (1895) 1 *N.L.R.* 178.

R. v. Bukhooree 8 *W.R.* 207.—Where a person whose property was attached did not appear " within two years " and his property was sold, and was, a few days after his appearance, discharged for want of evidence, *held*, that no action lay to set aside the sale.

Voluntarily.—See §37 Penal Code where the word is defined.

Disposal of the Governor.—See §60(6).

Abdulla v. Gitu (1900) 22 *Alla.* 216.—Where property had been attached and sold as being the property of the person proclaimed, it was held that, although the proclamation was irregular, yet the property having vested in third parties, who were strangers to the proceedings, the sale could not be set aside. On the other hand in *Shewdyal v. Gribau* 6 *W.R.* 73, in a similar case, the Court ordered notice to issue to the vendees to show cause why the sale should not be set aside. In the case of *Mian Jan v. Abdul* (1905) 27 *Alla.* 572, where it was found that the procedure culminating in the sale of the attached property was irregular, *held* that the *civil* Courts had jurisdiction to entertain a suit by the owner of the property so sold, to recover it from the vendee.

The *onus* lies very heavily on the proclaimed person who seeks to be restored back into possession under §61, to show (i) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant **and** (ii) that he did not have such notice of the proclamation as to enable him to attend before the Court within the specified time.

20. **Offences.**—Absconding in order to avoid any notice or order. —§170 Penal Code.

Intentionally preventing service on himself or on another of any notice, order, or the making of any proclamation, etc.—§171 Penal Code.

D.—Other Rules Regarding Processes.

Issue of warrant in lieu of or in addition to summons.

62. (1) A Court may in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor issue, after recording its reasons in writing, a warrant for his arrest :—

(*a*) If either before the issue of summons or after the issue of the same, but before the time fixed for his appearance the Court sees reason to believe that he has absconded or will not obey the summons ; or

(*b*) If at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith

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and no reasonable excuse is offered for such failure. §62

Court may require deposit to meet expenses of executing warrant. [§5, 31 *of* 1919.]

(2) *Provided the Court may make it a condition of the issue of a warrant under this section that the person applying for it shall deposit such sum as the Court may deem reasonable for the purpose of defraying any expenditure that may be incurred in executing the warrant.*

Court.—See §3 *ante.*

This Code.—See §1 *ante.*

Summons.—See §§44 – 49 *ante.*

Warrant.—See §§50 – 58 *ante.*

Service of Summons.—See §§45 – 48 *ante.*

Execution of warrant.—See §§52 – 58 *ante.*

Writing.—See §3 *ante.*

1. §62 is almost identical with §90 of the Indian Code, except that sub-section 2 of the local enactment finds no counterpart in the Indian Act.

2. **Scope of §62.**— §62 lays down the principles which should guide Courts in ordering warrants to issue in cases where summonses should ordinarily issue in the first instance. Except in the case of jurors and assessors, in every other case in which a Court is empowered by this Code to issue a summons for the appearance of *any person*, it may, instead of issuing a summons, order that a warrant should issue for the arrest of such person after recording its reasons for the order. Such a warrant may issue (i) if *before* the issue of a summons, or *after* the summons has issued, but before the time fixed for his appearance, there is reason to believe that the person wanted has absconded, or that he will not obey the summons—§62(1)(*a*); or (ii) if he fails to appear on the due date, and it is proved that the summons has been duly served in time to admit of his appearance on the due date, and no reasonable excuse is tendered for the default—§62(1)(*b*). See *Form* 3, *Schedule III. post.*

§62(2) adds a proviso to the effect that the Court may make it a condition of the issue of a warrant under this section, that the person applying for it shall deposit a certain sum which the Court considers reasonable, in order to defray the cost of executing the warrant.—See para 13 *infra.* See also §§84, 127(3), 151(2).

3. **May.**—§62 gives the Court a discretion as to whether a warrant is to issue instead of a summons, but such discretion should be exercised subject to the principles laid down by the Supreme Court in the cases set out in para 6 *infra.*

4. **Empowered by this Code to issue a summons.**—In *Schedule II. column* 4 *post*, it is specified in what cases a summons should ordinarily issue, and in what cases a warrant. With regard to offences other than those created by the Penal Code, see the title "Offences against other Laws" at the end of *Schedule II.* See also §§65, 151(2), 156(4), 282 *post*, and Civil Procedure Code §794.

N.B.—Where a Magistrate issues a summons for the attendance of an accused he may dispense with his personal attendance, and may permit him to appear by a pleader.—§154 *post.*

See *R. v. Kazim* (1901) *Alla. W.N.* 35.—§63 para. 4 *post.*

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5. **Other than a juror or an assessor.**—See §§207, 257, 270 – 271, 274, 276 *post*, and see §72 Courts' Ordinance 1889.

6. **Issue a warrant after recording his reasons in writing.**—

Writing.—See §3 *ante*.

Principles guiding the issue of warrants instead of summons.—See §151(2) para. 12 *post*.

Perera v. Ran Menika (1909) 3 *S.C.D.* 52 (3 *Leader* Pt. III. 13).—The complainant made a written complaint to Court charging the accused with committing an offence under the Labour Ordinance. At the foot of this complaint the Magistrate recorded the entry " Sworn to this 25th May, 1907 " and thereupon issued a warrant for the arrest of the accused. Subsequently, the Magistrate made the record: " Accused not pointed out, case dismissed." The warrant was re-issued several times, and, three months after its first issue, the accused was arrested and convicted on the charge. *Held*, *per* Hutchinson, C.J.: " I think the complaint upon which the warrant was issued did not contain sufficient material to justify the issue of a warrant. A warrant of arrest should not be issued as a matter of course upon every charge of a petty offence without any allegation that the person charged cannot be found, or that a summons is not likely to be effectual to secure his presence. Nor do I think that it was open to the Magistrate, having once dismissed the charge, to re-issue the warrant without some fresh material to go upon . . . "

Elworthy v. Kandasamy (1915) 1 *C.W.R.* 93.—" . . . It appears that the accused were brought before the Court on the 11th August and were bailed out, and the case was fixed for the 17th August. On the 12th August the superintendant of the estate made a statement to the Magistrate that the first accused . . . had gone back to the estate and had behaved in a drunken and disorderly manner and that he apprehended a breach of the peace. Thereupon, the Magistrate purported to cancel his previous order for bail and issued a warrant, and the first accused was immediately arrested and committed to jail. It cannot be too much insisted on that the law provides for the issue of a warrant of arrest only for the purpose of securing the attendance of the accused person. In this case the first accused had already been brought before the Court and released on the execution of a bail bond . . . If his conduct after his release amounted to a new offence, a separate charge should have been made, and fresh proceedings taken, and if it was thought that his attendance could not be secured otherwise than by means of a warrant, then a warrant might have issued . . . But the issue of the warrant, under the circumstances above stated, was wholly without legal justification " *per* de Sampayo, J. *C.f. R. v. Kazim* §63 para. 4 *post*.

Wills v. Sholay Kangany (1915) 18 *N.L.R.* at p. 445 (1 *C.W.R.* 107).—" A more serious matter is the evidence on which a warrant was obtained in this case to arrest the accused. On the back of the complaint is also a printed form signed by the complainant, and containing some stereotyped statements usually required to be sworn to for the purpose of obtaining a warrant. It concludes with the statement: "His (accused's) presence cannot be secured on summons." It is for the Court, and not for the complainant, to come to such a conclusion, and for that purpose the complainant must swear to the facts, of which, however, there is an entire absence. At the bottom of the form, even the order to be made by the Magistrate is printed, and the Magistrate in this case obediently signed it. The issue of a warrant is a serious matter, and the Magistrate should exercise his own independent judgment on

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the facts before he does this judicial act. In every case it is the duty of the Magistrate to see that the complainant or other person, when giving what purports to be oral evidence, gives it consciously and with a due sense of his own responsibility, and that he not merely adopts general statements already printed and furnished to him by the proctor . . . I think the practice followed in this case is reprehensible, and I hope not to see another instance of it," *per* de Sampayo, J. See *Litten v. Perera* (1908) 11 *N.L.R.* at p. 94. and *Rahim v. Ramasamy* (1917) 4 *C.W.R.* at p. 247.

Rahim v. Nonahamy (1916) 19 *N.L.R.* at p. 170.—" *Accused absent —move for warrant.*" " . . . The absence of the accused is presumably the ground for the application for the warrant. But since the accused had not been previously arrested, and this report was the initiation of the prosecution, the accused must necessarily have been absent, and I cannot understand how their absence could be considered any reason for the application. The Magistrate allowed the warrant, without any material before him, and merely stating, evidently as his reason, that the *police* moved for it . . . It seems to me that the issue of the warrant was not justified, and amounted to a misuse of the process of Court," *per* de Sampayo, J.

Sampanther v. Hiniappu (1916) 2 *C.W.R.* 109.—Where the accused obtained summons on his witnesses, who were absent on the day of trial, and he thereupon asked for warrants against them, and the Magistrate refused to make the order, *held*, that as the witnesses were material for the defence, and as they had not attended on summons, the Magistrate should have ordered warrants to issue.

Sella v. Sinno (1879) 2 *S.C.C.* 167.—Issue of warrants instead of summons—condemned.

R. v. Phukan (1911) 38 *Cal.* 789.—Warrant issued instead of a summons, and without any reasons for its issue being recorded by the Magistrate. The adoption of printed stereotyped forms was held not to be a compliance with the terms of §90 (*local*—§62) of the Indian Criminal Procedure Code, which requires the Court to record its reasons in writing.

Jayatilleke v. Jayasekera (1910) 5 *Bal.* 78.—A warrant may be issued under §62, if the Court records its reasons in writing, and if the summons is proved to have been duly served in time to admit of the person's appearing in accordance with it. There should be proof as to who served the summons, and at what place, and on what day, and at what time, so as to enable the Court to decide whether the requirements of §62 have been fulfilled.

7. **Issue of summons.**—See §§44 *et seq. ante.*

8. **Time fixed for his appearance.**—See *Forms* 1 and 7, *Schedule III. post*, and *c.f.*, §51(2)(*c*), *ante.*

9. **Reason to believe.**—*Litten v. Perera* (1908) 11 *N.L.R.* at p. 94. —" Unless the Court has evidence before it, it will not 'see reason to believe.'" See also §§32(1)(*b*), (*h*), 56 para. 10 *ante*, 59, §68 para. 10 *post*, §159(3).

Reason to believe.—Defined §24 Penal Code.

10. **Service of summons.**—See §§48 – 49 *ante.*

11. **Absconded.**—See §59 para. 7 *ante.*

12. **Reasonable excuse.**—The burden of proving a reasonable excuse is on the person summoned.

13. **Expenses of executing the warrant.**—Sub-section 2 was added to §62 by an amendment of the law effected by §5 of Ordinance

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§63 No. 31 of 1919. The amendment merely legalised an existing practice. In certain cases, it had been the custom to require a deposit of money in order to defray the expenses of executing the warrant. The amendment recognises the custom, and gives it legal validity. It is to be observed, that §62(2) can properly apply only to private prosecutions, and not to those instituted by the Crown. *C.f.* §§159(3), 282(2) *post.*

Power to take bond for appearance.

63. When any person, for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, such officer may require such person to execute a bond with or without sureties for his appearance in such Court.

Summons.—See §§44 – 49 *ante.*

Warrant.—See §§50 – 58 *ante.*

Bond.—See §§394 – 400, 410 – 412, 436 *post.* and *c.f.* §§33, 35, 36, 39, 51, 55, 126 – 127.

1. §63 of this Code is identical with §91 of the Indian Code.

2. **Scope of §63.**—In cases where it is open to the Court to issue a summons or a warrant to secure the attendance of any person, but before this has been done it is found that such person is actually present in Court, he may at once be required to execute a bond for his due appearance before such Court.

§394 *post* deals with the question of the admission to bail of all persons except the accused in non-bailable offences, who appear or are produced before the Court. §395 deals with the admission to bail of persons accused of non-bailable offences.

See also §§396 – 400, 410 – 412 *post.*

3. **Empowered to issue a summons or warrant.**—*C.f.* "Is empowered by this Code to issue a summons" in §62(1) *ante.*

4. **R. v. Kazim (1901) Alla. W. N. 35.**—Where a Magistrate suspected that a witness, who was present in Court might in the future be kept out of the way by the accused, *held* that neither §§91 (*local*—§63) nor 496 (*local*—§394) of the Indian Criminal Procedure Code justified his arresting her and placing her in the lock-up. This action "possibly might be supported by the provisions of §§65 (*local*—§41) and 90 (*local*—§62) of the Indian Criminal Procedure Code". *C.f. Elworthy v. Kandasamy.*—§62 para. 6 *ante*, and see §411 para. *post.*

Summons to run in any part of the Island.

64. (1) All summonses to appear may be served in any part of the Island, provided that no such summonses shall be served outside the local limits of the jurisdiction of the Court issuing the same unless the same be endorsed by such Court with the words "For service out of the jurisdiction."

(2) No such summons shall be endorsed with the words "For service out of the jurisdiction" unless the Court is satisfied that there are grounds for allowing such service.

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(3) The provisions of this Chapter as to the direction and execution of warrants shall apply as near as may be to summonses. §65

Summonses.—See §§44 *et seq. ante.*

Service of summons.—See §§45 – 49 *ante.*

In any part of the Island.—*C. f.* §§52(1), 55 *ante.*

Local limits of the jurisdiction of the Court.—See §§135 – 136 *post.*

Direction of warrants.—See §§51 – 52 *ante.*

Execution of warrants.—See §§53 – 58 *ante.*

1. §64(1), (2) find no counterparts in the Indian Code. §64(3) appears to have been based upon §93 of the Indian Act.

2. **Scope of §64.**—(i) §64(1), (2) deal with the service of summons beyond the jurisdiction of the Court, which issues it. These sub-sections are, therefore, supplementary to the procedure contained in §§44 *et seq. ante.* Unlike in the case of a warrant which has to be executed outside the jurisdiction of the Court, which issues it (see §56 para. 2 *ante*), all that the Court has to do in the case of a summons, which has to be served outside the jurisdiction of the Court, is to endorse it as required by §64(1). It is for the Court to be satisfied that there are grounds for making such an endorsement.—§64(2).

(ii) §64(3) declares that the provisions of *Chapter V.* of the Code regarding the direction (§§51 – 52 *ante.*) and the execution (§§53 – 58 *ante.*) of warrants are to apply " as near as may be " to all summonses. See §§44 para. 5 and 45 para 8 *ante*, and §§73 para. 3, 124(4) *post.*

Arrest on breach of bond for appearance.

65. When any person who is bound by any bond taken under this Code to appear before a Court does not so appear the officer presiding in such Court, may issue a warrant directing that such person be arrested and produced before him.

Bound by any bond taken under this Code.—See §§33, 35, 36, 39, 51, 55, 63, 126, 127, 394 – 400, 410 – 412.

This Code.—See §1 *ante.*

Warrant.—See §50 *et seq.*

Arrest.—See §23 *et seq. ante.*

1. §65 is identical in its terms with §92 of the Indian Code.

2. **Scope of §65.**—When any person who has entered into a bond taken under this Code to appear before a Court, and he fails to do so, the Court may at once issue a warrant for his arrest.—§65. The Court may also declare that the amount of the bond is forfeited.—§411 *post.* Such a person may also be arrested on the application of his sureties.—§400(2), or the surety may make the arrest and produce the person before the Court without any order, and ask that the bond be discharged. —§400(4).

C. f. §395(4), which authorises the Judge to order the re-arrest of any person accused of a non-bailable offence, and who has been released on bail.

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CHAPTER VI.*

OF PROCESS TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to Produce.

Summons to produce document or other thing.

66. (1) Whenever any Court considers that the production of any document or other thing is necessary or desirable for the purposes of any proceeding under this Code by or before such Court, it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of sections 123 and 130 of "The Evidence Ordinance, 1895,"† or to apply to any book, letter, postcard, telegram, or other document in the custody of the Postal or Telegraph authorities.

Procedure as to letters and telegrams, &c.

67. (1) If any such book, letter, postcard, telegram, or other document as in sub-section (3) of the last preceding section is mentioned is in the opinion of the Supreme Court wanted for the purpose of any proceeding under this Code, the Supreme Court may require the Postal or Telegraph authorities as the case may be to deliver such document to such person as such Court directs.

(2) If any such document is in the opinion of the Attorney-General wanted for any such purpose, he may require the Postal or Telegraph authorities as the case may be to cause search to be made for and to detain such document pending the orders of the Supreme Court.

Process to compel production of a document or thing.—See §282 *post*.

Court.—See §3 *ante*.

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* This chapter applies to maintenance proceedings—See Ord. No. 19 of 1885 §15 ; Ord. No. 15 of 1921 §9.

† No. 14 of 1895.

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Document.—See §3 Evidence Ordinance, 1895.
This Code.—See §1 *ante*.
Summons.—See §§44 *et seq.*
Supreme Court.—See §3 *ante*.
Attorney-General.—See §3 *ante*.
Requisition.—See §68 *post*.
Impounding of document or thing.—See §77 *post*.

1. §66 is based on §94 and §67 is based on §95 of the Indian Code, but they are not identical in their terms.

2. **Scope of §§66-67.**—It is a fundamental rule of evidence that documents must be proved by primary evidence.—§64 Evidence Ordinance. The rule is the same in civil as well as in criminal proceedings. Secondary evidence regarding the contents of documents may be given *inter alia* when the person in possession of the document is out of reach of, or not subject to, the process of the Court.—§66 *proviso* (6) Evidence Ordinance, and see *infra*.

The Civil Procedure Code by §§123, 127–129, 131, 133, 140 and the Criminal Procedure Code by §§66 *et seq.* and §282 provide the legal machinery by which the production of documents can be obtained before the Courts of law. Under the Criminal Procedure Code, the Court may act *ex mero motu*, or on application made in that behalf either by the prosecution or by the defence.—§282 *post*. Any disobedience to a lawful order for production is a contempt of Court.—§383 *post*.

It is to be observed that §66 of this Code applies not only to the production of documents, but also of things.—*c.f.* §60 *proviso* (2) Evidence Ordinance.*

Ordinarily a summons to produce will issue to the person " in whose possession or power " a document or thing, the production of which is required, is believed to be. The summons, which is equivalent to the *subpoena duces tecum* of the English law, will direct the person summoned to attend the Court and produce it at a given time and place.—§66(1). The summons will have to conform with all the legal requirements laid down by §§44 *et seq. ante*. If such person is summoned merely to produce a document or thing and not to give evidence, he need not attend personally. It will be sufficient if he causes such document or thing to be duly produced at the time and place stated.—§66(2). §66(3) draws attention to cases where no summons to produce, shall issue, *viz.*, (i) in the case of unpublished official records relating to affairs of State.—§123 Evidence Ordinance, (ii) documents for which privilege may be claimed under §130 (*ibid*) and (iii) in the case of any book, letter, post-card, telegram, or other document in the custody of the Postal or Telegraph authorities—see also §41A. Telegraph Ordinance No. 35 of 1908. It is to be noted that no search warrant can be issued by any Court except the Supreme Court for a search or inspection of documents in the custody of the Postal or Telegraph authorities.—§68(3) *post*. If any Court other than the Supreme Court desires the production of " such books, letters, post-cards, telegrams, or other documents " as are in the custody of the Postal or Telegraph authorities, an application must be made to the Supreme Court, ordinarily through the Attorney-General—§67(1)—and the Supreme Court may then direct their production, if necessary by the issue of a search warrant. Pending such an order it is lawful for the Attorney-General to direct the Postal or Telegraph authorities to cause search to be made for the required documents.—§67(2). Under

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§66-67 §26 of the Ceylon Telegraph Ordinance No. 35 of 1908, telegraph officers who divulge the purport of any telegraphic signal to any person not entitled to become acquainted with the same, commits an offence. It would seem that this section does not bind the Crown.—§14 Ordinance No. 21 of 1901. It is submitted that no offence would be committed by the Postmaster-General handing over a telegram to public officers lawfully engaged in investigating crime, *e.g.*, the Police.

If the Court " has reason to believe " that any person to whom a summons or requisition has been directed, or might have been directed, will not or would not produce the required documents or things ; or where it is not known in whose possession such documents or things are ; or in cases, where the Court considers that the interests of justice demand that a general search or inspection should be made, it may issue a search warrant in the prescribed form—§68,—but no Court except the Supreme Court can issue a search warrant on the Postal or Telegraph authorities.—§68(3).

Summons to produce under the Civil Procedure Code.—See §127 – 128 of that Code and §124 paras. 2, 4 *post.*

3. **For the purposes of any proceeding under this Code.**—Should there be some proceeding *actually pending*, before a summons or search warrant can issue ?—See §124 *post.* The balance of Indian authority is in favour of an answer in the affirmative, but it cannot be said that in India the question is free from all doubt.—See §68 para. 1 *post.*

Clarke v. Chowdhry (1909) 36 *Cal.* 433.—Considerable tension of feeling had existed between two rival factions, and a man was murdered. A Magistrate proceeded to the spot and was informed that a large quantity of firearms had been stored in the houses of certain people belonging to one faction. Under the orders of the Magistrate these houses were forcibly entered by the servants of the Crown, boxes forced open and a general search made. In an action instituted against the Magistrate for trespass it was found as a matter of fact that he, as well as those under him had been acting with perfect *bona fides. Held, per* Maclean, C.J. & Harington, J. (Brett J. *dissenting*) that the search constituted an actionable wrong unless warranted by some Statute, and that in the circumstances of this case, the search was not warranted by any Statute. When executive officers are vested with statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act, which created them. The search being a general search for arms, was not warranted by §25 of the Arms Act of 1878, which required that before making the search, the Magistrate should first record the grounds of his belief,* in terms of the section, which was not done. The search was not warranted by §105 of the Indian Criminal Procedure Code (*local*—§79(2)). *Semble*—a general search for arms would be governed rather by the provision of the Arms Act, than by the provisions of the Criminal Procedure Code. The issue of a search warrant is a *judicial* and not an executive act. " It is said that the search was warranted by §105 (*local*—§79(2)) of the Criminal Procedure Code . . . the Magistrate can only act under this section, where he is competent to issue a search warrant. That takes us to §96 (*local*—§68). That section applies to the issue of a search warrant by the Court. Here the defendant was not acting as a " Court," and all that section 105 enacts is that, instead of the Court issuing a search warrant,

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* *C.f.* §36 Excise Ordinance 1912, and see *Silva v. Hendrick Appu* (1917) 4 *C.W.R.* 232, *Zilva v. Sinno* (1914), 17 *N.L.R.* 473.

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the Magistrate may direct a search to be made in his presence . . ." *per* Maclean, C.J. "In my opinion §96 (*local*—§68) only authorizes the Magistrate to issue a search warrant when sitting as a "Court," *i.e.*, when some proceeding under the Code has been initiated before him . . . The only sections, which I can find in the Code authorizing a Magistrate to search without any proceeding having been initiated before him, are §§98 and 100 (*local*—§§70 and 72). It is significant that §96, which authorises the issue of a search warrant . . . confers the powers of issuing the warrant on "the Court," while §§98 and 100 confer the power of issuing a warrant to search only on the Magistrate (*local*—Police Court) specified in the section . . . ; under the Code, except in the cases specified under §§98 and 100, the issue of a search warrant presupposes the existence of . . . a proceeding in the course of which, the Court may be called on to determine judicially, whether a warrant ought or ought not to be issued . . ." *per* Harington, J. The dissenting judgment of Brett, J. should be carefully considered. See §124 para. 7 *post*.

Mandal v. R. (1908) 35 *Cal.* 1076.—"The . . . Magistrate's action in causing the search and taking away the papers was illegal and without jurisdiction . . . The question of its (*i.e.*, the issue of the search warrant) legality under §96 (*local*—§68) depends on whether there was any . . . proceeding under the Code as mentioned by §94 (*local*—§66). It seems there was not. The Magistrate had, no doubt, received the information that he mentions in the order, but he had not acted judicially on it at the time he issued the warrants . . . and . . . we must hold that the issue of the search warrants was not justified by that section (*i.e.*, §96 of the Indian Criminal Procedure Code). It has been contended that the issue of the warrants might have been under §98 (*local*—§70), in which case the existence of a proceeding, etc. under the Code is not necessary, and that though the warrants are informal under §96, they may be taken to be under §98 by operation of §537 (*local*—425) . . . It does not seem possible to read §537 as giving a legal effect to a defective warrant . . ." *per* Stephen & Holmwood, J.J.

R. v. Mahant (1889) 13 *Mad.* 18.—"We are of opinion that under the provisions of §96 of the Criminal Procedure Code (*local*—§68), it is lawful for a Magistrate to issue a warrant for the search and production of anything before him, when he considers that such production is necessary for the purposes of any investigation or inquiry (*local*—proceeding) under the Code. Nor is it obligatory upon him to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross-examined. Such restriction would often tend to defeat the object with which search warrants are authorized to be issued. The Magistrate is entitled, in our judgment, to act upon information, which he considers credible, provided there is a complaint before him and the complainant is examined before him on solemn affirmation . . ." *per* Collins C.J. & Muttusami Ayyar, J.

In re Buch 22 *Bom.* 949.—This case was followed in *Mandal v. R.* (*supra*).

Brajendra v. Clarke 12 *C.W.N.* 973.—Where the first step taken by the Magistrate was to conduct a search, it was held that he was not acting as a "Court" within the meaning of §94 (*local*—§66), and therefore, not within §96 (*local*—§68), and therefore, not within §105 (*local*—§79(2)) as there was no "proceeding" pending before him.

De Soysa v. Karagan.—See §68 para. 10 *post*.

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4. **Document or other thing.**—"Thing."—See §60 *proviso* (2) Evidence Ordinance. The rule as to primary evidence does not apply to things other than documents, so that there is no legal necessity to produce a thing in Court, oral evidence of its state or condition being admissible for that purpose.* Nevertheless, it is always open to a Court to order, that the thing itself should be produced. It would seem that the word "thing" would include not only articles forming the subject of a crime, but also articles, which are to be used only as evidence.—*Nizam v. Jacob* (1891) 19 *Cal.* 52.

Mahomed v. Ahmed (1887) 15 *Cal.* 109.—"Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorized, under certain circumstances, the compulsory production of an accused person's documents in Court" *C. f.* §132 Evidence Ordinance, and see §130 (*ibid*), where it is distinctly laid down that no witness *who is not a party*, shall be compelled to produce incriminating documents. §130 of the Indian Evidence Act is similar to the local enactment. This decision therefore is not inconsistent with §130 of the Evidence Ordinance, which only protects witnesses who are not parties. *Mahomed v. Ahmed* was followed in *R. v. Lakmidas* 5 *Bom. L.R.* 980, and *in re Abdul Latiff* (1917) 19 *N.L.R.* 346.

R. v. Bisu 11 *C.W.N.* 836 decided that a woman is not a "thing," and that no search warrant could issue to produce a woman. See §§72, 77 and 438 *post.*

Jonklaas v. Silva (1892) 1 *S.C.R.* 199.—The words "other thing" cannot be construed as being *ejusdem generis* with the word "document." See §§68 para. 1, 124 para. 8 *post.*

5. **In whose possession or power.**—See §§68, 383, 417 *post*, and §§66, 130(2), 162 Evidence Ordinance. See *Crowther v. Appleby* (1873) *L.R.* 9, *C.P.* 23; *Coomes v. Hayward* (1912) 1 *K.B.* 150; *Eccles v. Louisville Railroad Co.* (1912) 1 *K.B.* 135; and *Kearsley v. Philips* (1883) 10 *Q.B.D. at p.* 467.†

Nizam v. Jacob (1891) 19 *Cal. at p.* 61.—"As regards Mr. B's. objection that he had a lien on five of the notes, that in our opinion was no sufficient reason for the non-production of the notes." See §68 para. 1 *post.*

6. **Requiring him to attend and produce.**—See §68 para. 1 *post.*

R. v. Lakmidas 5 *B.L.R.* 978.—"The following order was held to be invalid: 'Inspection of accused's books to be granted at the office of Messrs. C. and V. daily from 12 noon to 5 p.m. to commence on 9th September, 1903.'" *Mahomed v. Ahmed* (para. 4 *supra*) followed.

Gorait v. Sadhukhan (1910) 38 *Cal.* 68.—A Magistrate on taking cognizance of a complaint, may issue either a summons under §94 (*local*—§66), or a search warrant under §96 (*local*—§68) of the Indian Criminal Procedure Code, but it is irregular to make an order directing the police to take possession of books, etc., which form the subject of the charge. See §124 para. 7 *post.*.

A person, who has only been summoned to produce a document or thing, and not to give evidence, need not attend personally, provided he causes the due production of what is wanted.—§66(2). Even if such

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* See *Dias on the Evidence Ordinance* p. 66, 70.

† See *Dias on the Evidence Ordinance* p. 317, 319, 338 where these cases have been considered.

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person attends, the mere fact that he formally produces the document in Court, will not give the adverse party the right to cross-examine him, " unless and until he is called as a witness ".—See §139 Evidence Ordinance.* See also Civil Procedure Code §§127, 135.

7. **Nothing in this section (66) shall be deemed, etc.....''**—Do the provisions of §66(3) imply that in criminal cases, no privilege can be claimed regarding documents, which are not (i) unpublished official records relating to affairs of State, (ii) documents specified in §130 of the Evidence Ordinance or (iii) documents in the custody of the Postal and Telegraph authorities ? For example, may a criminal court issue a summons or search warrant for the production of the following :(*a*) a letter written by a wife to her husband, privilege being claimed under §122 of the Evidence Ordinance, (*b*) or letters passing between officers of State in official confidence.—§124 (*ibid*)—or (*c*) letters written by informers to a Magistrate or the Police.—§125 (*ibid*)—or (*d*) letters passing between a client and his legal advisers regarding a lawful transaction.—§§125 – 127, 129 (*ibid*)—or (*e*) documents in a person's possession, which another might refuse to produce.—§131 (*ibid*)? The answer appears to be that, while in the case of the three kinds of documents specified in §66(2) no summons can lawfully issue for their production, and in the case of Postal and Telegraph authorities no search warrant can issue except from the Supreme Court.—§68(3)—it is perfectly competent for any Court to issue a summons or search warrant in the case of any other document, but if any privilege is claimed on their behalf against production, the person making the claim must appear and claim it prior to the production of the document as provided by §162 of the Evidence Ordinance, whereupon the Court will proceed to adjudicate on the merits of the objection.†

8. **Does §67 authorize the Supreme Court to compel the production of documents specified in §§123 and 130 of the Evidence Ordinance** ?—The answer appears to be in the negative. §67(1) refers to " any *such* book, letter, etc. . . ." as is mentioned in §66(3). These words have reference to documents in the custody of the Postal and Telegraph authorities. The word " such " restricts the operation of these words to the latter part of §66(3). The terms of §76(3) appear to support this view.

9. **Offences.**—A person, who being bound to produce any document before a public servant, intentionally omits to do so, commits an offence.—See §173 Penal Code.

B.—Search Warrants

When search warrant may be issued.

68. (1) Where any Court has reason to believe that a person to whom a summons under Section 66 or a requisition under Section 67 has been or might be addressed will not or would not produce the document or other thing as required by such summons or requisition ; or

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* See *Dias on the Evidence Ordinance* p. 273.

† See *Amey v. Long* (1808) 9 East 473 ; *Doe v. Ross* (1840) 7 M. & W. 102 ; *R. v. Greenaway* (1845) 7 Q. B. *at p.* 135 ; *Phelps v. Prew* (1854) 3 E. & B. 430 ; and other cases noted under §162—see *Dias on the Evidence Ordinance* p. 316 *et seq.*

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§68 Where such document or other thing is not known to the Court to be in the possession of any person ; or

Where the Court considers that the purposes of any proceeding under this Code will be served by a general search or inspection ;

It may issue a search warrant in the prescribed form and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) Every such warrant shall remain in force for a reasonable number of days to be specified in such warrant.

(3) Nothing herein contained shall authorize any Court other than the Supreme Court to grant a warrant to search for a document in the custody of the Postal or Telegraph authorities.

Court.—See §3 *ante*.
Summons.—See §§44 *et seq. ante*.
Requisition.—See §67 *ante*.
Document.—See §3 Evidence Ordinance.
Document or thing.—See §66 para. 4 *ante*.
This Code.—See §1 *ante*.
Supreme Court.—See §3 *ante*.
Warrants.—See §§50 – 58 *ante*, and §§69, 70, 72, 73 *post*.

1. §68 is based upon §96 of the Indian Code, but the two sections are not identical in their terms. This fact should be borne in mind when considering the Indian cases cited under this section, and those cited in paras. 3 – 6 in §66 *ante*.

2. **Scope of §68.**—§68 deals with the question of the issue of search warrants.

(i) **When may a search warrant issue**?—See *Costa v. Peris* (1933) 13 *C.L.Rec.* 73.

(*a*) Where the normal procedure by means of a summons or requisition (§§66 – 67) has either failed, or where there is reason to believe that such procedure will not be effective—§68(1).

(*b*) When the document or thing wanted is not known to be in the possession of any person—§68(1). See §124 *post*.

(*c*) When the Court considers that the purposes of any proceeding under this Code will be served by a general search or inspection—§68(1) and see *in re Abdul Latiff* (1917) 19 *N.L.R. at p.* 348.

(*d*) If there is reason to believe that a person is confined under circumstances which appear to make such confinement an offence—§72 *post*.

(*e*) When it is necessary to search houses or places which are suspected to be used for the deposit of the fruits of offences, etc.—§70 *post*.

A search warrant should not issue in cases where the proper remedy is to ask for a mandate of sequestration before judgment on giving proper security. A search warrant for the investigation of an offence may only issue when there is legal evidence before the Court that an offence has been committed—*Chettiar v. Darley Butler & Co.* (1932) 34 *N.L.R.* 41.

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But no search warrant may issue on the Postal or Telegraph authorities for the search of documents in their custody, except by the orders of the Supreme Court.—§68(3). See also §41A Telegraph Ordinance No. 35 of 1908. Search warrant to produce under the Civil Procedure Code—§131.

Police Officers and Inquirers investigating offences are empowered to issue search warrants.—§124 *post*. Certain Peace Officers may, without a search warrant, enter upon premises in order to search for false weights and measures.—§119 *post*. See also §79(2) *post*.

By §9 *ante* Police Courts are specially vested with authority to issue search warrants.

(ii) **The search warrant must be in the prescribed form.—See para. 6 *infra*. It must be in writing, and signed by the Judge**—§§50, 73. It must be regularly directed—§§68(1), 52, 73—but a search warrant directed to a Peace Officer, if such Peace Officer cannot proceed in person to carry out the search, may be executed by another Peace Officer, provided the former endorses over the warrant to the latter—§78 *post*. *C.f.* §20 *ante*.

The Court may restrict the operation of the search warrant as indicated by §69 *post*. The duration of the warrant must be specified—§68(2). See also *Koch* 40 ; *Soysa v. Karagan* (1886) 1 *S.C.R. at p.* 102 (translation of warrant); *Rasool v. Samuel* 6 *Tam.* 17 (name of person); *Fernando v. Nadan* (1908) 3 *A.C.R.* 61 (article to be searched not accurately specified); *Mahomed v. Ahmed* (1887) 15 *Cal.* 109 (article not specified, but no prejudice).

There is no section either in Part B or in the rest of this Chapter of the Code which provides for the disposal of the articles seized under a search warrant. The " disposal " of property which is the subject of offences is provided for by *Chapter XL. post* (§§413-421)—*Costa v. Peris* (1933) 13 *C.L.Rec.* 73.—See §413 paras. 2, 15 *post*.

3. **Should there be some proceeding actually pending before a search warrant can issue ?**—See §66 para. 3 *ante*.

Clarke v. Chowdhry.—See §66 para. 3 *ante*. " The only sections that I can find in the Code authorizing a Magistrate to search without any proceeding having been initiated before him, are §§98 and 100 (*local*—70 and 72)" *per* Harington, J.

Mandal v. R.—See §66 para. 3 *ante*.

De Soysa v. Karagan.—See para. 10 *infra* and see *Chettiar v. Darley Butler & Co.* (1932) 34 *N.L.R.* 41.

4. **Such warrant shall remain in force for a reasonable number of days.**—See §68(2) and see §73 para. 2(ii) *post*.

C.f. §50(2) *ante*.

5. **Execution of search warrant outside the jurisdiction of the Court which issued it.**—§§56 and 57 of this Code are made applicable to search warrants by §73 *post*. The procedure to be followed after the warrants have been so executed is to be found in §71 *post*. *C.f.* §58 *ante*.

6. **In the prescribed form.**—Although it is stated that search warrants should be in the prescribed form, it is to be noted that *Schedule III*. gives no form applicable to search warrants.—See §§441, 442 *post* and the form in *General Order* 899 and *Appendix L.* thereto.

7. **The search and inspection.**—The public are bound to assist the person executing the search warrant.—§§20, 73. *C.f.* §70(*a*) *post*.

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§68 **Until the search is completed the inmates of the house may be detained, and their persons searched.**—See §26 *ante*. The provisions of §§30 and 31 apply to such searches.

The persons residing in the house to be searched or inspected shall, on demand, afford the person executing the warrant free ingress thereto, and render him every facility.—§74(1). *C.f.* §24 *ante*.

If resisted, the person executing the warrant may enter the premises as provided by §25 *ante*.—See §74(2).

On demand.—See *De Soysa v. Karagan* (1886) 1 *S.C.R. at p.* 101.

While the search is in progress the occupant, or some person on his behalf, shall be allowed to be present.—See §76. After the search is completed, the person executing the warrant must make a list of everything seized during the search, *stating the places where each thing was found*, and he must sign such list—§75.

The occupant, or the person who represents him, is entitled to be given a copy of this list duly signed.—See §76. If the search has been made beyond the limits of the jurisdiction of the Court which issued the search warrant, such things as well as the list are to be forwarded as directed by §71. If the search has taken place within the jurisdiction of the Court which issued the search warrant, such things and the list will be produced before it.

Inspection.—See para. 11 *infra*.

8. **Powers of Magistrates regarding searches.**—The Magistrate may attend personally to see that a search warrant which has been issued by him is duly executed—§79(1) *post*.

If it was competent for the Magistrate to issue a search warrant in any given case, he may, without issuing a search warrant, orally direct the search to be made in his presence.—See §79(2) *post*.

9. **Search warrants issued by Police Officers or Inquirers.**—See §124 *post*.

10. **Has reason to believe.**—See §62 para. 9 *ante*, and §§70, 72 *post*.

Mahomed v. Ahmed (1887) 15 *Cal. at p.* 120.—Before a Magistrate can be said to have "reason to believe" should he be satisfied by judicial enquiry? *Held*, in the affirmative by Norris, J.

R. v. Mahant.—See §66 para. 3 *ante*.

De Soysa v. Karagan (1886) 1 *S.C.R. at p.* 102.—Under the Code, when the Court is satisfied that the production of a document or thing is necessary or desirable for the purpose of the investigation, the Judge has a discretion of issuing a summons, and in certain circumstances of issuing a search warrant.

R. v. Manekje 5 *Bom. L.R.* 1032.—Unless the Court "has reason to believe," the issue of the warrant is illegal and the order must be quashed.

R. v. Mul Chand 8 *A.L.J.* 517—Where a complaint was made, and a search warrant asked for, but counsel asked the Court, in order to prevent information leaking out, to treat the complaint as confidential, and not to examine the complainant on oath, *held*, "It is the duty of the Court in the first instance to consider if a summons to produce would not have the desired effect . . . It is a grave step to issue a search warrant."

Reason to believe.—Defined §24 Penal Code.

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Where the Court considers, etc.—*In re Abdul Latiff* (1917) 19 *N.L.R. at p.* 348.—Where one partner charged another with committing criminal breach of trust, and the Magistrate issued a search warrant to secure the production and inspection of all the partnership books, *held*, "I do not myself doubt that under the third paragraph of §68 of the Criminal Procedure Code the Police Magistrate had full power to order a general search for, and inspection of, all the books of the partnership, if he considered, as the search warrant itself shows that he did consider, the adoption of that course necessary for the purposes of these proceedings . . . It is essential, for the adequate administration of justice in this country that that power should exist . . ." *per* Wood Renton, C.J. In this case *Mahomed v. Ahmed* (*supra*) was followed. See *Chettiar v. Darley Butler & Co.* (1932) 34 *N.L.R.* 41.

See §124 para. 3 *post.*

11. **Inspection.**—*i.e.*, and inspection of the place, not of the documents. See §§69, 74(1) *post. C.f. In re Abdul Latiff* para. 10 *supra.*

12. **Document or other thing.**—See §66 para. 4 *ante.*

13. **Possession or power.**—See §66 para. 5 *ante.*

14. **General search.**—*i.e.*, a search for things of a particular class without specifying any one particular thing, or a general unrestricted search. See *In re Abdul Latiff* para. 10 *supra.* See also §69 para. 2 *post*, and §124 para. 6 *post.*

15. **Powers of search under laws other than the Criminal Procedure Code.**—*Clarke v. Chowdhry* (1909) 36 *Cal.* 433.—When executive officers are vested with statutory powers of a special and drastic kind, they must strictly comply with the provisions of the Act before exercising such powers. Thus, it was held in India, that a general search for arms would be governed, not by the Criminal Procedure Code, but by the Indian Arms Act.

See §§24, 25 para. 4, §§26 *ante* and 70 *post*, where examples are given of laws which permit searches.

R. v. Pareed (1927) 9 *C.L.Rec.* 43, 5 *T.L.R.* 91, 29 *N.L.R.* 204.—"It appears to me that the language of §9 considered in the light of the provisions of §§68, 70 and 72 indicate clearly that a search in the nature of that provided for in §7 of the Gaming Ordinance does not come within the provisions of the Criminal Procedure Code and contemplate only warrants issued for the purposes indicated in §§68, 70 and 72, which are different from the purpose of a warrant under §7 of the Gaming Ordinance."

C.f. §§119, 124 *post.*

16. **The word "warrant" as used in §187 *post* does not include a search warrant.**—*Gunewardene v. Lebbe* (1911) 15 *N.L.R. at p.* 184.

17. **Meedin v. Mohidin (1897) 3 N.L.R. 27.**—A person who maliciously and without reasonable cause obtains a search warrant may be liable in an action to pay damages to the aggrieved party.

18. **Impounding any document or thing.**—See §77 *post.*

19. **§68 applies to searches made by Inquirers.**—See §124(4) *post.*

Power to restrict warrant.

69. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection

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§70 shall extend, and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Court.—See §3 *ante*.

Warrant.—*i.e.*, the search warrant. See §§50 – 58, 68, 70, 72, 73.

Search or inspection.—See §§68, 74.

Direction of search warrant.—See §§68(1), 52, 73, 78.

1. §69 is identical in its terms with §97 of the Indian Code.

2. **Scope of §69.**—See §68 para. 2 *ante*. It is to be observed that a search under a warrant may either be a general search or not—see §68 para. 14. §69 refers both to searches which are general, and to searches which are not, and is designed to empower the Court to order that the search warrant is to be executed with as little inconvenience as possible to the inmates of the premises where the search is to be made. See *Costa v. Peris* (1933) 13 *C.L.Rec.* 73.

3. **Specify.**—*C.f.* §70(*b*) *post*.

4. **Search or inspection.**—See §68 paras. 7, 11; and see *In re Abdul Latiff*—§68 para. 10 *ante*.

5. **See §124(4) *post*.**—Searches by Inquirers.

Search of house suspected to contain stolen property, forged documents, &c.

70. If a Police Court, upon information and after such inquiry as it thinks necessary, has reason to believe:—

(*a*) That any place is used for the deposit or sale of stolen property or of property unlawfully obtained;* or

(*b*) That any place is used for the deposit or sale or manufacture of forged documents,† false seals,‡ or counterfeit stamps,‖ or coin,¶ or instruments or materials for counterfeiting coin or stamps, or for forging; or

(*c*) That any stolen property or property unlawfully obtained, forged documents, false seals, or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps, or for forging are concealed, kept, or deposited in any place;

it may, by warrant, authorize the person to whom such warrant is directed:—

(*a*) To enter with such assistance as may be required such place; and

(*b*) To search the same in manner specified in the warrant; and

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* See §393 Penal Code.
† See §§452 – 459 Penal Code.
‡ See §§460 *et seq.* Penal Code.
‖ See §§248 *et seq.* Penal Code.
¶ See §§225 *et seq.* Penal Code. See also Ordinance No. 32 of 1884.

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(*c*) To take possession of any property, documents, seals, stamps, or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false, or counterfeit and also of any such instruments and materials as aforesaid; and

(*d*) To convey such property, documents, seals, stamps, coins, instruments, or materials before a Police Court or to guard the same on the spot until the offender is taken before a Police Court or otherwise to dispose thereof in some place of safety; and

(*e*) To take into custody and carry before a Police Court every person found in such place who appears to have been privy to the deposit, sale, or manufacture, or keeping of any such property, documents, seals, stamps, coins, instruments, or materials, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained or the said documents, seals, stamps, coins, instruments, or materials to have been forged, falsified, or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.

Police Court.—See §3 *ante*.

Warrant.—*i.e.*, a search warrant, see §§50 – 58, 68, 72, 73, 69.

Direction of search warrant.—See §§68(1), 52, 73, 78.

Impounding document or thing.—See §77 *post*.

1. §70 is based upon §98 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §70.**—This section furnishes an example of one of the cases in which a search warrant may be issued in the first instance, but with §72 it differs from the other cases, *viz.*, those enumerated in §68(1), inasmuch as §§70 and 72 refer to Police Courts, whereas §68(1) refers to "any Court"—see *Clarke v. Chowdhry* (1909) 36 *Cal.* 433, §66 para. 3, and §68 para. 3 *ante*. It would also appear that in the case of search warrants issued under §§70 and 72 there need not be any "proceeding" pending before the Magistrate before he can order the issue of the search warrant; the Magistrate acts upon information which gives him reason to believe that the issue of the warrant is necessary or desirable.—See *Clarke v. Chowdhry* (*supra*) *at p.* 454.

§70 has been designed to permit of the search of premises which are suspected to be the repository of stolen property and the like, in which coining and the manufacture of counterfeit notes, stamps, seals, etc., is being carried on, or where the fruits of any crime are stored. If a Police Magistrate, after information, is satisfied that a search warrant should issue, he will do so and authorize the person to whom such warrant is directed:

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§70 (*a*) to enter the premises in question;

(*b*) to make a search thereof, *in the manner specified in the warrant*;*

(*c*) to take possession of any property found therein, and which is suspect;

(*d*) to convey the same before a Police Court, or to guard it until the offender is taken before a Police Court, or otherwise to dispose of them in some place of safety—See §71 *post;*

(*e*) to arrest and carry before a Police Court every person found on the premises, who appears to have been privy to any offence connected with the property which has been seized.

The Court has power under §69 to restrict the operation of such warrant to any particular place or part of the premises which are to be entered—See (*b*) *supra.*

If the warrant is executed beyond the jurisdiction of the Court which issued it, the person making the search must proceed as directed by §71 *post.* The provisions contained in §§20, 50, 52, 57 *ante* are by §73 *post* made applicable to search warrants issued under §70. If free ingress to the premises cannot lawfully be obtained, the person making the search may enter as provided by §25 *ante*—§74(2). The inmates may be detained during the search and their persons searched—§26 *ante.* It is the duty of all the inmates of such premises to permit the person making the search to enter, if he shows them the warrant on demand, and thereafter to render him every assistance—§74(1). The occupant, or some person on his behalf, is entitled to be present during the search—§76. The person making the search shall make a list of everything seized during the search, and specify therein the various places where each thing was found—§75. The occupant, or his representative, is entitled to receive a copy of this list—§76.

A search warrant directed to a Peace Officer may be executed by another Peace Officer, provided the former endorses the warrant over to the latter—§78.

The Magistrate who issued the warrant may attend at the search to see that it is duly carried out—§79(1). Without issuing a warrant the Magistrate may orally direct that a search should be made, provided he is present throughout the search—§79(2). As to the requisites of a valid search warrant issued under §70—see *Koch* 40.

3. **Should there be some "proceeding" pending before the Court to enable a Magistrate to issue a search warrant under §§70 and 72 ?**—§70 enacts that a Police Court may issue a warrant "upon information and after such inquiry as it thinks necessary." §72, on the other hand, enacts "If any Police Court has reason to believe." In neither section is anything stated with regard to any "proceeding" as in the case of §66 or §68 *ante.*

The view taken in India appears to be that under §§98 and 100 of the Indian Criminal Procedure Code, which correspond to §§70 and 72 of this Code, there need be no proceeding pending in the Police Court before a warrant under these sections can be issued by the Magistrate. —See §66 para. 3, §68 para. 3 *ante.*

Upon information and after such inquiry as it thinks necessary.—

C.f. **Whenever any court considers . . .**—See §66(1).
Where any Court has reason to believe.—See §68(1).
If any Police Court has reason to believe.—See §72.

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* See *Fernando v. Nadan* (1908) 3 *A.C.R.* 61.

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See §68 para. 10 *ante*, and §32 para. 6 *ante; Koch* 40, where this question is discussed; and *Costa v. Peris* (1933) 13 *C.L.Rec.* 73.

4. **Place.**—See §§3, 24 – 26 *ante*, §74 *post*.

"The word 'place' is generally found in conjunction with other words which give it a colour, and is usually controlled by its context." —*Stroud*.

Ferdinands v. Usoof (1909) 12 *N.L.R.* 24.—A certain by-law declared that "No place used as a bakery shall be used as a dwelling house." *Held*, that the word "place" meant only the building and grounds actually used as a bakery, and did not include other portions of the same building. "The framer of the by-law could not have intended that, if one room in an extensive block of buildings is used as a bakery, none of the other buildings, however distant, and however strictly shut off from it, can be used . . . as a dwelling house."

Silva v. Hendrick Appu (1917) 4 *C.W.R.* 232.—Search for excisable articles under §36 of the Excise Ordinance, 1912—"Place"—a hut is a place.

R. v. Careem (1920) 7 *C.W.R.* 300.—"Place"—§36 Excise Ordinance 1912—"Place other than a dwelling house" §34 (*ibid*)—An arrest of a person effected on a doorstep by the side of a road outside a dwelling house was held to be justified under §34 of the Excise Ordinance.

4A. **The fact that a public officer entered private premises wrongfully and without a search warrant and obtained evidence as a consequence of this breach of the law does not entitle a Court to reject such evidence**—*Almeida v. Mudalihamy* (1929) 10 *C.L.Rec.* 148—nor does the illegality of the entry entitle an offender to be discharged; such illegal entry being no bar to the conviction for an offence which is discovered—*A. G. v. Harthewyke* (1932) 12 *C.L.Rec.* 56.

5. **Deposit or sale of stolen property, etc.**—See §9 *ante*.

6. **To enter with such assistance as may be required.**—See §§73, 20, 25 – 26, 30 – 31, 74, 27.

7. **Search the same in the manner specified in the warrant.**—See §69 *ante*. *C. f.* §§26, 30 – 31 *ante*.

8. **Searches under laws other than the Criminal Procedure Code.**—See §26 para. 4 *ante*, §68 para. 15 *ante*, and para. 11 *infra*.

9. **Disposal of things seized.**—See §70(*c*), (*d*). *C. f.* §31 *ante*, and see §71 post.

10. **Carried.**—See §58 para. 7 *ante*.

11. **Ordinances permitting inspection and seizure.**—See *R. v. Pareed* (1927) 9 *C.L.Rec.* 43; 5 *T.L.R.* 91; 29 *N.L.R.* 204.

Enactment.	*Title.*	*Section.*
Ordinance No. 4 of 1841 ..	Vagrants ..	.. 10G
,, No. 18 of 1856 ..	Carts on Highway	.. 3
,, No. 5 of 1861 ..	Wrecks ..	.. 17
,, No. 13 of 1864 ..	Sale of Bread	.. 6
,, No. 16 of 1865 ..	Police ..	.. 53A, 59*
,, No. 17 of 1869 ..	Customs ..	.. 101, 108, 131A
,, No. 9 of 1876 ..	Cattle Trespass	.. 4, 5
,, No. 6 of 1887 ..	Petroleum ..	.. 36
,, No. 13 of 1888 ..	Merchandise Marks	.. 12(1)

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* See para. 13 *infra* and *Miskin v. Dingiribanda* (1922) 4 *C.L.Rec.* 166, *Full Court;* and *Michael v. Jamis Appu* (1879) 2 *S.C.C.* 42; *R. v. Abeyratne* (1879) 2 *S.C.C.* 89; *Cornelis v. Cookson* (1902) 6 *N.L.R.* 40; *Binduwa v. Tyrell* (1913) 4 *C.A.C.* 1; *Thiedeman v. Fernando* (1896) 2 *N.L.R.* 149.

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§70

Enactment.	*Title.*	*Section.*
Ordinance No. 17 of 1889 ..	Gaming	7*
,, No. 15 of 1890 ..	Fortifications and Official Secrets	9
,, No. 18 of 1890 ..	Chanks	10
,, No. 7 of 1893 ..	Rabies	6
,, No. 9 of 1893 ..	Butchers	24
,, No. 5 of 1894 ..	Indian Native Passengers	10, 12
,, No. 25 of 1901 ..	Dog Registration ..	10
,, No. 8 of 1904 ..	Cacao Thefts Prevention	17(2)
,, No. 12 of 1905 ..	Old Metal	3, 6
,, No. 17 of 1906 ..	Pearl Fishery ..	6
,, No. 13 of 1907 ..	Prevention of Cruelty to Animals	12
,, No. 16 of 1907 ..	Forests	37
,, No. 11 of 1908 ..	Post Office	27, 43, 83(3) (4)
,, No. 21 of 1908 ..	Rubber Thefts Prevention	16(2)
,, No. 1 of 1909 ..	Game Protection ..	12B
,, No. 22 of 1909 ..	Stamp	81
,, No. 5 of 1910 ..	Opium	22†, 24(3)
,, No. 6 of 1910 ..	Municipal Councils ..	142,
,, No. 8 of 1912 ..	Excise	35, 36, 37‡
,, No. 9 of 1912 ..	Medical Wants ..	15, 16
,, No. 20 of 1914 ..	Trading with the Enemy	7
,, No. 33 of 1916 ..	Firearms	37
,, No. 24 of 1922 ..	Rubber Restriction ..	21(*b*)
,, No. 4 of 1924 ..	Flood Protection ..	19
,, No. 10 of 1924 ..	Plant Protection ..	5
,, No. 27 of 1927 ..	Indian Labour ..	12
,, No. 17 of 1929 ..	Poisons, Opium and Dangerous Drugs ..	72, 73
,, No. 9 of 1930 ..	Betting on Horse Racing	15
,, No. 11 of 1933 ..	Tea Control	37

12. **See §124(4) *post*.**—Searches by Inquirers.

13. **§59 Police Ordinance No. 16 of 1865.**—In the case of *Miskin v. Dingiribanda* (1922) 4 *C.L.Rec.* 166—the *Full Court* reviewed all the authorities on the point and held that under the provisions of §59 of the Police Ordinance, a Police Officer may enter without a warrant any premises in which he had just cause to believe that a crime has been or is about to be committed or which contains stolen property. Such power is not affected by §70 of this Code, nor is it confined to cases of just suspicion as do not reasonably admit of delay in the search.¶ This case was followed in *S. I. P. v. Fernando* (1927) 8 *C.L.Rec.* 186; 29 *N.L.R.* 122.

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* See *Silva v. Silva* (1920) 22 *N.L.R.* 27; 7 *C.W.R.* 295; *R. v. Porthenis* (1920) 22 *N.L.R.* 163; 8 *C.W.R.* 121; 2 *C.L.Rec.* 100; *R. v. Meerasa* (1922) 24 *N.L.R.* 33; 4 *C.L.Rec.* 5; *Weerakoon v. Cumara* (1922) 24 *N.L.R.* 29; *R. v. Arseculeratne* (1924) 5 *C.L.Rec.* 201; 2 *T.L.R.* 144; *S. I. P. v. Kandiah* (1927) 29 *N.L.R.* 94; 8 *C.L.Rec.* 173; 5 *T.L.R.* 26; *R. v. Pareed* (1927) 9 *C.L.Rec.* 43; 5 *T.L.R.* 91; 29 *N.L.R.* 204; *S. I. P. v. Pieris* (1929) 30 *N.L.R.* 509; 10 *C.L.Rec.* 71; *Weerakoon v. Fernando* (1928) 30 *N.L.R.* 342; 9 *C.L.Rec.* 71; *Bartholomeusz v. Mendis* (1930) 8 *T.L.R.* 55; *Beddewela v. Abraham* (1933) 13 *C.L.Rec. liii.*

† *R. v. Kathiamali* (1934) 13 *C.L.Rec. lxxii.*

‡ See *Dewasundera v. Sinnathana* (1930) 31 *N.L.R.* 493; *De Silva v. Silva* (1931) 8 *T.L.R.* 97; *A. G. v. Hathenayaka* (1932) 12 *C.L.Rec. xix.*

¶ *S. I. P. v. Fernando* (1927) 8 *C.L.Rec.* 186, 29 *N.L.R.* 122; *R. v. Manikam* (1931) 33 *N.L.R.* 152.

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Disposal of things found in search beyond jurisdiction.

71. When, in the execution of a search warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made are found, such things together with a list of the same prepared under the provisions hereinafter contained shall be immediately taken before the Court issuing the warrant unless such place is nearer to the Police Court having local jurisdiction therein; in which case the list and things shall be immediately taken before such last-mentioned Court, and, unless there be good cause to the contrary, such last-mentioned Court shall make an order authorizing them to be taken to the Court issuing the warrant. §71

Search warrant.—See §§50 – 57, 68, 69, 70, 72, 73.

Local limits of jurisdiction.—See §§135 – 136 *post*, *Schedule II*. Courts Ordinance, 1889.

Court.—See §3 *ante*.

List.—See §§75, 76 *post*.

Police Court.—See §3 *ante*.

1. §71 is based upon §99 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §71.**—§71 applies to all search warrants, and provides the procedure to be followed whenever the warrant has to be executed outside the limits of the jurisdiction of the Court which issued it. §71 should be read and construed together with §§56 – 57 *ante*, which, by §73 *post*, are made applicable to search warrants.

After the warrant has been executed, it is the duty of the person effecting the search immediately to take the things seized, together with the list specified in §75 *post*, before the Court which issued the warrant, unless the place of search is closer to the Police Court having jurisdiction over the place in question, in which case the things will be taken before such Police Court. In the latter event, " unless there shall be good cause to the contrary " such Police Court shall make order authorizing the removal of the things before the Court which issued the warrant. This section is similar to §58 *ante*. *C.f.* §§29 – 31 *ante*.

See *Costa v. Peris* (1933) 13 *C.L.Rec.* 73.

3. **Execution of search warrant.**—See §68 para. 5 *ante*. See also §§50, 52, 56 – 57, 73, 75 – 76, 78.

4. **Things.**—This word would include " documents". *C.f.*—*Jonklaas v. Silva* (1892) 1 *S.C.R.* 199 (§68 para. 4 *ante*).

5. **List.**—See §§75 – 76 *post*, and *c.f.* §§29 – 31 *ante*.

6. **Immediately.**—

C.f. **Forthwith.**—§33 para. 3 *ante*, §60 para. 17 *ante*.

Immediately.—See §§42 – 43 para. 5 *ante*, §72 *post*, §§96 – 97 para. 4 *post*.

7. **Unless there be good cause to the contrary**—it is for the person whose " things " have been seized to show cause. The *onus* is on him.

8. **Impounding documents and things.**—See §77 *post*. " Any Court " in §77 would mean the Court which issued the process.

9. **See §124(4) *post*.**—Searches by Inquirers.

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§72

C.—Discovery of Persons Wrongfully Confined.

Search for persons wrongfully confined.

72. If any Police Court has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, it may issue a search warrant; and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith; and the person, if found, shall be immediately taken before such Court, which shall make such order as in the circumstances of the case seems proper.

Police Court.—See §3 *ante*.

Offence.—See §3 *ante*, and see §38 Penal Code.

Search warrant.—See §§50 – 58, 68 – 70, 72 – 73.

Direction of search warrant.—See §§52, 68, 69, 73, 78.

Court.—See §3 *ante*.

1. §72 is based upon §100 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §72.**—§72 furnishes another example of a case where a search warrant may lawfully issue in the first instance—see §70 para. 2 *ante*. As in the case of §70, this section only refers to Police Courts. Moreover, it would appear that there need not be any "proceeding" pending before the Magistrate in order to enable him to issue the warrant —See §70 para. 2 *ante*.

If a Magistrate has reason to believe that any person is being kept in confinement, under circumstances which tend to show that such confinement is an offence, he may issue a search warrant ordering that a search shall be made for such person, and that, when found, he is to be produced immediately before his Court, whereupon the Magistrate is empowered "to make such order as in the circumstances of the case seems proper."

§72 should be contrasted with the terms of §438 *post*, which applies to the case of abducted females. Under the latter section any Magistrate *or District Judge* may, upon a complaint made on oath that a woman or other female under fourteen has been abducted or is being unlawfully detained for any unlawful purpose, order the immediate restoration of such woman to liberty, or that such child be handed over to her lawful guardian.—*C. f.*; *R. v. Bisu* (§66 para. 4 *ante*).

It will be observed that the provisions contained in §§72 and 438 are somewhat analogous to §49 of the Courts Ordinance 1889, which declares the jurisdiction of the *Supreme Court* to issue writs of *habeas corpus* for the production of the body of any person who is being detained in custody which is alleged to be unlawful.*

In executing a search warrant under §72 all the general provisions applicable to such warrants apply to such a warrant.—See §70 para. 2 *ante*.

See *R. v. Pareed* (1927) 9 *C.L.Rec.* 43; 5 *T.L.R.* 91; 29 *N.L.R.* 204.

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* The Power of minor Courts to issue writs of *habeas corpus* was considered in the case *In re Shaw* (1860-62) Ram. 116–128, which is a decision of great historical importance.

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3. **Should there be some "proceeding" pending before the Magistrate, in order to enable him to issue a search warrant under §72?**—See §70 para. 3 *ante*. §73

4. **Reason to believe.**—See §68 para. 10 *ante*, and §70 para. 2 *ante*.

5. **Offence.**—*i.e.*, any act or omission made punishable by *any law in force in this Island*.—See §3 *ante*. *C.f.* §38 Penal Code.

6. **Immediately.**—See §71 para. 6 *ante*.

7. **See §124(4) *post*.**—Searches by Inquirers.

D.—General Provisions relating to Searches.

Direction, etc., of search warrants.

73. The provisions of Sections 20, 50, 52, 56 and 57 shall, so far as may be, apply to all search warrants issued under this Chapter.

Search warrants.—See §§50 – 57, 68 – 70, 72.

1. §73 is almost identical in its terms with §101 of the Indian Code.

2. **Scope of §73.**—§§73 – 76 contain certain general provisions relating to all kinds of searches. §73 brings into operation, in the case of searches, certain other sections of this Code which, had it not been for the provisions of §73, would not have applied to searches.

(i) In making a search, the person who makes it, whether he is a Peace Officer or not, may call upon any other person to assist him, provided the person making the search is by and acting lawfully—§20 *ante*.

(ii) Search warrants should conform with the requirements laid down by §50 with regard to warrants of arrest,—§50 *ante*—but unlike a warrant of arrest (§50(2)) a search warrant remains in force for a reasonable time, which is to be specified in the warrant—§68(2). There appears to be no legal impediment to the cancellation of a search warrant by the Court which issued it under §50(2) *ante*. Needless to say, the search warrant expires when it has been executed.—*R. v. Pareed* (1927) 9 *C.L. Rec.* 43; 5 *T.L.R.* 91; 29 *N.L.R.* 204.

(iii) Search warrants are to be "directed" as in the case of warrants of arrest—§52 *ante*—provided that, in cases where such a warrant is directed to a Peace Officer, who is unable to execute the warrant, it can be executed by another Peace Officer if the former endorses the warrant over to the latter—§78 *post*.

(iv) Search warrants for execution outside the jurisdiction of the Court which issues them should be dealt with as provided by §§56 – 57 *ante*. It is to be observed that the provisions of §58 have not been made applicable to search warrants, its place being taken by §71 *ante*.

There are other provisions in this Code which are applicable to searches under this Chapter, but which are not referred to in §73, *viz.*, §§26, 29 – 31, 119, 124(4). By §74(2) the provisions of §25 *ante* are made applicable to searches under this Chapter.

See also §74 para. 5 *post*.

3. **So far as may be.**—*C.f.* "As near as may be" in §64(3) *ante*, and §124(4).

4. **See §124(4) *post*.**—Searches by Inquirers.

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§74 Persons in charge of closed place to allow search.

74. (1) Whenever any place liable to search or inspection under this chapter is closed any person residing in or being in charge of such place shall, on demand of the person executing the warrant and on production of the warrant, allow him free ingress thereto and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the person executing the warrant may proceed in manner provided by Section 25.

Search.—See §§68, 72, 70, 119, 124.

Inspection.—See §§68(1), 69.

Execution of search warrant.—See §§50 - 57, 68, 70, 72, 73, 69, 71, 75.

Ingress.—*C. f.* §24 *ante.*

1. §74 is similar in its terms to §102 of the Indian Code, but the latter is much more comprehensive in its terms.

2. **Scope of §74.**—This section bears the same relation to searches which the provisions of §24 *ante* bears to arrests. In either case, if any house or premises have to be entered, it is the duty of the person trying to effect the arrest, or make the search, to show his authority, if this is demanded by the person residing therein or having charge of the premises in question. When this has been done, the law casts an obligation upon such householder to allow the person seeking to make the arrest or make the search, free ingress into the premises, and to afford him all reasonable facilities for effecting the arrest or making the search. A breach of this obligation will render the offender liable to the penalties of §§183, 181, Penal Code.

If, after showing his authority, the person seeking to make the search is not given free ingress into the premises, he may forcibly enter as provided by §25 *ante*—§74(2).

N.B.—The provisions of §26 *ante* apply to searches.

3. **On demand.**—See §68 para. 7 *ante.*

4. **Place.**—See §70 para. 4 *ante.*

5. **It is submitted that the provisions of §§74 - 76 would apply to all lawful searches made under laws other than this Code**—See §26 para. 4 *ante.*

6. **Searches by Inquirers.**—See §124(4) *post.*

Officer to make list of things seized.

75. The person executing the search warrant shall make a list of all things seized in the course of the search and of the places in which they are respectively found and shall sign such list.

Execution of search warrant.—See §§50 - 57, 68 - 74.

List.—See §§71, 76.

Sign.—See §3(2) *ante.*

1. §75 appears to have been based upon §103(2) of the Indian Code, but the latter section differs widely from §75.

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2. **Scope of §75.**—§75 has been designed to protect both the person making the search as well as the owner of the house or premises which are searched. It is essential that the terms of this section as well as those of §76 should be observed to the very letter.—See §26 para, 5 *ante*. Under §103(2) of the Indian Criminal Procedure Code, two respectable witnesses are also required to sign the list which is prepared. Although our law does not insist upon this formality, it is one which may well be adopted in every case as a rule of practice. See also §74 para. 5 *ante*.

3. **See §124(4) *post*.**—Searches by Inquirers.

4. **R. v. Naik (1910) 34 Mad. 349.**—When a search is conducted under the Code, oral evidence can be given regarding the things seized in the course of the search, and regarding the places in which they were found, in addition to the documentary evidence supplied by the list made under §75. In this case it was contended that no evidence except the list itself produced could be proved under §91 of the Evidence Ordinance. *Held*, that if the contention was correct, the accused would be unable to prove in any case that the list is incorrect or even false. *Held*, further, that the words "any matter required by law to be reduced to the form of a document" in §91 of the Evidence Ordinance, could not have been intended by the Legislature to mean observations relating to physical facts which. under the ordinary law, has to be proved by oral evidence in Court.

R. v. Thankamma (1925) 26 *N.L.R.* 307.—The failure to make a list of the things seized on a search warrant is a breach of §75, the terms of which are imperative, but this is not fatal to the subsequent prosecution regarding any prohibited article found at the search.—*Nicholas v. Fernando* (1931) 8 *T.L.R.* 149.

Occupant of place searched may attend.

76. The occupant of the place searched or some person on his behalf shall, in every instance, be permitted to attend during the search and a copy of the list prepared under the last preceding section, signed by the person executing the warrant, shall be delivered to such occupant or person at his request.

Search.—See §§68 – 70, 72 – 75, 79, 119, 124.

List.—See §§71, 75 *ante*.

Signed.—See §3(2) *ante*.

Execution of search warrant.—See §§50 – 57, 68 – 75.

1. §76 is based on §103(3) of the Indian Code.

2. **Like §75 this section has been designed to protect the person making the search as well as the owner of the premises which are searched.**—See §75 para. 2 *ante*. See also §74 para. 5 *ante*.

3. **The occupant of the place searched.**—*C. f.* §§24, 74 *ante*.

4. **Place.**—See §70 para. 4 *ante*.

5. **At his request.**—*C. f.* "On demand" §§24, 74 *ante*.

6. **Searches by Inquirers.**—See §124(4) *post*.

7. **R. v. Thankamma (1925) 26 N.L.R. 307.**—In the execution of a search warrant under §76, the provisions which require the presence of the occupant of the place searched or of someone on his behalf must be strictly observed as a guarantee of the reality of the search.

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§77

E.—Miscellaneous.

Court may impound things produced.

77. Any Court may, if it thinks fit, impound any document or other thing produced before it under this Code.

Court.—See §3 *ante*.

Document or other thing.—See §§ 66, 68, 71, 75.

This Code.—See §1 *ante*.

Produced before it.—See §§29 – 31, 66 – 68, 70 – 72, 119, 124, 419.

1. §77 is identical in its terms with §104 of the Indian Code.

2. **Scope of §77.**—§77 enacts that any criminal Court may, if it thinks fit, impound any document or thing which has been produced before it under this Code. Under the Civil Procedure Code similar powers are vested in Courts exercising civil jurisdiction.—§§115, 117 Civil Procedure Code.

§77 should be carefully contrasted with the provisions of §§413, 414, 417 *post*, and should be read and construed subject to their provisions.

Examples of other laws which justify the forfeiture of property will be found noted at pages 46, 47 *ante*.

3. **Any Court.**—*i.e.*, any Court of criminal jurisdiction. It is submitted that, for example, where a search warrant is executed outside the jurisdiction of the Court which issued process, and the things seized are taken before the Police Court exercising jurisdiction over the locality under §71 *ante*, such last named Court would not be justified in exercising the powers conferred by §77.

4. **Thing.**—A woman has been held not to be "a thing"—*R. v. Bisu* §66 para. 4 *ante*.

5. **Produced before it.**—These words are very wide. In order to justify an order under §77 the document or thing need not have been produced on a summons or search warrant, so long as they have been produced before the Court, and so long as the production has been under this Code.

6. **Has the party aggrieved by an order under this section a right of appeal?**—*C. f.—Perera v. Fernando* (1912) 6 *S.C.D.* 82.—Where under the Arrack Ordinance 1844 §37, an order was made directing the confiscation of a cart which had been used to transport arrack, *held*, that this was an appealable order under §338 *post*.

7. **Case Law.**—*Aratchi v. Madateno Baas* (1899) 1 *Tam.* 62.—Charge of letting out on hire an unlicensed cart—order confiscating the cart and bulls—validity of such order.

Daniel v. Careem (1899) *Koch* 25.—Conviction for selling opium in contravention of the terms of a licence—order that the opium and the vessels in which it was contained should be confiscated and destroyed—validity of such order. *C. f.—Nona v. Lebbe* (1899) *Koch* 51.

Katha v. Meera (1898) 3 *N.L.R.* 90.—On a charge of criminal misappropriation the Magistrate discharged the accused after advising the parties to have their dispute settled in a civil Court. The property, which was the subject matter of the charge, had been sold by the order of the Magistrate, and the proceeds paid into Court. The Magistrate refused to allow the complainant to draw this money until the civil case was decided. *Held*, that this order was bad. (This case was cited in *Silva v. Hamid infra*).

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Hassim v. Musa (1917) 20 *N.L.R.* 15.—Where a person charged under §3 of the Merchandise Marks Ordinance 1888 is acquitted, the Court cannot order the forfeiture of the articles in relation to which the offence was alleged to have been committed.

Govinden v. Pitche (1917) 20 *N.L.R.* 115; 3 *C.W.R.* 278.—Where the accused was convicted under §53(4) of the Police Ordinance 1865 with obstructing a public road by keeping a sherbet cart thereon, the Court cannot order the forfeiture of the cart.

Silva v. Hamid (1918) 20 *N.L.R.* 414.—Charge of receiving stolen property—acquittal of the accused—clear proof required that the property is stolen property—correct order to be made. *Katha v. Meera* (*supra*) considered.

De Saram v. Wijeysekera (1917) 4 *C.W.R.* 403.—Charge under §279 of the Penal Code in respect of a revolver—acquittal of accused —no order can be made confiscating the revolver.

S. I. Police v. Silva (1919) 7 *C.W.R.* 55.—Conviction under the Defence of the Colony Regulations—charge of removing foodstuffs in breach of the orders of the Food Controller—order forfeiting the foodstuffs. *Held*, that the order was *ultra vires*. See also *Kachcheri Mudliyar v. Mohameddo* (1920) 21 *N.L.R.* 369; 7 *C.W.R.* 155; 1 *C.L.Rec.* 178 (*Full Court*).

Peris v. Joseph (1913) 5 *B.N.C.* 64.—Where the accused committed theft of certain property and pawned it, *held*, that the Court had power to restore it back to the lawful owner.

For other cases see §§413 – 414, 417 *post*.

Search warrants may be endorsed by Peace Officer.

78. (1) A search warrant directed or endorsed to a Peace Officer may, if he is not able to proceed in person, be executed by any other Peace Officer.

(2) In such case the name of such Peace Officer shall be endorsed upon the warrant by the officer to whom it is directed or endorsed.

Search warrant.—See §§50 – 57, 69 – 73.

Direction of search warrant.—See §§52, 68 – 69, 73.

Peace Officer.—See §3 *ante*.

Execution of search warrant.—See §§ 50 – 57, 68 – 75.

1. There is no section corresponding to §78 in the Indian Code.

2. **Scope of §78.**—This section is solely concerned with search warrants which have been directed or endorsed to Peace Officers. If the Peace Officer to whom such warrant is entrusted is unable to execute it in person, it may be executed by any other Peace Officer, but before so doing it is the duty of the Peace Officer to whom the warrant was entrusted to endorse it over to the Peace Officer who is proceeding to make the search. *C.f.* §52(3) *ante*.

If a search warrant is directed or endorsed to a person who is not a Peace Officer, it would appear that if such person cannot make the search in person, a fresh warrant will have to be obtained, unless the Magistrate is willing to act as provided by §79(2) *post*.

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§79 Powers of Magistrate when present at search.

79. (1) The Police Magistrate by whom a search warrant is issued may attend personally for the purpose of seeing that the warrant is duly executed.

(2) Any Police Magistrate may orally direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant.

Police Magistrate.—See §3 *ante*.

Search warrant.—See §§50 – 57, 69 – 78.

Execution of search warrant.—See §§50 – 57, 68 – 75, 78.

1. §79(1) is based upon no section in the Indian Code, but §79(2) appears to have been based on §105 of that Code.

2. **Scope of §79.**—§79 is very similar to §§40 – 41 *ante*. §79(1) is merely declaratory, and empowers a *Magistrate* who has issued a search warrant to be present at the search, for the purpose of seeing that it is properly carried out. §79(2), on the other hand, enacts that in cases where any *Police Magistrate* might have issued a search warrant he may, instead of issuing one, make an oral order directing the search, and such search may be carried out if it is effected in the presence of the Magistrate.

C.f. §§121(2), 124(2) *post*.

3. **In his presence.**—*R. v. Fernand.*—See §41 para. 7 *ante*. See also §35 para. 3 *ante*.

4. **Clarke v. Chowdhry.**—See §66 para. 3 *ante*. *Brajendra v. Clarke.*—See §66 para. 3 *ante*.

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PART IV. §80

PREVENTION OF OFFENCES.

As was noted at pages 39 – 41 *ante*, one of the principal objects of criminal sanctions, is the prevention of future offences. Part IV. of this Code, as will be seen from the headnote, is concerned with the "prevention of offences."

This embraces the whole range of:—

§§80 – 98.—The taking of security to keep the peace, and to be of good behaviour.

§§99 – 104.—The suppression of unlawful assemblies.

§§105 – 114.—The prevention of nuisances.

§§115 – 119.—Preventive action by Peace Officers.

C.f. §§113A, 449–451 Penal Code.

CHAPTER VII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

The law on this subject is to be found in §§80 – 98, 325 *et seq. post*, and *c.f.* §369 *post*. "There is no doubt that *Chapter VII.* of the Criminal Procedure Code . . . is capable of the most salutary use, but its provisions are of a special character and the precautions which the chapter requires ought to be very carefully observed."—*Kanagasingham v. Tambiah* (1925) 4 *C.L.Rec.* 211.

Speaking generally, the measures provided by *Chapter VII.* are resorted to for the purpose of preventing a future breach of the peace by a particular person, or of ensuring, so far as it is possible to do so, that a person of questionable character, will be of good behaviour in the future. In either of these cases, the suspect is required to enter into a bond, with or without sureties, to keep the peace or to be of good behaviour for a definite period.

§§80, 81, 86, 90 – 94, 96 – 98 provide the procedure for dealing with persons who are to be bound over to keep the peace. §§82 – 93, 95 – 98 refer to cases where persons are required to give security to be of good behaviour.

The object of *Chapter VII.* is the prevention of crime, and does not provide procedure for its punishment.—*Erakunather v. Rantan* (1895) 2 *N.L.R.* 248. Thus, it is illegal to convict an accused, and, without passing sentence, merely to bind him over under §80. See also *Samuel v. Brito* (1913) 17 *N.L.R. at p.* 160.

R. v. Silva (1925) 6 *C.L.Rec.* 73, 3 *T.L.R.* 34.—It is irregular for a Magistrate to convert an inquiry under *Chapter VII.* of this Code into a summary trial. Where a Magistrate wants criminal proceedings initiated against a person proceeded against under *Chapter VII.*, proper action under §148 *post* should be taken. It is submitted that if the Magistrate himself initiates fresh proceedings, the trial ought, in fairness, to take place before another Magistrate unless non-summary proceedings are taken.

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§80 The provisions of *Chapter VII.* of the Code have *no* application to bonds contemplated by §325 *post.*—*R. v. Ratnam* (1928) 30 *N.L.R.* 212, 10 *C.L.Rec.* 10; 6 *T.L.R.* 81.

So long as a person who has given security keeps the peace, or is of good behaviour, he is not to be molested under this Chapter.*

A.—Security for keeping the Peace on Conviction.

Security for keeping the peace on conviction.

80. (1) Whenever any person is convicted of any offence which involves a breach of the peace or of committing criminal intimidation by threatening injury to person or property, or of being a member of an unlawful assembly, and the Court before which such person is convicted is of opinion that it is proper to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace during such period in each instance as it thinks fit to fix, not exceeding six months if the sentence or order be by a Police Court or two years if the sentence or order be by a District Court.

(2) If the conviction is set aside on appeal or otherwise the bond so executed shall become void.

Convicted.—See §§152(3), 166, 188, 190, 192, 205, 214, 220, 221(2) 251, 304 *et seq. post.*

Offence.—See §3 *ante.*

Criminal intimidation.—See §§483, 486, 487 Penal Code.

Unlawful Assembly.—See §§138 *et seq.* Penal Code. See §§99 – 104 *post.*

Court.—See §3 *ante.*

Police Court.—See §3 *ante.*

District Court.—See §3 *ante.*

On appeal or otherwise.—See *Chapters XXIX, XXX* and *XXXI. post.*

Security to be of good behaviour.—See §§81 – 83, 325 and *c.f.* §369 *post.*

1. §80 is based upon §106 of the Indian Criminal Procedure Code, but the latter differs from the local law in many essential particulars. Care should, therefore, be exercised when applying cases decided under §106 of the Indian Code, to cases arising under this section.

2. **Scope of §80.**—See page 149 for a general outline of §§80 – 98.

§80 provides for the taking of security from convicted offenders to keep the peace. The section applies to persons convicted :—

(i) of all offences which involve a breach of the peace ; or

(ii) (*a*) of the offence of criminal intimidation by threatening injury to persons or property, and

(*b*) of being a member of an unlawful assembly.

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*See §§3—5 Vagrants Ordinance 1841.

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If a Court which convicts any person of any of the offences above-named, is of opinion that in the circumstances it would be proper to require the convict to execute a bond to keep the peace, such Court may, at the time it passes sentence, order him to execute a bond for a sum proportionate to his means, whether with or without sureties, for keeping the peace for a certain period which the Court is to fix. In the case of an order before a Police Court, such period is not to exceed six months, and in a District Court not to exceed a period of two years. *Silva v. Seneviratne* (1925) 3 *T.L.R. at p.* 128. As to the Supreme Court —see para. 14 *infra*.

If on appeal " or otherwise " such conviction is set aside, this fact *ipso facto* has the effect of rendering the bond null and void.—See §80(2).

Differences between §80 and §§81 - 83.

(i) §§80 and 81 require a person to keep the peace*, while §§82 - 83 require him to be of good behaviour. §81 appears to contain characteristics of §80 as well as of §§82 - 83.

(ii) §80 comes into play upon conviction, and the order to keep the peace is imposed in addition to the sentence passed. The latter sections come into operation only upon information placed before the Magistrate.

(iii) Under the former section no separate legal proceeding is essential before the order can be made, whereas in the latter there must be an independent judicial investigation—*e.g.*, §§87 - 88 *post*.

(iv) Under §80 a District Court may order security, whereas §§81 - 83 are confined to Police Courts.

3. **Offence which involves a breach of the peace.**—

What is meant by the expression, " offences which involve a breach of the peace ? " See *Abeywardene v. Fernando* para. 4 *infra*. Certain offences necessarily involve in themselves a breach of the peace—*e.g.*, §§149 - 150 Penal Code—while others do not—*e.g.*, criminal trespass committed with the intention of committing theft—but these latter may lead to a breach of the peace, as where the owner of the thing stolen turns upon the trespasser and assaults him.

The better opinion, both in Ceylon and in India, appears to be in favour of confining these words to such offences in which the breach of the peace is a necessary ingredient of the offence itself. Thus a commentator on the Indian Criminal Procedure Code states : " It would seem clear that this phrase must mean an offence, one necessary ingredient of which is a breach of the peace. There is a material difference between the terms ' involving ' and ' attending.' Rioting is clearly an offence ' involving a breach of the peace,' but criminal trespass . . . though it may be ' attended ' by a breach of the peace, does not ' involve ' such a breach."†

The following is a summary of the case law on the point :—

1. Uttering obscene songs, ballads, or words.—§287 Penal Code.—*Rahim v. Nonahamy* (1916) 19 *N.L.R.* 169; 3 *C.W.R.* 111.— " In my opinion the nature of the offence itself should involve a breach of the peace. An offence under §287 of the Penal Code is not an offence involving a breach of the peace within the contemplation of §80(1) of the Criminal Procedure Code." *per* de Sampayo, J. See also 7 *Tam.* 24 and *R. v. Silva* (1928) 10 *C.L.Rec.* 6.

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*See *Samuel v. Brito* (1913) 17 *N.L.R. at p.* 160.

†*Boyes* on the *Indian Criminal Procedure Code* Vol. II. p. 133 and see *R. v. Muttiah Chetty* (1905) 29 *Mad.* 190; *R. v. Perera* (1915) 5 *B.N.C.* 92.

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Ukku Banda v. Gregoris (1917) 4 *C.W.R.* 299.—" It has been held by this Court in many cases that using obscene or insulting language does not involve a breach of the peace," *per* Shaw, J.

Fallil v. Veerappen (1908) 4 *A.C.R. iv.*—The offence under §287 of the Penal Code does not involve a breach of the peace.

R. v. Ma Hla Pon 2 *L.B.R.* 125.—An offence under §294 (*local*—§287) of the Indian Penal Code does not fall within the purview of §106 (*local*—§80) of the Indian Criminal Procedure Code.

2. The offence of inciting coolies not to attend muster, and forbidding them to do so, does not involve a breach of the peace.—*Hatuorn v. Nalla Kangany* (1914) 1 *Crim. App. R.* 36.

3. Drunk and disorderly conduct in public—*Cader v. Perera* (1908) 2 *S.C.D.* 26.—The offence of being drunk and disorderly on the public highway is an offence which involves a breach of the peace. See Ordinance No. 4 of 1841, §2.

Velupulle v. Arunasalem (1911) 5 *S.C.D.* 80.—The offence of behaving in a riotous or disorderly manner in any public street or highway is an offence which involves a breach of the peace, more so, if the conduct of the accused amounts to an affray.

Appu v. Mohamaddu (1917) 4. *C.W.R.* 40.—The offence of behaving in a riotous or disorderly manner in a public street, is one which involves a breach of the peace.

Peris v. Jokino (1919) 6 *C.W.R.* 175.—The offence of misconduct in a public place by a person who is intoxicated (§488 Penal Code) does not involve a breach of the peace.

Wijeysuriya v. Obeyesekera (1919) 21 *N.L.R.* 159; 6 *C.W.R.* 26.—" The offence under §488 of the Penal Code does not involve a breach of the peace, nor do the facts of the present case show that any breach of the peace was committed," *per* Shaw, J.

Daniel v. Fernando (1921) 22 *N.L.R.* 346; 3 *C.L.Rec.* 44.—The offence of being drunk and disorderly even where the accused uses indecent language or utters threats, is not one which involves a breach of the peace. If it was desired to deal with the accused under §80 he should have been charged with the offence of criminal intimidation.

4. Insult—§484 Penal Code—*Graham v. Alagie* (1908) 1 *S.C.D.* 86.—" In the present case, there is no suggestion of criminal intimidation ; and the offence punishable under §484 of the Ceylon Penal Code is intentional insult with a view to provoke a breach of the peace. Altogether, apart from authority, I should, without hesitation, have construed . . . §80(1) of the Criminal Procedure Code as applicable only to cases in which the offence of which the accused has been convicted involves as one of its ingredients a breach of the peace. I do not think that §80(1) can fairly be extended to a case in which there is only a probability of a breach of the peace. . . ." *per* Wood Renton, J. See *Rahim v. Nonahamy supra*; *Silva v. Fernando infra*; *Bastian v. Perera* (1919) 7 *C.W.R.* 95, and *R. v. Jayawardene* (1907) 2 *A.C.R.* 97 – 99.

Arlinahamy v. Jonis (1917) 4 *C.W.R.* 118 (see *Silva v. Fernando infra*; *Wijeysuriya v. Obeyesekera supra*).—The offence of insult under §484 does not involve a breach of the peace. See *Lucy v. Rodrigo* (1930) 11 *C.L.Rec.* 84.

Silva v. Fernando (1917) 4 *C.W.R.* 260.—The offence of insult does not involve a breach of the peace. *Graham v. Alagie* and *Rahim v. Nonahamy* (*supra*) followed. See *Lucy v. Rodrigo* (1930) 11 *C.L.Rec.* 84; *R. v. Silva* (1928) 10 *C.L.Rec.* 6.

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Allegaiah v. Allegaratnam (1919) 6 *C.W.R.* 184.—*Held*, but without any reference to authority, that the offence of insult under §484 does involve a breach of the peace.

R. v. Nga Wet Taung 1 *L.B.R.* 262.—An offence under §504 (*local*—§484) of the Indian Penal Code does not come within the purview of §106 (*local*—§80) of the Criminal Procedure Code.

R. v. Lallamian 1 *C.L.Rec.* 123; 21 *Bom. L.R.* 270.—It was here held, that the offence of insult under §504 of the Indian Penal Code did involve a breach of the peace, or at any rate, that it involved a probability of a breach of the peace, and that, therefore, an order directing security to keep the peace could lawfully be made.

5. Criminal Trespass—§§427, 433 Penal Code—*Alwis v. Kumarasinghe* (1912) 16 *N.L.R.* 45 (approved in *Hatuorn v. Nalla Kangany*, and referred to in *Rahim v. Nonahamy* (*supra*).—Where a person was convicted of the offence of criminal trespass, and the facts showed an intention on the part of the accused to commit a breach of the peace, *held*, that the Court had power to direct him to give security. " In these circumstances, I consider that the offence was one calculated to involve a breach of the peace. . . ." *per* Ennis, J.

The following* is a summary of the law in India on this point:

Upon a conviction for criminal trespass (§441), it has been held that an accused may be bound over, if his conduct and acts clearly point to an intention to commit a breach of the peace.—*R. v. Khan* (1867) 7 *W.R.Cr.* 14; *R. v. Jhapoo* (1873) 20 *W.R.Cr.* 37. On a conviction for house trespass (§448), where it is committed for the purpose of causing hurt, the accused can be bound over.—*R. v. Mundle* (1902) 7 *C.W.N.* 25; 29 *Mad.* 190, and 18 *M.L.J.* 57. Where, however, the conviction is merely for criminal trespass (§447) and there is no finding of fact which indicates that there was any intention to commit a breach of the peace, no security can be taken.—*R. v. Majumdar* (1902) 6 *C.W.N.* 471; 30 *Cal.* 93. If there is no such finding, the fact that the evidence may show such an intention will not suffice.—*Nath v. Nibaran* 30 *Cal.* 93. Where the accused was convicted of committing house trespass and it was proved that his intention was to have illicit intercourse with the wife of the complainant, *held*, that an order for security was bad.—*R. v. Dey* (1897) 3 *C.W.N.* 18; 25 *Cal.* 628. House trespass is an offence which involves a breach of the peace.—9 *Bur. L.T.* 204. *R. v. Kundan* (1885) *A:W.N.* 303.—Where the accused broke into an empty house, *held*, that an order requiring security was bad.

6. Mischief—§§408 Penal Code *et seq.*—*Fernando v. Mathes Pulle* (1909) 12 *N.L.R.* 159; 1 *Curr. L.R.* 30 (see *R. v. Baronchi* (1914) 17 *N.L.R.* 444, and *Rahim v. Nonahamy*, *supra*).—The offence of mischief (uprooting a fence) was held not to be one involving a breach of the peace.

Silva v. James (1910) 3 *S.C.D.* 80 (see *Rahim v. Nonahamy*, *supra*).—Although primarily the offence of mischief does not in itself involve a breach of the peace, it may tend to cause others to do so. It was held, therefore, in this case, that a Court could order security to be given in such a case.

De Mel v. Silva (1907) 1 *A.C.R. iv.*—Entering the premises of another and smashing things is mischief, and is an offence as would make others

*See *Roy* on *Bad Livelihood* pp 17-18. The references are to sections in the Indian Penal Code.

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§80 break the peace. Therefore, the accused who is convicted of mischief under such circumstances may be ordered to furnish security.

R. v. Menik Rai (1911) 12 *Cr. L.J.* 405; 33 *Alla.* 771.—An offence under §434 (*local*—§417) of the Penal Code, is one in which security may be ordered.

7. The offence of intentionally interrupting judicial proceedings (§223 Penal Code) is one which does not involve a breach of the peace.—*R. v. Maria Nona* (1915) 1 *C.W.R.* 206.

8. Hurt.—*Phillipu v. Rodrigo* (1900) 1 *Br.* 372.—*Qu.* On a conviction for causing hurt may an order directing security to keep the peace be made ? The point was not decided in this case, because there was no conviction of the accused. See *Bastian v Perera infra.*

Bastian v. Perera (1919) 7 *C.W.R.* 95.—On a conviction for causing hurt under §315 Penal Code it is competent for the Court to order security. " Any act of violence done to an individual who has the natural right to be left in peace, is a breach of the peace within the contemplation of that section," *i.e.*, §80(1),—*per* de Sampayo, J. See *Perera v. Abeyesekera* (1907) 1 *A.C.R. xi.*

9. Theft—§§366 *et seq.* Penal Code—*R. v. Jayawardene* (1907) 2 *A.C.R.* 97.—Upon a conviction for theft, an order directing security should not be passed.

Summary of the Indian Law.*—Where a Magistrate, after convicting the accused of theft, bound them over to keep the peace, the High Court set the order aside, as there was no finding by the Magistrate that the accused had an intention of committing a breach of the peace.—*R. v. Maitie* (1896) 1 *C.W.N.* 186. See also *R. v. Shiek* (1902) 6 *C.W.N.* 678; 29 *Cal.* 393.

R. v. Sirkar (1903) 8 *C.W.N.* 517.—Where, upon a conviction under §§379 and 143 (*local*—§§367 and 140) of the Penal Code, an order calling for security was made, *held*, that the weight of authority was clearly in favour of the view that the mere fact of conviction was *per se* insufficient to justify the order, although the conviction coupled with the findings might show that there are grounds for sustaining the order. Note.—In Ceylon the mere fact that an accused is convicted of the offence of being a member of an unlawful assembly carries with it the liability of being called upon to furnish security.

Perera v. Abeysekera (1907) 1 *A.C.R. xi.*—See para. 5 *infra.*

R. v. Kannookaram 26 *Mad.* 469.—Where offences of theft and mischief did not necessarily involve a breach of the peace and there was no finding that there had in fact been such a breach of the peace, or that unlawful measures had been taken with the view of committing such a breach, *held*, that an order calling for security was bad.

10. Immorality.—Indecent or immoral behaviour, such as attempting to seduce women, or behaving indecently or immodestly towards them, were held in India not to involve a breach of the peace under §110 *clause* (*e*) of the Indian Criminal Procedure Code.—*R. v. Samanta* (1902) 30 *Cal.* 366.

4. **Breach of the peace defined.**—*Abeywardene v. Fernando* (1924) 3 *T.L.R.* 4; 27 *N.L.R.* 97. The " peace " referred toi n §§80, 81 is the King's peace. Any person who subjects to violence either the

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*See *Roy* on *Bad Livelihood* p. 15 *et seq.*

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person or the property of one of the King's subjects, commits a breach of the King's peace. Persons who disturb the public tranquility by their quarrelsome behaviour cannot be said to commit a breach of the peace.

R. v. Lallamian (1918) 1 *C.L.Rec. at p.* 124; 21 *Bom. L.R.* 270.—"I have said nothing about what actually constitutes a 'breach of the peace,' and that is a matter that also is very frequently argued. It is questioned, whether, in order to reach what is known as a breach of the peace, you have to go so far as to inflict blows. One view is that you must go that length. The other view is that you may have a breach of the peace long before you come to the infliction of blows . . . the mere use of language, if it is violent enough, is a breach of the peace . . ." *per* Heaton, J.

Observe the use of these words in §32(1)(*a*) *ante*, and see §§148 156, 484, and *Chapter VIII.* Penal Code.

"Involve" defined.—*R. v. Manik* 33 *Alla.* 771.—"The word 'involve', in my opinion, connotes the inclusion, not only of a necessary, but also of a probable, feature, circumstance, antecedent condition, or consequence . . ." *per* Knox, J. See *Hatuorn v Nalla Kangany* (1914) 1 *Crim. App. R.* 36 and *Alwis v. Kumarasinghe* (1912) 16 *N.L.R.* 45.

5. **Convicted.**—*Erakunather v. Rantan* (1895) 2 *N.L.R.* 248.—The order for security under §80 is, in addition to the sentence, imposed upon the accused. Where a Judge convicted the accused, but passed no sentence, and merely bound him over under §80, *held*, that such order was illegal. Case sent back.

Phillipu v. Rodrigo (1900) 1 *Br.* 372.—After trial the Judge acquitted (*discharged?*) the accused, but, as he considered that it would be to the advantage of public tranquility that both the complainant and the accused should be bound over to keep the peace, he proceeded to make an order against them under §80. *Held*, that such order was illegal.

Perera v. Abeysekera (1907) 1 *A.C.R. xi.*—A, B, C and D were jointly charged with causing hurt. A and B were acquitted at the close of the case for the prosecution, but, after convicting C and D, the Judge bound A and B over to keep the peace under §80. *Held*, that such order was illegal.

R. v. Jayawardene (1907) 2 *A.C.R.* 97.—The "conviction" should be in respect of an offence specified in §80.

Samuel v. Brito (1913) 17 *N.L.R. at p.* 160.—"The Magistrate has passed no sentence on the accused. He has ordered the accused to give security . . . under, I presume, §80 of the Criminal Procedure Code. . . An order for security under §80 can only be made at the time of (*not for*) passing sentence. The section presupposes the passing of a sentence to pave the way for an order for security . . ." *per* Pereira, J.

Anley v. Rudd (1907) *Aser.* 8.—An order binding over a person to keep the peace cannot be made except upon conviction.

May the complainant in a case be bound over under §80 ?—*Phillipu v. Rodrigo supra.*

R. v. Hazari Mull (1902) 3 *P.L.R.* 334.—A Court may not, under §106 (*local*—§80) of the Indian Criminal Procedure Code, call upon a complainant to furnish security.

May a witness in a case be bound over under §80 ?—It has been held in India that such an order is illegal.—*R. v. Umda* 3 *C.L.R.* 72; *R. v. Khan* 5 *Mad.* 380.

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§80 If an accused is acquitted and the judge desires to bind him over he should cause proceedings to be taken under §§81 - 83 *post.*

6. **The Court is of opinion that it is proper.**—Before making an order binding a person over to keep the peace, there should be satisfactory evidence before the Judge, of an intention or preparation on the part of the accused to break the peace.—*Marikar v. Lebbe* (1899) 1 *Tam.* 4. Moreover, in the case of offences which are held to involve a breach of the peace, there should be evidence on the record, and a finding by the Judge to support the conclusion arrived at—see the *dicta* in the cases collected under para. 3 *supra.* See also *R. v. Chowdhri* (1915) 43 *Cal.* 671.

The order should be such as will not amount to a prohibition to a person against exercising his lawful rights.

7. **Criminal intimidation by threatening injury to person or property.**—These words were introduced into the law as a result of the decision in *R. v. Raghubar* 2 *Alla.* 351. It is to be noticed that the words " by threatening injury to person or property " do not now exist in §106 of the Indian Code. Hence, §80 of this Code, unlike §106 of the Indian Code, does not apply to all cases of criminal intimidation as defined in §483 of the Penal Code.

Being a member of an unlawful assembly.—These words have the effect of bringing within the purview of §80 every offence in which an unlawful assembly forms a necessary ingredient,—*viz.*, §§139 - 153 Penal Code.

R. v. Nahar Khan (1907) 11 *C.W.N.* 840.—X, who was in occupation of land, was convicted of rioting in the course of a dispute which arose upon an attempt by Y to take possession of the land. *Held*, that in these circumstances it was not just to bind X over to keep the peace.

R. v. Mollah (1908) 12 *C.W.N.* 83n.—Conviction for riot—finding that the accused had acted " on the impulse of the moment" *held*, that an order under §80 was not justified.

R. v. Mahunty (1913) 18 *C.W.N.* 39n.—Conviction for rioting—absence of moral turpitude—order under §80 set aside.

R. v. Bakhsh (1907) 29 *Alla.* 569.—Certain persons taking part in a religious procession disobeyed the orders of the Police with the result that a riot was only averted by the bringing of armed Police upon the scene. The accused were convicted under §153 (*local*—§150) of the Penal Code, and were also bound over under §106 (*local*—§80) of the Procedure Code. *Held*, that the order directing security was bad.

8. **Before making an order under §80, should the accused be asked to show cause** ?—*Anley v. Rudd* (1907) *Aser.* 8.—The accused should be given an opportunity of showing cause against the order.

Perera v. Benedict (1915) 1 *C.W.R.* 217.—It is not necessary under §80 to give the accused an opportunity of showing cause (see the argument at the bar in *Samuel v. Brito, supra* and the *dicta* in *Perera v. Fernando* (1910) 4 *S.C.D.* 27 which clearly do not amount to binding authority under §80).

C.f. §89 *post.*

9. **At the time of passing sentence.**—See §§152(3), 166, 188, 190, 192, 205, 214, 220, 221(2), 251, 304, *et seq. post.*

10. **Illegal orders under §80.**—*Kanagasabai v. Velupillai* (1904) 1 *Bal.* 128. The accused, who claimed to be the owners of a certain land, were charged with committing criminal trespass on that land and were acquitted. The Magistrate, in order to prevent further disturbances,

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bound them over to undertake not to enter the land, until they provided themselves with documentary title thereto. *Held*, that this order was illegal. "I cannot, I regret to say, find any authority to support the order of the Magistrate" *per* Layard, C.J. See *R. v. Wijeysinghe* §81 para. 3 *post* and §418 para. 2 *post*.

The limits prescribed in §80(1) should not be exceeded.—*Silva v. Seneviratne* (1925) 3 *T.L.R. at p.* 128.

11. **Procedure under §80.**—See paras. 2, 5, 6, 8 and 9 *supra*, and §81 *post*.

In cases under §80 the period for which security has been taken commences to run on the expiration of the sentence of imprisonment to which the accused has been sentenced.—§90(1) *post*. If only a fine has been imposed, such period will begin from the date of the order.—§90(2) *post*.

The bond must conform with the provisions of §91 *post*—see §410 *et seq. post*. The Court may refuse to accept any surety tendered by the accused.—§92 *post*.

If security has been ordered, and this is not duly provided, the accused will be committed to prison. If he is already in gaol, he will be ordered to be detained "until such period expires," or until such period within the time during which security has been ordered, when he shall tender the security.—§93 *post*.

Any imprisonment imposed under §80 for failure to give security is to be simple imprisonment.—§94 *post*.

The release of persons imprisoned for failure to furnish security is dealt with in §§96 – 97 *post*.

Any surety may apply to be released, and thereupon the Court will proceed as indicated in §98 *post*.

If the accused is convicted subsequently of an offence which amounts to a breach of any of the conditions of the bond, in such a case the full amount of the bond may be recovered from the accused or his sureties. —See §91 *post*. See §411 *et seq. post*.

12. **The Bond.**—

Form of the Bond.—See §§88 – 89 para. 4 *post*.

It should recite the undertaking by the accused, and should contain the terms of the undertaking by him to keep the peace during the period for which security is called for, and an undertaking to pay the amount of the bond, if he commits a breach of any condition of the bond within such period.—§91 *post*. The surety, if there is one, should undertake that the accused shall not commit a breach of the terms of the bond during the period in question, and stipulate, in case the accused commits any such breach, to forfeit a certain sum to His Majesty the King. See *General Order* 899 and *Appendix L*.

The amount of the bond is to be fixed with due regard to the circumstances of each case, and should not be excessive.—§§80(1), 88 *proviso* 1. *C.f.* §396 *post*.

If the accused is a minor, the bond is to be executed only by the sureties.—§88 *proviso* 2, and see §325(2), 326. *C.f.* §19(*b*) Youthful Offenders Ordinance 1886.

With or without sureties.—If the Court does not call upon the accused to furnish sureties, he may be allowed to deposit a sum of money in cash, to be fixed by the Court, instead of executing a bond.—§410 *post*.

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§80 **Violation of the terms of the bond.**—*e.g.*, not keeping the peace during the period specified in the bond, or a conviction of the person bound over for an offence which involves a breach of the peace amounts to a breach of the terms of the bond.—See §91 *post.*

The procedure for recovering the amount on a forfeited bond.—See §411 *et seq. post.*

The obligations under the bond lapse—

(i) If during the time fixed, the accused commits no breach of its conditions ;

(ii) If the sureties request the Judge to cancel the bond.—§98 *post ;*

(iii) Upon forfeiture of the bond, and the recovery of the money due under it.

13. Abdul Cader v. Perera (1908) 2 S.C.D. 26.—The accused entered into a bond to keep the peace for a period of six months, which expired on August 11th. He was convicted on October 7th for an offence involving a breach of the peace ; the date of the latter offence being August 2nd. *Held*, that it was competent for the Magistrate to declare, after the conviction had on October 7th, that the bond was forfeited, because at the date the offence was committed by the accused the bond had not expired, and the fact that on October 7th it had expired made no difference, as the obligation had by then accrued to the Crown.

Sallay v. Perera (1908) 1 *S.C.D.* 85 ; 4 *A.C.R.* 77.—Apparently, the bond should be forfeited on the very next occasion. If the Judge allows one act of the accused, which would render the bond liable to forfeiture to pass unchallenged, he may not take into consideration *such lapsed act* on some future occasion.

14. Court before which such person is convicted.—

May the Supreme Court make an order calling for security to keep the peace under §80 ? It will be observed that, while §80 takes care to point out that if the Court of conviction is a Police Court, the term for which security may be taken is not to exceed six months, and, if such Court is a District Court, it is not to exceed two years ; no mention is made of the Supreme Court. Under §251 *post*, when a person is convicted before the Supreme Court, the Judge should pass a sentence "according to law." But power is expressly reserved by the section itself to the Judge, if he so deems fit, to direct that the accused should be released on his entering into a bond, with or without sureties, during "such period as the Judge may direct" to come up for judgment if and when called upon, and in the meantime to "keep the peace, and to be of good behaviour." *C.f.* §§96 - 97 *post.*

Police Court.—See 7 *Tam.* 24.

Where a Magistrate exercises jurisdiction under §152(3) *post*, the *Full Court* has ruled that he acts as Police Magistrate, and not as a District Judge.—*Lebbe v. Banda* (1915) 18 *N.L.R.* 376 ; 1 *C.W.R.* 146. Therefore, a Magistrate, who makes an order under §80 when exercising the powers under §152(3) cannot bind over an accused for a period longer than six months.

Where a Magistrate exercises jurisdiction under §166 *post*, may he make an order under §80 ? §166(2) specifies what "punishments" a Magistrate when so acting can impose, but an order under §80 is not a "punishment."—See para. 15 *infra.* It would appear, therefore, that although the Magistrate may impose a heavier sentence than that which the law ordinarily allows, he may not exceed the period of six months, if he acts under §80, when convicting an accused under §166.

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15. **Appeal.**—§80(2) declares that if a conviction is set aside on appeal " or otherwise " this fact automatically renders any security taken under §80 null and void also.

Is it permissible, however, to appeal against an order directing security under §80, without appealing against the sentence, *e.g.*, in cases where no appeal lies against the sentence ?

Sanders v. Pary (1904) 1 *Bal.* 22.—An order under *Chapter VII.* of this Code does not come either under the designation of " sentence " or of " punishment," and is not within §335 of the Code. " An order to find security for keeping the peace or for good behaviour in a criminal ' case ' forms, apparently, no part of the judgment." *per* Moncrieff, C.J. See *Gunesekera v. Jayaratna* (1905) 1 *Bal.* 157 (*Full Court*).

Culantiveloe v. Somasundram (1904) 2 *A.C.R.* 122 (but see *Forrest v. Leefe* (1910) 13 *N.L.R.* 119).—An order under §88 *post* is one from which no appeal lies. *Cassim v. Kandappa infra* approved.

Cassim v. Kandappa (1901) 5 *N.L.R.* 311.—There is no appeal against of a sentence of Rs. 30 coupled with an order to keep the peace. See 809 *D.C.Crim., Kalutara*, 2739 (*April* 4, 1914) *Full Court.*

Fernando v. Mathes Pulle (1909) 12 *N.L.R.* 159, 1 *Curr.L.R.* 30.—An appeal lies against a sentence of a fine of Rs. 20 and an order to keep the peace for six months. In this case the appeal was allowed to be argued, because it was based on a point of law. Note the cases considered by the learned Judge.

Samuel v. Brito (1913) 17 *N.L.R. at p.* 160 (*Culantiveloe v. Somasundram approved*).—*Held*, that no appeal lies against an order under §80, but the Court in this case set aside the conviction acting in revision. See also *Perera v. Abeysekera* (1907) 1 *A.C.R. xi.*

Chelliah v. Samman (1921) 3 *C.L.Rec.* 37, *Culantiveloe v. Somasundram* followed, *Forrest v. Leefe* distinguished—an order to give security to keep the peace is not an appealable order.

On appeal or otherwise.—The word " otherwise " clearly includes the exercise of the revisional powers of the Supreme Court.

Again, if an habitual criminal is summarily convicted in ignorance of the fact of his previous convictions, and it is subsequently discovered that the conviction is void by reason of the provisions of Ordinance No. 2 of 1926, all orders pronounced or made would *ipso facto* become void.

Does the word " otherwise " extend to other cases, where a conviction is set aside, *e.g.*, upon a pardon extended by the Crown ? It would appear that such cases would fall within the purview of §80(2).

16. **Analogous provisions.**—See §81 *post* and *c.f.* §325 *post.*—Conditional release of offenders; §369 *post*—Release of insane accused on security; Vagrants Ordinance 1841 §§6, 10; Youthful Offenders Ordinance 1886 §19(*b*).

B.—Security for Keeping the Peace in other Cases and Security for Good Behaviour.

Security for keeping the peace in other cases.

81. Whenever a Police Magistrate receives information that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace within the local limits of the jurisdiction of the Police Court of such Magistrate,

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or that there is within such limits a person who is likely to commit a breach of the peace or do any wrongful act as aforesaid in any place beyond such limits, the Police Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding six months as the Magistrate thinks fit to fix.

Security for good behaviour from suspected persons and vagrants, &c.

82. Whenever a Police Magistrate receives information :—

(*a*) That any person is taking precautions to conceal his presence within the local limits of the jurisdiction of the Police Court of such Magistrate and that there is reason to believe that such person is taking such precautions with a view to committing an offence ; or

(*b*) That there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself :

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding six months as the Magistrate thinks fit to fix.

Security for good behaviour from habitual offenders. [*See* §87 (3).]

83. Whenever a Police Magistrate receives information that any person within the local limits of the jurisdiction of the Police Court of such Magistrate is an habitual robber, house-breaker, or thief or an habitual receiver of stolen property knowing the same to have been stolen or that he habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury or that he is an habitual protector or harbourer of thieves or that he is an habitual aider in the concealment or disposal of stolen property or that he is a notorious bad liver or is a dangerous character such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding six months as the Magistrate thinks fit to fix.

Police Magistrate.—See §3 *ante*.

Breach of the peace.—See §80 *ante*.

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Police Court.—See §3 *ante*.

Offence.—See §3 *ante*.

1. §81 is founded upon §107, §82 upon §109 and §83 upon §110 of the Indian Code, but it should be noted that, although the two sets of sections are similar to one another, inasmuch as they deal with the same subject-matter, they are by no means identical in their terms.

2. **Scope of §§81 – 83.**—See p. 149 *ante* for a general outline of §§81 – 83.

These sections provide for the taking of security from certain classes of people to keep the peace or to be of good behaviour in the future. The essential differences which exist between §§81 – 83 on the one hand and §80 on the other have already been set out—see §80 para. 2 *ante*.

Under §§81 – 83 it is only a Police Magistrate who is empowered to set the procedure of these sections in motion. He may only act upon receiving " information " of a certain state of facts. If he thinks that the facts stated to him are well founded, and that it is necessary or desirable to call upon the party complained against (hereafter called the respondent) to keep the peace (§81) or to be of good behaviour (§§82-83) he must first call upon the respondent to show cause why such an order should not be made. In order to enable him to do this, he should be compelled to appear before the Court, and, therefore, the Magistrate will issue process to secure his attendance.—§§84 – 85 *post*.

In proceedings under §81 the personal attendance of the respondent may be dispensed with.– §86 *post*.

If the respondent is not already before the Court, the Magistrate will issue a summons requiring him to appear. If such person is in custody, and not before the Court, the Magistrate will issue a warrant, directed to the person in whose custody the respondent is, ordering him to produce the respondent before the Court.—§84 *post*. No warrant for the arrest of the respondent should be issued, except where the Magistrate is satisfied " upon the report of a Peace Officer or upon other information," the substance of which he is bound to record, that there is reason to fear the commission of a breach of the peace, and that it cannot be prevented otherwise than by the immediate arrest of the respondent.—§84 *proviso post*.

Every summons or warrant issued on a respondent under §84 should conform with the provisions of §85 *post*.

In cases where the respondent is required to show cause against an order " to keep the peace," *i.e.*, under §81, the Magistrate may, if he sees fit to do so, dispense with the personal attendance of the respondent and allow him to appear by his counsel or proctor.—§86 *post*. This does not mean that the Magistrate can order such a person not to appear ; all that §86 means is that, in such cases, the respondent need not appear in person, but there is nothing to prevent his doing so, if he wants to attend.

If the accused is already before the Court, when the " information " is received—§84 *post*—or when the respondent appears either in person or by agent—§§86 – 87 *post*—the Court will proceed to inquire into the truth of the information upon which it issued process, and may record any further evidence as may appear to be necessary.—§87(1) *post*. This investigation shall be " as nearly as may be practicable " in conformity with the procedure to be followed by a Magistrate in a summary case tried before him—see *Chapter XVIII. post*. The ordinary rules of evidence should be followed, except that, in order to prove that the res-

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§81-83 pondent is an habitual offender, or a person falling under §83, evidence of "general repute" or other evidence may be led. See §55 Evidence Ordinance.

When the case for the informant is closed, the respondent must be allowed to show cause.

If, after the investigation, the Magistrate comes to the conclusion that an order should be made binding over the respondent, either to keep the peace or to be of good behaviour, he will make the necessary order—§88 *post*—but if the Magistrate is of opinion that no case has been made out by the informant, he will discharge the respondent, after having made a minute on the record to that effect—§89 *post*.

§§88 *provisos* (1) and (2), 91 - 92 *post* contain provisions relating to the bond which the respondent has to execute.

If the respondent fails to furnish the necessary security when ordered to do so, he will be dealt with according to the provisions of §§93 - 97 *post*.

Any surety may claim his discharge as is provided by §98 *post*.

Our law contains other provisions which are analogous to the provisions contained in §§81 - 83. *C.f.* §§251, 325, 369 *post*. Vagrants Ordinance 1841 §§6, 10; Youthful Offenders Ordinance 1886 §19(*b*), "Police supervision," release of convicts on "Tickets of leave."—See Ordinance No. 2 of 1926.

3. §81.—

(*a*) **Analysis of §81.**—The "information" upon which the Police Magistrate can act should show :—

(i) that some person within the jurisdiction of the Court, (*a*) is likely to commit a breach of the peace, or (*b*) is likely to commit some wrongful act* which may probably occasion a breach of the peace, in some place *within the jurisdiction of the Court;* or (ii) that some person within the jurisdiction of the Court, (*a*) is likely to commit a breach of the peace or (*b*) is likely to do some wrongful act* which may occasion a breach of the peace, in some place *outside the local limits of the Court.*

(*b*) **Case Law.**—*Singho v. Punchihamy* (1915) 5 *B.N.C.* 13.—Where the appellant was bound over under §81, it was urged in appeal that the order binding him over under §81 was bad, inasmuch as the conduct imputed to him was practically a threat to murder, and that the case could not, therefore, be dealt with under §81. *Held*, "It appears to me that the view taken by the learned Police Magistrate was that, although the appellant had used language, which, if it were seriously meant, would disclose an offence of the character that I have above referred to, the real likelihood was that it had no serious meaning, and that the probable result of its use would merely be a breach of the peace. In my opinion, that view is justified by the evidence, and . . . the application fails." *per* Wood Renton, C.J.

Velaiden v. Zoysa (1910) 14 *N.L.R.* 140.—The members of two opposing factions cannot be bound over to keep the peace under §81 in one and the same proceeding. Order quashed and case sent back. This decision is in accordance with the rulings in the following cases :—*R. v. Dineshamy* (1919) 21 *N.L.R.* 127; 6 *C.W.R.* 277; *Wickremasuriya v. Lewis* (1915) 1 *C.W.R.* 192; *Samath v. Silva* (1917) 4 *C.W.R.* 238; *Keegal v. Mohideen* (1918) 5 *C.W.R.* 162. See *R. v. Ramen Chetty* (1909) 1 *Curr.*

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*See *Langram v. Nilame* (1920) 22 *N.L.R.* 445 ; 2 *C.L.Rec.* 151.

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L.R. 64. *Banda v. Punchirala* (1923) 1 *T.L.R.* 197 *Abeywardene v. Fernando* (1924) 27 *N.L.R.* 97; 3 *T.L.R.* 4. *Hewavitarne v. Appuhamy* (1928) 30 *N.L.R.* 33 (*F.B.*) and *Weerasinghe v. Ismail* (1932) 33 *N.L.R.* 245 (*F.B.*).

R. v. Ramen Chetty (1909) 1 *Curr. L.R.* 64.—The information and the evidence showed that two rival claimants were preparing to assert their rights to a certain land by force, and that they had collected gangs of men, and that both sides were "in a fighting mood." *Held*, that the Magistrate was justified in directing both claimants to execute bonds under §81 to keep the peace. See *Velaiden v. Zoysa supra* and *Gooneratne v. Gooneratne infra.*

Gooneratne v. Gooneratne (1916) 2 *C.W.R.* 25.—It is not competent for a Magistrate, in dealing with an application under §81 to bind a certain person over to keep the peace, to raise *ex proprio motu*, and to consider and decide, at the same time, the question whether the applicant himself should not be similarly bound over. *Velaiden v. Zoysa* followed. See *Banda v. Punchirala* (1923) 1 *T.L.R.* 197.

R. v. Wijeysinghe (1909) 5 *A.C.R.* 101.—Certain persons were produced before the Magistrate on the ground that a land dispute amongst them was likely to lead to a breach of the peace. *Held*, that the Magistrate had no jurisdiction to prohibit them from entering upon the land, to place the land in the charge of the headmen, or to order the parties concerned to enter into a bond to institute a partition action within a certain period before being allowed to enter into possession. "In my opinion the bond is bad . . . I do not see that the Magistrate had any jurisdiction under the Criminal Procedure Code to make it . . . " *per* Wood Renton, J. See *Kanagasabai v. Valupillai*, *infra* and §418 para. 2 *post*.

Kanagasabai v. Valupillai (1904) 1 *Bal.* 128.—Where the accused who claimed to be the owners of certain land, were charged with criminal trespass, and were acquitted, *held*, that the Magistrate had no power to order them, in order to prevent further disturbances, to provide themselves with legal documentary title to the land, and, pending its acquisition, to furnish security to keep away from the land. See §80 para. 10 *ante*, and *R. v. Wijeysinghe supra.*

Karuppiya v. Subramania Kurukal (1907) 3 *Bal.* 187; 2 *A.C.R. iii.* —A Magistrate has no jurisdiction to make an order regarding the restoration of property about which there is merely a civil dispute in the absence of any criminal charge pending before him, and in the absence of any allegation or ground of suspicion that an offence has been committed in respect of such property. Such an order cannot be justified either under §419 *post*, or §148(*d*) *post*. If the Magistrate was informed that, owing to the dispute, there was a probability of a riot taking place, it was the duty of the Magistrate to act under §81 of the Code.

Banda v. Punchirala (1923) 1 *T.L.R.* 197; *Gooneratne v. Gooneratne*, *Velaiden v. Zoysa* (*supra*) referred to—*held*, §81 does not entitle a Magistrate to bind over a complainant to a criminal charge.

Jamal v. Aponsu (1924) 2 *T.L.R.* 215.—The "information" on which a Police Magistrate issues a notice on a person calling on him to shew cause against the making of an order under §81 should state the name of the particular person with whom such person is likely to commit a breach of the peace.

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Abeywardene v. Fernando (1924) 3 *T.L.R.* 4; 27 *N.L.R.* 97.—The principle that members of opposing factions, who have been involved in a common disturbance, cannot be dealt with in the same proceeding appears to have been developed with the aid of Indian authorities, but it is not in accord with the English law. *Per* Bertram, C.J.: "It would often be most convenient and reasonable to bring them together before the Court, have all the circumstances investigated and have the several accused dealt with according to their responsibility."

(*c*) **Receives information.**—See *infra.*

(*d*) **Any person.**—*i.e.*, any person residing within the local limits of the Court's jurisdiction.

(*e*) **Likely to commit.**—*C.f.* "Likely to prevent an affray."—§114(1) *post.*

Lorensz v. Davith (1927) 8 *C.L.Rec.* 199.—There is no provision of law which empowers a Magistrate to call upon a person to give security to keep the peace in a case where such person is a rival claimant to land in order to assure to the party, who, at some future date, succeeded in finally vindicating title to the land, the means of recovering the loss or damages he may have sustained by being kept out of possession. In such a case, if a breach of the peace is likely to be committed §81 will apply.

R. v. Babua 6 *Alla.* 132.—"It is not because a man has a bad character that he is, therefore, necessarily liable to be called upon for sureties to keep the peace, or for good behaviour. There must be satisfactory evidence, in the one case, that he has done something, or taken some step that indicates an intention to break the peace or that he is likely to occasion a breach of the peace; and, in the other, that he is within the category of persons mentioned in §110 (*local*—§83), the determination of which question must always be guided by the considerations pointed out in *R. v. Nawab* 2 *Alla.* 835."—See §83 *infra.*

R. v. Abdul Huq 20 *W.R.* 57.—There must be a reasonable probability, not merely a bare possibility, that a breach of the peace will be occasioned.

Mohun v. Kalinath 25 *W.R.* 15.—The evidence must point to some specific conduct or act on the part of the respondent, from which a reasonable or immediate inference can be drawn that he is likely to commit a breach of the peace.

R. v. Batuk (1884) *A.W.N.* 54.—Where the evidence showed that the applicants and the respondents had quarrelled among themselves and committed mutual assaults upon each other, but no act was proved to show that there was any likelihood of a further breach of the peace, *held*, that an order directing security to keep the peace was bad.

(*f*) **Breach of the peace.**—See §80 paras. 3, 4 *ante.*

R. v. Kostan (1917) 4 *C.W.R.* 70.—Under §81 the contemplated breach of the peace should be as regards a particular person.—See *Pietersz v. Silva* (1916) 3 *C.W.R.* 361.

Jamal v. Aponsu (1924) 2 *T.L.R.* 215.—Before a person can be bound over under §81, it must be shewn that a breach of the peace is imminent or is in contemplation at the time information is given. A mere apprehension, from past conduct, that a breach of the peace is likely to be repeated is insufficient.

Abeywardene v. Fernando (1924) 3 *T.L.R.* 4; 27 *N.L.R.* 97.—The "Peace" referred to in §§80 and 81 of the Code of Criminal Procedure is

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the King's peace. Any person who subjects to violence either the person or the property of one of the King's subjects commits a breach of the King's peace. Persons who disturb the public tranquillity by their quarrelsome behaviour cannot be said to commit a breach of the peace.

(*g*) **Any wrongful act.**—*Langran v. Nilame* (1920) 22 *N.L.R.* 445; 8 *C.W.R.* 328; 2 *C.L.Rec.* 151.—A "wrongful act" is an act which is wrongful in law, and not one which is merely open to criticism, or deserving of reprehension.

R. v. Ramen Chetty (1909) 1 *Curr.L.R.* 64.—Is the forcible removal of coconuts by persons who claim to be owners of a land, in defiance of the prohibition of those in possession, a "wrongful act"? The question was raised in this case, but not decided.

(*h*) **Within the local limits of the jurisdiction.**—See para. 6(*c*) *infra.*

(*i*) **Show cause.**—See §§84 – 85, 87 *post*, and para. 6(*d*) *infra.* The respondent need not appear in person.—See §86 *post.*

(*j*) **Bond.**—See para. 6(*f*)(*v*) *infra.*

(*k*) **Sureties.**—See §88 *post.*

(*l*) **Joinder of parties.**—See *Velaiden v. Zoysa* and the cases noted thereunder para. 3(*b*) *supra.*

(*m*) **Change of proceedings from §81 to §83.**—*R. v. Driver* 25 *Cal.* 798.—Where the respondent was asked to show cause why he should not be bound over to keep the peace, he cannot be directed to execute a bond to be of good behaviour.—*C.f. R. v. Kostan* (1917) 4 *C.W.R.* 70.

(*n*) **Alternative action under §§105, 112, 114** *post.*—See §114 *post.*

4. §82.—

(*a*) **Analysis of §82.**—The "information" upon which the Police Magistrate can act under §82 should show :—

(i) that any person is taking precautions to conceal his presence within the local limits of the Police Court, *and* that there is reason to believe that such person is taking such precautions with a view to committing an offence ; or

(ii) that there is within the local limits of the jurisdiction of the Police Court some person who has no ostensible means of subsistence, *or* who is unable to give a satisfactory account of himself.

(*b*) **Proceedings under this section unlike under §80 *ante* should be independent of any proceedings on account of any offence committed.**—*R. v. Bhim* (1869) *Bom. H. Ct.* Ruling ; nor may proceedings be taken both under this section as well as under §83, so as to enable the Magistrate to impose two orders for security, *viz.*, one under §82 and one under §83.—*R. v. Ali* (1904) 8 *C.W.N.* 543.—See also *R. v. Pillai* (1915) 28 *Mad.* 555.

(*c*) **Clause (a).**—The whole of *clause* (*a*) of §82 must be read and construed together, and the "precautions" taken by the respondent should be shown to be with a view to the commission of an "offence," *i.e.*, some act or omission made punishable by any law in force in Ceylon. —See §3 *ante.* Mere concealment in order to avoid observation is not *per se* cognizable under §82(*a*).

R. v. Sarkar (1912) 16 *C.W.N.* 499; 39 *Cal.* 456.—A person cannot be called upon to furnish security for an alleged concealment in his father's house, unconnected with any intention to commit an offence. The fact that such person had been previously connected with some

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§81-83 criminal conspiracy, or might still be in correspondence with his confederates outside the Magistrate's jurisdiction, would not be relevant in a proceeding under this sub-section.

Rodrigo v. Appuhamy (1913) 1 *B.N.C.* 26.—See para. (*e*) *infra.*

R. v. Polugadu (1883) 2 *Weir* 53.—Where it appeared that a person had joined a band of criminals, and that he fled on the approach of the police, *held*, that, although the facts appeared to show that the case might fall under §82 or 83, it was hardly one in which the respondent should be kept in jail.—See *R. v. Kaviraj infra.*

R. v. Mahadeo (1908) 6 *A.L.J.* 253. *Held*, that persons who exhibited a " ring game " did not come under §82(*a*), but if they gave false names and a false account of what they were doing, they might come under §82(*b*), which clause was very elastic.

R. v. Datta (1915) 15 *Cr.L.J.* 255.—A person who gives a false name and secretly delivers letters, which contain incitements to commit an offence, is liable under §82(*a*).

R. v. Kaviraj (1917) 22 *C.W.N.* 163; 27 *Cr.L.J.* 382.—A person was found at night with two others, with implements of house-breaking in their possession. On being discovered, they fled and when arrested, gave false answers both to the Police and to the Magistrate. *Held*, that the case did not fall under §82. " Clause (*a*) of §109 (*local*—§82) refers to a continuous act, and does not, therefore, apply to a case where there is a momentary effort at concealment to avoid detection or arrest ; nor can it apply to the case of a person brought under arrest, for it cannot be said of such a person that he is taking precautions to conceal his presence," *per* Huda, J. See *R. v. Polugadu supra.*

There is reason to believe.—See §§62 para. 9, and §68 para. 10 *ante.* See also *R. v. Sarkar supra* and *R. v. Jilani* para. (*d*) *infra.*

Precautions with a view to committing an offence.—See §32 (1) (*g*) *ante.*

(*d*) **Clause (b)**—*C.f.* §§449 - 450 Penal Code, Vagrants Ordinance No. 4 of 1841.

R. v. Agarawalla (1900) 5 *C.W.N.* 28.—The fact that a man does no work, or that he has once previously been bound over, does not justify the Magistrate in binding him over under §82(*b*) without being satisfied by evidence, that since his release, he has had no ostensible means of livelihood.

R. v. Mahadeo.—See Clause (*a*) *supra.*

R. v. Sarkar (1912) 16 *C.W.N.* 499; 39 *Cal.* 456.—Where a young man who is out of work is staying in his father's house, and the father is a man of substance, and able to support his son, the son cannot be said to be without ostensible means of subsistence under §82(*b*). *Held further*, the whole object of §82(*b*) is to enable Magistrates to take action against suspicious strangers lurking within their respective jurisdictions. A similar opinion was expressed in the case of *R. v. Madho Dhobi* (1903) 7 *C.W.N.* 661; 31 *Cal.* 557 approving *R. v. Kesigadu* (1902) 29 *Mad.* 124.

R. v. Jilani 20 *Cr.L.J.* 401.—The only persons to whom §82(*b*) applies are those who, within the limits of a Magistrate's jurisdiction, have no ostensible means of subsistence, or who cannot give a satisfactory account of themselves. In order to justify an order under §82 there must be a sound basis of fact ; mere suspicion is not sufficient.

(*e*) **Cannot give a satisfactory account of himself.**—*C.f.* §450 Penal Code.

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Rodrigo v. Appuhamy (1913) 1 *B.N.C.* 26.—Where the Magistrate called upon the respondent to show cause in that he was "a person wandering about without ostensible means of subsistence, and, being unable to give a satisfactory account of himself," the respondent had no cause to show, whereupon the Magistrate bound him over, *held*, that there being no evidence in support of the allegations made in the order calling on the respondent to show cause, the order binding him over was bad.

R. v. Sarkar (1912) 16 *C.W.N.* 499; 39 *Cal.* 456.—"Where a person gives a satisfactory account of his presence within the limits of the Magistrate's jurisdiction, he cannot be called upon to give an account of his presence in any place outside such jurisdiction."

(*f*) **May a person called upon to show cause under §81 *ante* be bound over under §82 instead** ?—See *R. v. Driver* §81 para. (*m*) *supra*.

5. §83.—

(*a*). **Analysis of §83.**—The "information" upon which the Magistrate acts under §83 should show that some person within the jurisdiction of the limits of the Court's jurisdiction is either :—

(i) an habitual robber*, house-breaker†, or thief ‡; or

(ii) an habitual receiver of stolen property‖, well knowing the same to be stolen property ; or

(iii) that he habitually commits extortion, or that, in order to commit extortion, he habitually puts, or attempts to put, persons in fear of injury ¶; or

(iv) that he is an habitual protector, or harbourer, of thieves §; or that he is an habitual abettor in the concealment of stolen property**; or

(v) that he is a notorious "bad liver" or a "dangerous character".

The information ought to be certain and definite—*Kanagasingham v. Tambiah* (1923) 4 *C.L.Rec.* 211 ; 1 *T.L.R.* 209 ; 24 *N.L.R.* 474.

It should be given on oath, and the summons issued should contain the substance of the information.—*Jayatilleke v. Udiya* (1925) 26 *N.L.R.* 496 ; *R. v. Hendrick* (1929) 10 *C.L.Rec.* 133.

(*b*) **The object of §83, as in the case of §§80 – 82, is the prevention and not the punishment of crime.**—The law makes adequate provisions for the punishment of most of the offences described in §83. This section can only be used legitimately for the purpose of securing the future good behaviour of the person, and any attempt to use it for the purpose of punishing past offences is wrong.—*R. v. Prashad* 1 *C.L.R.* 268.—see *R. v. Raja* (1885) 10 *Bom.* 174; *R. v. Pedda* (1881) 3 *Mad.* 238. "The object of enabling a Magistrate to take security for good behaviour is for the prevention and not the punishment of offences."—*R. v. Telang* (1900) 4 *C.W.N.* 531; 27 *Cal.* 781, and see *R. v. Kanta* (1904) 31 *Cal.* 350. In the case of *R. v. Nawab* (1888) 2 *Alla.* 835 it was laid down by Straight, J., "that §110 (*local*—§83) relates to the calling upon of a person of a habitually dishonest life, and in that sense 'desperate and dangerous,' to find security for good behaviour, as a protection to the public against

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*See Penal Code §§379-385.
†See Penal Code §§431 *et seq.*
‡See Penal Code §§366-371.
‖See Penal Code §395.
¶See Penal Code §§372-378.
§See Penal Code §§209.
**See Penal Code §§395-396.

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§81-83 a repetition of crimes by him, in which the safety of property is menaced, and not the safety of the person alone is jeopardized." The object of §83 is not to fill the jails with bad characters, but merely to provide legal machinery whereby reasonable pressure can be brought to bear on such persons to keep the law.—*R. v. Mahala* (1914) 6 *P.R.Cr.*; *R. v. Ibrahim* (1915) 16 *Cr.L.J.* 479.

The proceedings under §83 should be conducted in the interest of the public welfare and not in the interest of private individuals—*R. v. Pershad* (1895) 23 *Cal.* 621. "It is notorious that accusations under this section are constantly made with the object of blackening an enemy's character and satisfying feelings of spite and hatred; and the Magistrates cannot be too cautious in making sure that provisions intended for securing the peace of the community are not utilised for wreaking private vengeance under the *aegis* of a Crown prosecution."—*R. v. Kaliprosonna* (1911) 38 *Cal.* 156.

With regard to the procedure to be followed under §83.—see para. 2 *supra*, and under §82 *supra*. §§82 and 83 are similar as regards the procedure to be followed. The fact that a person is an habitual offender may be proved by evidence "of general repute or otherwise."—§87(3) *post*.

(*c*) (i) **Habitual robber, house-breaker, or thief.**—

Habitual.—See (*e*) *infra*.

Banda v. Kalubanda (1887) 1 *S.C.R.* 93.—"Habitual robber, etc." The information that any person comes under this category should be precise, and supported by evidence on oath.

R. v. Nawab (1880) 2 *Alla.* 835.—Where the evidence adduced did not show that the respondent was an habitual robber, etc., but merely that he had been guilty of acts of violence, *held*, that he could not be bound over under §83.—See *R. v. Babua* (1883) 6 *Alla.* 132; *R. v. Raja* 10 *Bom.* 174; *R. v. Ali* 12 *Cal.* 520.

R. v. Talakchand 2 *B.L.R.* 57.—It is not enough to prove by evidence as to general character that a man is by repute an habitual robber, etc., it must further be proved that he is an habitual offender, though this fact may be proved by evidence of general repute, and it is not always possible or necessary to prove bad character by the proof of actual previous convictions. Where actual convictions are not relied on, great care should be taken to test the evidence led against the respondent, with a view to ascertaining the means the witnesses had of knowing the facts stated by them.

R. v. Alep 11 *C.W.N.* 413.—"Beyond statements that the witnesses suspect or are under the impression that the two persons are thieves and dacoits, no single fact is mentioned by any of them, which would go to indicate that there was any sufficient reason for their suspicions or impressions. In our opinion the evidence is perfectly worthless."—See *R. v. Ahmad* (1905) *A.W.N.* 34, and *R. v. Pedda* (1881) 3 *Mad.* 238.

(ii) **Habitual receiver of stolen property.**—

Habitual.—See (*e*) *infra*.

Stolen property.—Defined §393 Penal Code.

The punishments for the offences of habitually dealing in stolen property, and assisting in its concealment, are to be found in §§395 - 396 Penal Code.

Jusoop v. Poddappu (1890) 9 *S.C.C.* 82.—The nature of the evidence required to substantiate a charge under this clause discussed. The evidence must be convincing.

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R. v. Masti 2 *P.R.* 1897.—"There could hardly be better evidence that a man is not an habitual receiver of stolen property than that no proof of his possession of such has ever been discovered." This *dictum* does not appear to lay down that there should invariably be proof of previous convictions, it apparently means that in the absence of evidence of possession, whether proved by means of a previous conviction or not, the evidence of general repute would be worthless to support an order under this clause.

(iii) **Habitually commits extortion, etc.**—*R. v. Telang* 27 *Cal.* 781.—"The evidence shows that certain acts amounting to extortion were committed by these persons . . . No doubt, they may have been liable to punishment on conviction in a regular trial for any of these acts, and we think that was the proper mode of dealing with the case, but it cannot be said that they have habitually committed extortion, by which we understand is meant that they are in the habit of committing extortion as individual members of the community . . ."

Extortion by fear of injury.—See §372 Penal Code.

(iv) **Habitual protector or harbourer of thieves, etc.—Habitual.**—See (*e*) *infra*.

The offence of harbouring offenders is chiefly dealt with by §209 of the Penal Code, see also §§133, 154, 198 *et seq.* 213 *ibid.* It is clear that the wife of a person who habitually harbours her husband cannot be bound over under this clause.—See the special exception created by §209 of the Penal Code.

(v) **Notorious "bad liver" or a "dangerous character."**—Under Clause (*f*) of the section in the Indian Code, which corresponds to §83 of the local enactment, the words used are "is so desperate or dangerous as to render his being at large without security hazardous to the community." These words have been held to mean "a person who shows a reckless disregard for the safety of the person or property of others."—*R. v. Wahid Ali* 11 *C.W.N.* 789.

Wenabanaya v. Fernando (1916) 3 *C.W.R.* 370.—Allegation that respondent was a notorious bad liver and a dangerous character. Nature of the evidence required to substantiate such an allegation.

R. v. Polugadu (1883) 2 *Weir* 53.—See under §82 para. (*c*) *supra*.

R. v. Sanyal 46 *Cal.* 215.—Persons who are banded together for the purpose of spreading disloyal doctrines among school boys, by inculcating ideas of armed rebellion, were held to be desperate and dangerous characters.

(*d*) **Any person.**—See §81 para. 3 *supra*. See also *R. v. Babua* para. 3(*e*) *supra* and *R. v. Nawab* para. (*c*) *supra*.

(*e*) **The nature of the evidence required in a proceeding under §83 (see §87(3)** *post*).—The question which the Magistrate is called upon to decide is whether the alleged habit is still a habit of the respondent when he is called upon to give security.*—R. *v. Wahid Ali* 11 *C.W.N.* 789; *R. v. Ajmal* 2 *P.R.* 1898. If there is no evidence that, since the person was last released from jail, or was last bound over, he has been guilty of such acts as are specified in §83, no order can be made under the section.—*R. v. Nanku* 29 *P.R.* 1910; *R. v. Bahadur* 4 *P.R.* 1910. The mere fact that a man is of a bad character does not justify

*As to the effect of previous convictions see *R. v. Nawab* (1880) 2 *Alla.* 835; *R. v. Raja* (1885) 10 *Bom.* 174; *R. v. Abdul* (1916) 43 *Cal.* 1128; *R. v. Ali* (1886) 12 *Cal.* 520; *R. v. Ranjit* (1905) 28 *Alla.* 306; *R. v. Janab Ali* (1904) 31 *Cal.* 783.

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§81-83

an order under §83—*R. v. Jagernath* (1903) *A.W.N.* 181 ; *R. v. Kaka* 3 *B.L.R.* 269—and the mere fact that the respondent is suspected of bad conduct is insufficient to support a charge under this section.—*R. v. Ganga* 10 *A.L.J.* 383. The personal knowledge of the Magistrate is not admissible against a respondent in proceedings under §81.—*R. v. Alimuddin* 29 *Cal.* 392; *R. v. Nurdin* 27 *P.R.* 1910; *R. v. Sukah* 4 *P.R.* 1898. The fact that the respondent associates with bad characters is not sufficient.—*R. v. Babu* 13 *I.C.* 102. The exercise of the powers under §81 is not confined to cases where there is positive evidence forthcoming to prove the commission of crime by the respondent.—*R. v. Pedda* (1881) 3 *Mad.* 238. Hence, §87(3) *post* enables evidence of general reputation " or otherwise " to be led in proceedings under §83. " Specific evidence of convictions for offences may, of course, be given, but the man's general repute among persons among whom he lives is also relevant . . ."—*Wenabanaya v. Fernando* (1916) 3 *C.W.R.* 370, and such evidence does not become inadmissible, merely because it consists of hearsay—(*ibid.*). See also *Singho v. Punchihamy* (1915) 5 *B.N.C.* 13, but evidence of reputation must support some allegation of fact which is based upon the terms of §83. The mere fact that the respondent is of evil repute is not *per se* sufficient to justify an order binding him over.—*In re Peris* (1885) 7 *S.C.C.* 42. See also *Kanagasingham v. Tambiah* (1923) 4 *C.L.Rec.* 211, 1 *T.L.R.* 209, 24 *N.L.R.* 474 where the question of evidence is discussed.

Jusoop v. Poddappu (1890) 9 *S.C.C.* 82—See para. 5(*c*)(*ii*) *supra.*

R. v. Talakchand 2 *B.L.R.* 57.—See para. 5(*c*)(*i*) *supra.*

R. v. Telang 27 *Cal.* 781.—See para. 5(*c*)(*iii*) *supra.*

R. v. Masti 2 *P.R.* 1897.—See para. 5(*c*)(*ii*) *supra.*

R. v. Shahukha (1907) 9 *Bom. L.R.* 164.—It is not necessary for the purposes of §83 that specific instances of crime should be given, for then the respondent may be charged and convicted under the Penal Code in respect of them.

(*f*) **The nature of the proceedings under §83.**—Proceedings under §83 should not be instituted with a view to binding over persons on some indefinite charge, after prosecutions against them on specific charges have failed for the substantive offence.—*R. v. Alep* (1906) 11 *C.W.N.* 413, but see *R. v. Rajkaren* (1909) 32 *Alla.* 55. Nor may the Magistrate pass an order under §83 in the same proceeding in which he convicts an accused for some offence.—*R. v. Tamiz* (1882) 9 *Cal.* 215.

(*g*) **A person cannot in one proceeding be bound over under §§82 as well as under §83.**—*R. v. Pillai* (1915) 38 *Mad.* 555, nor may he be ordered to execute a bond for good behaviour, when he was called upon to keep the peace.—*R. v. Driver* 25 *Cal.* 798. See also *R. v. Kostan* (1917) 4 *C.W.R.* 70.

(*h*) **Joinder of respondents.**—See *Velaiden v. Zoysa* ; *R. v. Ramen Chetty* under §81 para. 3 *supra.*

R. v. Andrisa (1890) 9 *S.C.C.* 129.—In proceedings against habitual offenders under §83, it is wrong to join more than one respondent in one and the same proceedings.

6. **General provisions applicable to §§81 – 83.**—

(*a*) **Receives information.**—*Pietersz v. de Silva* (1916) 3 *C.W.R.* 361.—" There is no doubt as I pointed out in the case of *Mortimer v. Podisinno* (*S.C.M.* of 17th June, 1913) that the information under this section should be full, and contain sufficient particulars, so that the person charged may know what case he has to meet . . ." *per* de Sampayo, J. See *Kanagasingham v. Tambiah* (1927) 4 *C.L.Rec.* 211; 1 *T.L.R.* 209 ; 24 *N.L.R.* 474.

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R. v. Dineshamy (1919) 21 *N.L.R.* at p. 128.—" I take it he (the Magistrate) had information as required under §81 . . ." *per* Schneider, J.

R. v. Kostan Appuhamy (1917) 4 *C.W.R.* 70.—" As the point was fully argued before me, I think that I ought to say that in my opinion, it is not necessary that the ' information ' spoken of in §§81, 82 and 83 of the Criminal Procedure Code should be on oath or affirmation . . ." *per* Wood Renton, C.J. *Banda v. Kalubanda* (1887) 1 *S.C.R.* 93 and *Rodrigo v. Appuhamy* (1913) 1 *B.N.C.* 26 referred to. See also the *dicta* of Wood Renton, J. in *Karuppiya v. Subramania Kurukal* (1907) 3 *Bal.* at p. 188, 2 *A.C.R. iii.*

Pillai v. Gnapragasam (1907) 1 *A.C.R. ii.*—A Magistrate who in the course of an investigation into a crime finds that there are circumstances justifying his taking action under §§81 – 84, may lawfully act under those sections, as he must be taken to have "received information." *Kulanthaivelu v. Kathirithamby* (1904) 4 *Tam.* 8 followed. See also *Perera v. Fernando* (1910) 4 *S.C.D.* 27 and *R. v. Partab* (1878) 1 *Alla.* 666, *R. v. Tamiz* (1882) 9 *Cal.* 215.

Gooneratne v. Gooneratne (1916) 2 *C.W.R.* 25.—May the Magistrate in proceedings under §§81 – 83 call upon the informant to show cause ?

Perera v. Abeysekera (1907) 1 *A.C.R. xi.*—Where A, B, C and D were charged with causing hurt, and A and B were acquitted and all of them were bound over to keep the peace, *held*, that the order against A and B was bad.

R. v. Khan 27 *Alla.* 172.—" The words used are as wide as possible, there is no limit as to the nature of the information, no limit as to the source from which it is derived. It is obvious that if a Magistrate is to set out for the information of the person summoned, the names of the persons from whom he receives information, and the nature of the information given, very few self-respecting persons . . . would dream of placing any information at the disposal of the Magistrate. It is not as if this information were any evidence against the person concerned, this of course, it can never be. The substance of the information informs the person concerned what is the matter upon which he has to show cause."

R. v. Nath 21 *P.R.* 1888.—A Police Report that a person is " quarrel some, headstrong, and contumacious " is insufficient information for the foundation for a preliminary order. There should be information of specific acts on the part of the respondent.

R. v. Raja (1885) 10 *Bom.* 174.—The information required under §83 must be to the effect that the respondent by habit commits the offences enumerated in that section. The commission of one offence, or the mere fact that the respondent has once been convicted for such an offence is not sufficient.—See also *R. v. Ali* (1886) 12 *Cal.* 520.

R. v. Singh (1912) 17 *C.W.N.* 238.—" §110 (*local*—§83) provides that a Magistrate . . . may, on receipt of information institute proceedings with a view to taking security for the good behaviour from those who may be described as habitual offenders. . . . . The Magistrate may initiate proceedings on information from any source, the Statute does not impose any restriction as to the quarter from which the information may be derived. The Magistrate is further not bound to reveal the source of his information (see §125 Evidence Ordinance); it is sufficient if he states the substance thereof."—See §105 *post.*

(*b*) **Breach of the peace.**—See §80 paras. 3, 4 *ante.*

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(*c*) **Within the local limits of the jurisdiction.**—See paras. 3(*a*), 4(*a*) and 5(*a*) *supra*; §§135 – 136 *post*, and the Courts Ordinance 1889 *Schedule II*.

R. v. Jai Prakash Lal 6 *Alla.* 26 (*Full Bench*).—A Magistrate has no power to issue process for taking security for keeping the peace, from a person residing within the limits of another Magistrate's jurisdiction. This ruling was followed in *R. v. Aziz* (1891) 14 *Alla.* 49; *R. v. Mullick* (1885) 12 *Cal.* 133. In the following cases it was held that the respondent should be actually residing within the limits of the jurisdiction of the Magistrate who issues the process.—*R. v. Ketaboi* 27 *Cal.* 993, *R. v. Kalu* 12 *P.R.* 1901, but permanent residence is not essential.—*R. v. Charan* (1897) 24 *Cal.* 344; *R. v. Bapoo* 9 *Bom. L.R.* 244. See also *R. v. Sundar* 31 *Cal.* 419, *R. v. Rajendro* 11 *Cal.* 737, *Dinonath v. Girija* 12 *Cal.* 133 and *R. v. Krishnaji* 23 *Bom.* 32. In the case of *R. v. Halwai* (1916) 43 *Cal.* 153 it was held that the words " within the local limits of his jurisdiction" were not equivalent to "residing within the local limits." There was jurisdiction if the evil habits of the respondent were practised within the Magistrate's local jurisdiction.

R. v. Sanyal 46 *Cal.* 215.—The words " any person . . . within the local limits, etc." do not imply residence.

(*d*) **Show cause.**—*Siriya v. Fernando* (1908) 1 *S.C.D.* 14; 1 *Leader* 87.—Before making an order under §§81 – 83 it is essential that the respondent should be called upon to show cause. Case sent back. See also *Silva v. Kaluwa* (1915) 1 *C.W.R.* 193, *Perera v. Fernando* (1910) 4 *S.C.D.* 27, *Kulanthaiveloe v. Kathirithamby* (1904) 4 *Tam.* 8. *C.f. Phillipu v. Rodrigo* (1900) 1 *Br.* 373. If the respondent is unable to show cause owing to unsoundness of mind it would appear that he may be dealt with under *Chapter XXXIII. post.*

(*e*) **The object of the proceedings.**—The object of §§81 – 83 is the prevention of crime, and not its punishment.—*R. v. Telang* 27 *Cal.* 781. *C.f.—Pietersz v. de Silva* (1916) 3 *C.W.R.* 361. "Magistrates cannot be too careful in requiring and placing on record evidence of a cogent, convincing and reliable kind, and they are not to make up for carelessness, supineness, or incompetence on the part of the police to bring home a specific crime to a particular person for which he can be convicted and punished, by calling on him to find security."—*R. v. Hamidullah* (1889) *A.W.N.* 114. See also *Banda v. Kalubanda* (1887) 1 *S.C.R.* 93. Before proceeding afresh under §§81 – 83 against a person who has recently been bound over, he should be given a fair chance of showing that he is attempting to adopt an honest livelihood.—*R. v. Ahmad* (1905) *A.W.N.* 34, *R. v. Ranjit* 28 *Alla.* 306, *R. v. Junab* 31 *Cal.* 783.

(*f*) **Procedure.**—(i) Joinder of respondents.—See §184 *post*. *R. v. Dineshamy* (1919) 21 *N.L.R.* 127; 6 *C.W.R.* 277—persons belonging to three factions, and whose defences are distinct, cannot be bound over under §81 in one and the same proceeding. See also *Wikremesuriya v. Don Lewis* (1915) 1 *C.W.R.* 192; *Samath v. Silva* (1917) 4 *C.W.R.* 238.

R. v. Andrisa (1890) 9 *S.C.C.* 129.—In proceedings against habitual offenders it is improper to join more than one respondent.

(ii) See §80 para. 14 *ante*.

(iii) In manner hereinafter provided.—*viz.*, §§84 – 89 *post*.

(iv) " May "—The use of this word vests the Magistrate with a discretion as to whether he will or will not bind over the respondent. It is always competent for the Supreme Court to review the exercise by

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the Magistrate of the powers vested in him by §§81 – 83. See *R. v. Kalachand* (1880) 6 *Cal.* 14, *R. v. Singh* (1891) 14 *Alla.* 45, *R. v. Pedda* (1881) 3 *Mad.* 238. See under Appeal *infra.*

(v) The bond—See §§88 – 89 para. 4 *post.*

(*g*) **Appeal.**—*Sanders v. Pary* (1904) 1 *Bal.* 22.—No appeal lies against an order under *Chapter VII.* of the Criminal Procedure Code. But see *Cassim v. Kandappa* (1901) 5 *N.L.R.* 311, 809 *D.C.Crim. Kalutara* 2739 (*S.C.M. April* 4, 1914); *Fernando v. Mathes Pulle* (1909) 12 *N.L.R.* 159, 1 *Curr. L.R.* 30; *Rahim v. Nonahamy* (1916) 19 *N.L.R.* 169, 3 *C.W.R.* 111; *Broome v. Carolis* (1916) 19 *N.L.R.* 276; *Culantaiveloe v. Somasunderam* (1904) 2 *Bal.* 122.

Summons or warrant in case of person not so present.

84. When a Police Magistrate acting under any one of the last three preceding sections deems it necessary to require any person to show cause under such section he shall, if such person is not present in Court, issue a summons requiring him to appear, or when such person is in custody, but not present in Court, a warrant directing the officer in whose custody he is to bring him before the Court.

Provided that whenever it appears to such Magistrate upon the report of a Peace Officer or upon other information (the substance of which report or information shall be recorded by the Magistrate) that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

Form of summons or warrant.

85. Every summons or warrant issued under the last preceding section shall contain a brief statement of the substance of the information on which such summons or warrant is issued.

Police Magistrate.—See §3 *ante.*

Peace Officer.—See §3 *ante.*

1. §§84 and 85 are based upon §§114 and 115 of the Indian Code.

2. **Scope of §§84 – 85.**—These two sections are only applicable to proceedings under §§81 – 83 *ante* and together with §98(2) *post* provide the legal procedure necessary in order to compel the attendance of the respondent before the Court. The Magistrate may act under §84 only when he "deems it necessary" that the respondent should show cause.

If the respondent is already before the Court, the Magistrate can proceed with his investigation under §87 *post* without any further delay. If, however, he is not present in Court, §84 lays down the rule that ordinarily the Magistrate is to issue a summons upon him.

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A warrant may only be issued.—

(i) If the respondent is not before the Court, and is in lawful custody, in which case a warrant to produce the respondent will be issued to the jailer.

(ii) If it is made to appear to the Magistrate either upon a report from a Peace Officer, or upon other information, that there is reason to fear that a breach of the peace may be committed, and which cannot be prevented, except by the immediate arrest of the respondent.

Every summons or warrant issued should, of course, comply with the general provisions of the law regulating their issue and execution.—See §§44 – 49, 50 – 58, 62 – 65 *ante*. Moreover, every process issued under §84 must contain a brief statement of the substance of the information upon which, it was issued. See *Kanagasingham v. Tambiah* (1923) 4 *C.L.Rec.* 211; 1 *T.L.R.* 209; 24 *N.L.R.* 474. The identity of the informant need not be disclosed.— *R. v. Khan* (see §§81 – 83 para. 6 (*a*) *ante*).

It is open to the Magistrate when issuing process under §84 to " dispense with the personal attendance of the respondent and to permit him to appear by counsel or his proctor."—See §86 *post*.

The subsequent procedure to be followed is to be found in §§87 *et seq. post*.

3. **Principles guiding the issue of warrants.**—*C. f.* §62 *ante* and §327 *post*. *Pietersz v. de Silva* (1916) 3 *C.W.R. at p.* 362.—" The proceedings authorized under *Chapter VII.* . . . are of a special character, and the issue of a warrant or summons is regulated by the provisions of §84 . . . In this case, the information contained in the written report . . . even if it be sufficient though unsworn, did not indicate that it was necessary to issue a warrant in order to prevent an imminent danger . . . " *per* de Sampayo, J.

In the cases of *Banda v. Kalubanda* (1887) 1 *S.C.R.* 93 and *R. v. Dineshamy* (1919) 21 *N.L.R.* 127; 6 *C.W.R.* 277, it was held, that the procedure specified in *Chapter VII.* should be carefully followed. See also *R. v. Singh* 14 *Alla.* 45.

4. **Every person for whose attendance process has been issued under §84 is entitled to something more than a mere assertion in writing by the Magistrate that he has received certain information.**—*R. v. Nather* (1884) 6 *Alla.* 214; *R. v. Iswar* (1884) 11 *Cal.* 13. The substance of the information should be set out in the process—§85, but an omission to state this, unless it seriously prejudices the respondent will not vitiate a subsequent order to furnish security.— *R. v. Behary* (1871) 15 *W.R.Cr.* 43.

5. **Report of Peace Officer.**—*C. f.* §148(1) (*b*) *post*.

6. **Show cause.**—See §§81 – 83 para. 6(*d*) *ante*.

7. **Information.**—See §§81 – 83 para. 6(*a*) *ante*.

8. **Breach of the peace.**—See §80 paras. 3 and 4, and §§81 – 83 para. 3(*f*) *ante*.

9. **Reason to fear.**—See §§62 para. 9, 68 para. 10 *ante*.

10. **§10B(2) of Ordinance No. 4 of 1841 makes applicable the provisions of §§84 – 93, 96 and 98 to proceedings under that section.**

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Power to dispense with personal attendance.

86. The Police Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace and may permit him to appear by a pleader.

Police Magistrate.—See §3 *ante.*

Pleader.—See §3 *ante.*

1. §86 is identical with §116 of the Indian Code.

2. **Scope of §86.**—This section only applies to proceedings to keep the peace—*viz.*, §81 *ante*, and not to proceedings for good behaviour—§§82 – 83 *ante.*

If a Magistrate issues process under §84 *ante* upon a person to show cause why he should not be bound over to keep the peace, he may, if there is sufficient cause for so doing, intimate to the respondent that he need not appear in person before the Court, and that he may do so through his counsel or proctor.—For case-law see §§297 and 154 *post* and see *R. v. de Silva* (1914) 1 *Crim. App. R.* 73.

Where the respondent resides at a distance, and there are no special circumstances making his personal attendance necessary, the Magistrate may lawfully act under §86.—*R. v. Mullick* 12 *Cal.* 133. See also §§81 – 83 para. 2 *ante.*

3. **Show cause.**—See §§81 – 83 para. 6(*d*) *ante.*

4. **Breach of the peace.**—See §81 *ante.*

5. **Judgments in cases where the personal attendance of the accused is dispensed with.**—See §304 para. 6 *post.*

Inquiry as to the truth of information.

87. (1) When any person appears or is brought before a Magistrate in compliance with or in execution of a summons or warrant issued under Section 84 the Magistrate shall proceed to inquire into the truth of the information upon which he has acted and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made as nearly as may be practicable in the manner hereinafter prescribed for conducting trials in summary cases before Police Courts.

(3) For the purpose of this section the fact that a person is an habitual offender or is such a person as is mentioned in Section 83 may be proved by evidence of general repute or otherwise.

Magistrate.—See §3 *ante.*

Summons.—See §§44 – 49, 62 – 64 *ante.*

Warrant.—See §§50 – 58, 62 – 65 *ante.*

Summary cases.—See §§187 – 199 *post.*

Police Court.—See §3 *ante.*

Habitual offender.—See §83 *ante.*

1. §87 is based upon §117 of the Indian Code, but the two sections are not identical in their terms. It is to be observed that a new Sub-section (4) has been added to §117, which authorizes the joinder in

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§87 one and the same proceeding of two or more respondents who have been associated together in the matter under inquiry. Our law contains no provision corresponding to this sub-section.

2. **Scope of §87.**—This section lays down the procedure to be followed by the Magistrate when the respondent is lawfully present before the Court, in answer to a summons or warrant issued under §84 *ante*. The Magistrate is " to proceed to inquire into the truth of the information upon which he has acted," and in order to do this, he will proceed to examine the witnesses " as may appear necessary " to be examined for that purpose.—§87(1). §87(2) declares that the procedure to be followed shall be " as nearly as may be practicable in the manner hereinafter prescribed for conducting trials in summary cases before Police Courts." This provision brings into operation the provisions of §§187 – 199 *post*. Therefore, the Magistrate must call upon the respondent to show cause why he should not be bound over. If he admits the truth of the information against him, the Magistrate may make order for security without any further formality. The witnesses called in support of the information should be examined in the presence of the respondent who should be allowed an opportunity of cross-examining them. When the case for the informant is closed, the respondent should be given a chance of calling evidence, unless the Magistrate finds that on the case for the informant no case has been made out.—See para. 5 *infra*.

In the case of proceedings against ' habitual offenders' under §83 *ante*, evidence of general repute is made admissible by §87(3).

If the Magistrate finds that no case has been made out against the respondent, he will make an entry on the record to that effect, and discharge him.—§89 *post*. If, on the other hand, it is found that the case is a proper one in which security should be taken, the Magistrate will follow the procedure laid down in §88 *post*.

3. **Appears.**—*i.e.*, either in person, or through his pleader.—See §86 *ante*.

4. **Information.**—See §§81 – 83 para. 6(*a*) *ante*.

5. **The inquiry.**—*Fernando v. Tamby Sinno* (1897) 3 *N.L.R.* 54. The respondent appeared before the Magistrate upon process calling upon him to show cause, but without calling the informant and his witnesses, and without giving the respondent an opportunity of cross-examining them, called upon him to show cause, and bound him over. *Held*, that this procedure was illegal.—*C. f. Jayatilleke v. Udiya* (1925) 26 *N.L.R.* 496.

Velaiden v. Zoysa (1910) 14 *N.L.R. at p.* 141.—" Proceedings of the kind now in question have, under §87(2), to be conducted like summary trials . . . . " *per* Middleton, J.—See *Wickremasuriya v. Lewis* (1915) 1 *C.W.R.* 192.

Perera v. Fernando (1910) 4 *S.C.D.* 27.—The respondent is entitled to lead evidence for the defence in order to disprove any information which the Magistrate may have received. Every opportunity should be given to a respondent to defend himself.

It will be seen that §87(2) requires the inquiry to conform as closely as possible to the procedure of a summary trial. The investigation is a judicial proceeding, and no order can be made except upon legally admissible evidence recorded in a lawful manner. It has been held in India that the words " *such further evidence as may appear necessary* " in §87(1) should be construed as being *ejusdem generis* with the words immediately preceding them—*R. v. Juggan* (1915) 15 *Cr.L.J.* 212.

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§87

Although in an investigation under §87 the nature or *quantum* of evidence need not be as full or as conclusive as in the case of the trial of an offender, yet the Magistrate ought not to proceed upon a mere apprehension of future bad conduct, but is bound to see that substantial grounds for such apprehension exist by legal proof—*R. v. Kadir* (1886) 9 *Alla.* 452. The record should show that the respondent was afforded an opportunity of making his defence—*R. v. Sur* (1884) 11 *Cal.* 13—and if the record is silent on the point no presumption of regularity will arise to cure the defect.—*R. v. Haidar* (1881) *A.W.N.* 155. The respondent should likewise be given a reasonable postponement, if asked for, in order to prepare his defence.—*R. v. Nathu* (1884) 6 *Alla.* 214. The respondent is entitled to cross-examine the witnesses called against him.—*R. v. Shunkar* (1870) 2 *N.W.P.* 406. The *onus* of proving that the respondent is a person who ought to be bound over is upon the informant. "It is not for him who is free, and who has not transgressed the law, to show why he should remain free, and why his freedom should not be qualified; it is for him who wishes to take away that freedom, or wishes to qualify it, to establish circumstances which would operate either in defeasance of, or in derogation of that freedom."—*R. v. Abdul Cader* (1886) 9 *Alla.* 452.

Where a respondent, when called upon to show, cause stated "I am a poor man, and have very little expectation of getting any benefit by fighting this case, and I therefore agree to being bound over," *held*, that the order made thereupon was invalid.—*R. v. Chandra* 35 *Cal.* 674, and see *R. v. Parathipati* 30 *Mad.* 330. "I am of a bad character and have been to jail" is not an admission of the truth of the information, as would justify a Magistrate in ordering security without further evidence. —*R. v. Kaka* 3 *Bom. L.R.* 269.

6. **Habitual offenders.**—In proceedings under §83 *ante* the fact that the respondent is an habitual offender, or is such a person as is mentioned in that section, may be proved by evidence of "general repute or otherwise."—§87(3). This does not mean that the informant is at liberty to place before the Court a heterogeneous mass of more or less vague and general statements by any witness who can be produced to say something on hearsay or otherwise, label it "general repute" and ask the Magistrate to act upon the strength of it. "This evidence of general repute appears . . . to have received a very wide interpretation, as in several cases . . . the most vague and general statements that a man is an habitual offender have been accepted by Magistrates as sufficient evidence upon which to convict (*sic*) a party under this section." —*R. v. Rup Singh* (1904) 1 *A.L.J.* 616. In order to avoid confusion and the admission inadvertently and illegally of a lot of inadmissible statements, the Magistrate might well insist that it should be made clear, at the time a witness is tendered for examination, whether he is going to give evidence of "general repute" or of other definite facts testified to by his own personal knowledge, or both.

General repute.—See the *explanation* to §55 of the Evidence Ordinance. Under that Ordinance whenever evidence of character becomes relevant, evidence may be given both of "reputation" as well as of "disposition," but such evidence must be restricted to evidence of general repute and general disposition, and not of particular acts by which reputation or disposition were made manifest. So under §87 (3) the following evidence would be evidence of general repute. "The respondent has the general reputation of being a man who habitually commits robbery." The witness may of course be tested in order to show

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§87 that he of his own knowledge is in a position to know what the general reputation of the respondent is. The fact that the respondent has been suspected of having habitually committed offences is not evidence, nor is the personal opinion of the witness. It is not necessary that the witness should have personal knowledge of the facts, provided he has a personal knowledge of the reputation current concerning the respondent. The question is not what the general repute of the respondent was, but what it is.

Jusoop v. Poddappu (1890) 9 *S.C.C.* 82.—Evidence of general repute should not be acted upon unless convincing.

Singho v. Punchihamy (1915) 5 *B.N.C.* 13.—In a proceeding under §83 it was held, that evidence of general repute that the respondent was a drunkard and a bully was admissible.

Wenabanaya v. Fernando (1916) 3 *C.W.R.* 370.—The respondent was called upon to show cause under §83 against an information that he was a notorious bad liver and a dangerous character. " Evidence was given by the complainant himself, the Ratamahatmaya and several minor headmen and a number of other witnesses. It has been objected that this evidence is too vague and general and consists largely of hearsay. But the very nature of the proceedings is such that this kind of evidence must necessarily be admissible and in many cases would be the only evidence available . . . Specific evidence of convictions for offences may of course be given, but the man's general repute among persons among whom he lives is also relevant. If any proceedings are taken to punish a person for a crime, direct evidence of the particular offence is required, but where the object of the law is to provide preventive measures, evidence of repute, though hearsay, is proper. This does not mean that the Court should easily accept such evidence. Indeed, where the liberty of a man is sought to be affected by evidence as to his bad character, the Court should be more careful and slow to draw conclusions against him than in other cases. But subject to such caution, it is the duty of the Court to find judicially, whether the man comes within one of the descriptions mentioned in §83." *per* de Sampayo, J.

R. v. Pershad (1896) 23 *Cal.* 621.—*Held*, that the expression " general repute " meant the reputation which a man bears in the place in which he lives. (*C. f.—R. v. Kitabdi* (1900) 27 *Cal.* 993). It was *further held* " It is hardly necessary to say that evidence of rumour is mere hearsay evidence, and hearsay evidence of a particular fact. Evidence of repute is a totally different thing." *per* Pethram, C.J.

Or otherwise.—By the use of these words the Legislature appears to have vested the Magistrate with a great deal of latitude as to the admission of evidence. " According to the general rule of interpretation, the word ' otherwise ' must be read as meaning something *ejusdem generis* with the particulars alleged above it. It seems difficult to interpret the word ' otherwise ' in the sense in which the law would ordinarily read it. I am therefore of opinion that the Magistrate was intended to use a very large discretion as to the nature of the evidence he may admit. Applying the *ejusdem generis* principle of interpretation, the nearest approach to the particular general repute would be hearsay not amounting to general repute."—*R. v. Kallu* (1904) *A.W.N.* 140. This interpretation, however, has not met with the approval of the Indian commentators. *Roy* on *Bad Livelihood** states that " with all deference to his Lordship it may be said that the interpretation is rather laboured than

* (2nd Edition) p. 100.

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natural." This writer is inclined to the view that by the use of these words the Legislature intended to make admissible evidence, which under the existing law of evidence would not have been admissible. *Boys** commenting on this expression states:" It would seem that a clue to the meaning of the words ' or otherwise ' is to be found in the change of phraseology from that employed in Act X of 1872 §505, to that in Act X of 1882 §117, which is the same as that in the later Codes. Act X of 1872 §505 reads : ' Whenever it appears to such Magistrate from the evidence as to general character, adduced before him, that any person is by repute a robber, etc. . . .' This clearly required that the person should be ' by repute ' a robber, and all that it would seem that the Legislature intended by the words ' repute or otherwise ' adopted in the subsequent Codes, was to make it clear that evidence might be led in regard to, but not restricted to ' repute ' ".

7. **Pearl Fisheries.**—By §12 of Ordinance No. 2 of 1925 it is provided that in any inquiry under §87 of this Code as respects any person found in or attempting or proposing to enter a pearl fishery camp, the evidence of any member of the Police force of the country to which that person belongs or from which that person has come, that that person is an *habitual robber*, *house-breaker*, or *thief*, or an *habitual receiver of stolen property*, or that he is a *dangerous character* by reasons of his having been convicted of a *crime of violence*, shall be sufficient *prima facie* evidence of the fact, and shall be admissible in evidence, if it appears to the Magistrate in all the circumstances of the case and after hearing any evidence given by or on behalf of the person charged, to be true; *and* if the Magistrate is satisfied that in the circumstance it is impracticable to obtain direct evidence as to the fact without an amount of delay or expense, which in the circumstances appears to the Magistrate to be unreasonable. The above provision applies *only* where the holding of the inquiry has been approved in writing by the camp superintendent.

Order to give security.

88. If upon such inquiry it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond with or without sureties, the Magistrate shall make an order accordingly.

Provided.—

First.—That the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.

Second.—That when the person in respect of whom the inquiry is made is a minor the bond shall be executed only by his sureties.

Discharge of person informed against.

89. If upon such inquiry it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the

* Vol. 2 pp. 173-174.

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§§88-89 inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or if such person is not in custody shall discharge him.

Inquiry.—See §87 *ante*.

Proved.—See §3 Evidence Ordinance.

Not proved.—See §3 Evidence Ordinance.

Keep the peace.—See §§80, 81 *ante*.

Good behaviour.—See §§82, 83 *ante*.

Magistrate.—See §3 *ante*.

1. §§88 and 89 are based upon §§118 and 119 of the Indian Code which they follow closely, except that §88 does not reproduce *proviso* 1 of §118 and §89 is not identical in its terms with §119.

2. **Scope of §§88 – 89.**—(*a*) If, after holding the inquiry provided by §87 *ante*, the Magistrate comes to the conclusion that it has not been proved that any necessity exists for binding over the respondent, he will make an entry of his finding on the record and order that the respondent be discharged. If the respondent is in custody for the purposes of the inquiry he must be released.—§89.

(*b*) If after the inquiry the Magistrate is satisfied that a case has been made out for calling upon the respondent to furnish security to keep the peace, or to be of good behaviour, the Magistrate after recording his finding will make order that the respondent shall execute a bond, with or without sureties, to keep the peace or to be of good behaviour. —§88. The amount of the bond is to be fixed with due regard to the circumstances of the case and should not be excessive.—§88 *proviso* 1. If the respondent is a minor, the bond is to be executed only by the sureties.—§88 *proviso* 2. *C.f.* §325(1)(*b*),(2) *post*.

3. **Is proved.**—There should be a clear and specific finding on the point that the case is a proper one in which security may be called for. The Magistrate has to base his finding upon the evidence which has been led, and then decide judicially whether the substance of the allegations made have been proved or not. Thus, where it was found that the respondent had used his influence for the purpose of stopping the village barber, dhoby and others from working for the informant and also that he had committed "divers other acts of oppression," it was held that the order calling for security was bad.—*R. v. Jenaul* (1902) 7 *C.W.N.* 32. *C.f.* §3 Evidence Ordinance 1895.

4. **The bond.**—See §80 para. 12 *ante*; §§81 – 83 para. 6(*f*)(*v*) *ante*.

The security demanded is a personal bond, with or without sureties. It should be noted, however, that under §§82 and 83 the law expressly declares that the bond is to be executed with sureties, while under §§80, 81 the bond may be executed with or without sureties. Under §80 the term for which the bond can be executed may be two years or less in the case of District Courts and six months or less in the case of Police Courts. Under §§81 – 83 the period is limited to six months or less.

Under §80 the bond is to be executed for a sum "proportionate to the means" of the respondent. These words do not appear in §§81 – 83, but in the first *proviso* to §88 it is provided that the amount of every bond "shall be fixed with due regard to the circumstances of the case and shall not be excessive." Although the words "circumstances of the case" do not imply the same meaning as the words "proportionate

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to his means," yet, it may safely be said that the latter ought to be the basis in fixing the amount of the bond, for what may not be excessive according to the circumstances of the particular case, may nevertheless be excessive to the means of the respondent.—*C.f.* §396 *post.* Moreover, the respondent's status in life ought always to be considered, and the sum demanded should never be such as to absolutely preclude him from being able to furnish the necessary security. The provisions of this Chapter should never be used with the object of imprisoning a person who has made himself obnoxious to others, he should be given a chance of obtaining his freedom by tendering security.—See *R. v. Dedar* (1877) 2 *Cal.* 384. Where the amount of security ordered is wholly out of proportion to the circumstances of the case, the Supreme Court will interfere.—*R. v. Juggut* (1876) 2 *Cal.* 110; *R. v. Rama* (1892) 16 *Bom.* 372; *R. v. Raza Ali* (1900) 23 *Alla.* 80. Although the law vests the Court with a discretion, it has no power to impose arbitrary conditions. Thus, a condition that the respondent should furnish two sureties of respectability and substance, not related to him, and residing within one mile of his house, was held to be bad. " Such an order is tantamount to saying that the respondent shall not furnish security, but must go to jail—"*per* Jackson, J., in *R. v. Sooboodhee* (1874) 22 *W.R.* 37. It is nevertheless competent for the Court to refuse to accept any surety tendered if it considers him to be " unfit."—§92 *post.*

The bond binds the respondent over to keep the peace or to be of good behaviour.—§91 *post.* If the respondent is a minor, no personal bond may be taken from him, but his sureties have to execute the bond. —§88 *proviso* 2. *C.f.* §325 *post.* In cases where the respondent is ordered to execute a bond without sureties, the Court may, except in the case of a bond for good behaviour, permit him to make a cash deposit in lieu of executing a bond.—§410 *post.*

§411 *et seq.* deals with the provisions for forfeiting bonds, and for exacting the penalties due thereunder. See also §§91, 98 *post.*

If the security ordered is not tendered, the Court will act as provided by §§93 – 95 *post.*

R. v. Wijeysinghe (1909) 5 *A.C.R.* 101.—Land Dispute—Magistrate makes order that parties are not to enter the land which is to be in the charge of the headman, and that the parties should execute a bond to institute a partition action within a certain time. *Held*, that the order was illegal.

5. **In custody.**—*e.g.*, as in the circumstances set out in the *proviso* to §84 *ante.*

6. **Appeal.**—See §§81 – 83 para. 6(*g*) *ante.*

C.—Proceedings in all Cases subsequent to Order to Furnish Security.

Commencement of period for which security is required.

90. (1) If any person in respect of whom an order requiring security is made under this Chapter is at the time of making such order sentenced to or undergoing a sentence of imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order.

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§90

Security.—§§80 – 83 *ante.*

1. §90 is based upon §120 of the Indian Act. §90(1) is almost identical with §120(1) in its terms ; but §120(2) of the Indian Act departs from §90(2) in an important particular. After the words " such order " there has been added "unless the Magistrate, for sufficient reasons, fixes a later date."

2. **Scope of §90.**—If any person who has been ordered to furnish security, whether to keep the peace (§§80 – 81 *ante*) or to be of good behaviour (§§82 – 83 *ante*), is at the time such order is made, either sentenced to, or undergoing a sentence of imprisonment, the period for which the security is required shall commence on the expiration of the sentence.—§90(1). In other cases, the period is to begin as from the date the order is pronounced.—§90(2).

3. **Sentenced to or undergoing sentence.**—These words are meant to make it quite clear that the provisions of §90(1) are to apply to all cases where (*a*) the respondent has been convicted, and an order for security made in addition to such sentence, under §80 *ante* ; (*b*) the respondent has been sentenced in some other proceeding, but for some valid reason (*e.g.*, pending an appeal) is not undergoing sentence ; and (*c*) the respondent is actually undergoing a term of imprisonment. *C.f.* §321 *post.*

4. **§90(2).**—As the law stands at present, if a respondent who has been ordered to furnish security has not been sentenced to or is not undergoing a sentence of imprisonment, and is unable forthwith to furnish the required security, he must be committed to prison. The Indian Law has provided for this by an amendment of §120(2) of the Indian Code.

5. **The legal effects arising from the fact that security is not tendered on or before the date on which the period for which the security is given.**—See §§93 – 95 *post.*

Contents of bond.

91. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour as the case may be ; and in the latter case the commission or attempt to commit or the abetment of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Keep the peace.—See §§80 – 81 *ante.*

Good behaviour.—See §§82 – 83 *ante.*

1. §91 is based upon §121 of the Indian Code.

2. **Scope of §91.**—See §§ 80 para. 12 *ante*, §§81 – 83 para. 6(*f*) (*v*) and §§88 – 89 para. 4 *ante.*

The bond to be executed must bind the respondent over to keep the peace, or to be of good behaviour. In the case of a bond to be of good behaviour, the commission or any attempt to commit, or any abetment of any offence punishable with imprisonment, wherever committed operates by law as a breach of the bond. §91 is silent as to what would constitute a breach of a bond to keep the peace. This is provided in the form of bond* used.

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* No. 20 Criminal P. C. 1898 §86 (L. 2 [July 1913]).

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The two provisos to §88 *ante* and §410 *post* specify certain other formalities relating to bonds called for under this chapter. §411 *et seq. post* lay down the procedure to be observed on forfeiture of the bond.

3. **Commission of any offence.**—Before the bond can be forfeited the commission of the offence must be proved.—See §411(1) *post.* See also *Abdul Cader v. Perera* (1908) 2 *S.C.D.* 26.

4. **Attempt.**—See §490 Penal Code.

5. **Abetment.**—See §3(1) Interpretation Ordinance 1901.

6. **Offence**—See §3(1) *ante.*

7. **Offence punishable with imprisonment.**—Does the word "imprisonment" as used in §91 refer to both, rigorous and simple imprisonment, or only to simple imprisonment? §3(10) of the Interpretation Ordinance 1901 defines "imprisonment" to mean "simple imprisonment." It seems to be quite clear that such could not have been the intention of the legislature. The solution to the difficulty is to be found in §3 *ante* where it is stated that "all words used herein and defined in the Penal Code, and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code." §52 of the Penal Code defines "imprisonment" to include both "rigorous" and "simple," and it is in this sense that the word is used here.

8. **Wherever it may be committed.**—*i.e.*, whether beyond the limits of the jurisdiction of the Court which ordered the security or not.

Power to reject sureties.

92. A Court may refuse to accept any surety offered under this chapter on the ground that, for reasons to be recorded by the Court, such surety is an unfit person.

Court.—See §3 *ante.*

Surety.—See §§80(1), 81 – 83, 88 *ante*, §§98, 410 – 412 *post.*

1. §92 is based upon §122 of the Indian Code.

2. **Scope of §92.**—This section enables the Court to refuse to accept any surety tendered on the ground that he is an unfit person to act as surety. There is nothing in the Code to guide the Judge in determining the question of the fitness of the surety, except his own discretion. As a safeguard against an unreasonable exercise of his discretion, the law requires that the Judge should record his reasons for rejecting the person as a surety. *C.f.* §§395(4),400 *post.*

3. **Unfit person.**—The following is a summary of the Indian decisions upon the point: A surety need not necessarily be *resident* in the locality, and a Judge cannot reject him simply because he happens to reside in another district.—*R. v. Jalil* (1908) 13 *C.W.N.* 80; *R. v. Pershad* (1902) 6 *C.W.N.* 593 and see *R. v. Khan* (1902) 24 *Alla.* 471. The fact that a person "*is unfit to control* the respondent," or that "*he is a member of the same firm* as the respondent" are not valid reasons for rejecting a person.—*R. v. Pershad* (1902) 6 *C.W.N.* 593, but see *R. v. Karim* (1916) 44 *Cal.* 737.

The true test of fitness or otherwise is "whether he is a person of *sufficient substance* to warrant his being accepted."—*R. v. Pershad* (*supra*), and see *R. v. Sheikh* (1908) 35 *Cal.* 400. This latter view, however, has not been universally accepted. "The word 'unfit' does not in ordinary language connote that idea (*i.e.*, pecuniary position). If we look at §513 (*local*—§410) of the Criminal Procedure Code, we find that whereas in an ordinary case a Magistrate may accept a money

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§92 deposit in place of a surety, an exception is made where a person is called on to furnish security for good behaviour. In my opinion, the unfitness referred to in §122 (*local*—§92), though it may not exclude the idea of pecuniary fitness, is *more concerned with the idea of moral fitness.*"—*per* Woodroffe & Geidt, J.J., in *R. v. Jalil* (1908) 13 *C.W.N.* 80. An *ex-convict* has been held not to be unfit to act as surety.—*R. v. Singh* (1903) 26 *Alla.* 189.

In the case of *R. v. Jafar Ali* (1910) 14 *C.W.N.* 666, it was held that " the first matter to be inquired into is the *ability of the sureties to pay* the sums for which they became bound down, in case of default of the person who is bound down."

In *R. v. Mandal* (1914) 41 *Cal.* 764, it was laid down that the grounds for which a Judge refuses to accept a surety must be such as are valid and reasonable in the circumstances of each case as it arises.—See *R. v. Abdul Karim* (1916) 44 *Cal.* 737.

In *R. v. Toni* (1895) *A.W.N.* 143, it was stated that the surety should be a person who had *an interest* in seeing that the respondent behaved well, and that he should be a person *exercising some influence* over the respondent. See also *R. v. Nga Hein* (1915) 16 *Cr.L.J.* 553.

In *R. v. Baksh* (1898) 20 *Alla.* 206, it was held that the object of requiring sureties was not for the purpose of obtaining money for the Crown by forfeiture of the bond, but in order to *ensure the good behaviour of the respondent. A surety should not be rejected simply because a police officer states that he is of bad character*, especially if such rejection involves the committal of the respondent to prison.—*R. v. Ibrahim* (1900) 16 *Cr.L.J.* 100. In the same case it was held that a surety was a fit person if he was *in a position to ascertain how the respondent was behaving* and if he was of such a character and standing that *he would not hesitate to apply for a cancellation of the bond if he saw a risk of its forfeiture. Relationship* to the respondent is not a disqualification.—*R. v. Singh* 25 *Alla.* 131.

4. **Reasons to be recorded.**—" The intention of the Legislature in insisting that Judges should record their reasons in refusing to accept sureties on the ground of unfitness, is that the Judges should exercise their independent judgment."—*R. v. Abdul* (1906) 10 *C.W.N.* 1027. No procedure, however, has been laid down as to the mode of inquiry to be adopted by the judge. Police reports are not to be relied upon exclusively.—*R. v. Abdul* (1906) 10 *C.W.N.* 1027; *R. v. Mahomed* (1915) 42 *Cal.* 706. The Judge ought to act upon evidence.—*R. v. Singh* (1898) *A.W.N.* 154; *R. v. Musthapa* (1904) 26 *Alla.* 371.

Must the Judge himself hold the inquiry, or may he delegate this function to another ? The opinion in India seems to be against delegation. See *General Orders* 148, 612 *et seq.*

Imprisonment in default of security.

93. If any person ordered to give security under this Chapter does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison be detained in prison until such period expires or until within such period he gives the security to the Court

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which made the order requiring it or to the superintendent or jailer of the prison in which he is detained. §§93-95

Simple imprisonment for failure to give security for the peace.

94. Imprisonment for failure to give security for keeping the peace shall be simple.

Rigorous or simple imprisonment for failure to give security for good behaviour.

95. Imprisonment for failure to give security for good behaviour may be rigorous or simple as the court in each case directs.

Security.—See §88 *ante*.

Commencement of period of security.—See §90 *ante*.

Court.—See §3 *ante*.

Keeping the peace.—See §§80 - 81 *ante*.

Good behaviour.—See §§82 - 83 *ante*.

1. §93 is based upon §123(1), §94 upon §123(5) and §95 upon §123(6) of the Indian Code.

2. **Scope of §§93 - 95.**—These sections relate to the procedure to be followed in case the respondent does not give the security ordered on or before the date on which the period for which the security is to be given commences. If security is given, these sections have no application.—*R. v. Pershad* 23 *Cal.* 621, 627. The provisions of §93 have no application to the bonds contemplated by §325 *post*.—*R. v. Ratnum* (1928) 6 *T.L.R.* 81, 10 *C.L.Rec.*10, 30 *N.L.R.* 212.

3. **On or before the date on which the period . . . commences.** —See §90 *ante*.

If the security is not forthcoming, or if the security which is tendered is not acceptable to the Court (see §92 *ante*), the respondent will be committed to prison. If he is already in prison an order will be made for his detention *until the period for which security is called for has expired*. This means that he will have to remain in jail after the expiration of the sentence he is undergoing, until the period during which security is wanted has also expired.—See §90(1) *ante*. If before that period terminates the desired security is given either to the Court which made the order calling for it, or to the Superintendent of the jail or the Jailer of the prison, the order for imprisonment until security is given is automatically withdrawn by operation of law.

4. **Imprisonment in default of giving security.**—See §§94 - 95.

With regard to orders made under §§80 - 81 *ante*, the imprisonment for failure to give security to keep the peace is to be "simple imprisonment," whereas, with regard to orders passed under §§82 - 83 *ante*, such imprisonment may either be "rigorous" or "simple" as the Court sees fit to direct. Under the Pearl Fishery Ordinance No. 2 of 1925 §12(2), an offender dealt with under this Chapter under the provisions of that Ordinance may be ordered to be removed from the camp or to refrain from entering the camp instead of remanding him to jail.

A person committed to prison in default of finding security is not a person "undergoing imprisonment" within the meaning of §321 *post*. —See §321 para. 3 *post* and *R. v. Fakir* (1882) 8 *Cal.* 644.

5. **Release of persons imprisoned for failure to give security.** —See §§96 - 97 *post*.

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§§96-97

Power to release person imprisoned for failing to give security.

96. (1) Whenever a Court is of opinion that any person imprisoned for failing to give security under this chapter may be released without hazard to the community or to any other person, the Court may order such person to be discharged.

(2) A Court other than the Supreme Court shall not exercise this power except in cases where the imprisonment is under its own order.

Police Magistrate to report to superior court and such court may order release.

97. Whenever a Police Magistrate is of opinion that any person imprisoned for failing to give security under this chapter as ordered by the Supreme Court or a District Court may be released without the hazard mentioned in the last preceding section, such Magistrate shall make an immediate report of the case for the orders of the Supreme Court or District Court as the case may be, and such Court may, if it thinks fit order such person to be discharged.

Court.—See §3 *ante*.

Imprisonment for failure to give security.—§§93 - 95 *ante*.

Supreme Court.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

District Court.—See §3 *ante*.

1. §96(1) is based upon §124(1) of the Indian Code. Our law does not reproduce §124(2) of the Indian Code, nor is there any provision in that Code, corresponding to §96(2) of this Code.

§97 is based upon §124(3) of the Indian Code.

2. **Scope of §§96 - 97.**—If a person from whom security to keep the peace or to be of good behaviour, has been committed to prison for failing to give security, and before the expiration of the period, for which the security was demanded, it is shown that the circumstances are such that the prisoner can be released without danger to the community or to any other person, the reason for which the security was called for vanishes, and with it the liability to remain in prison.

The Supreme Court may in all such cases order the discharge of the respondent, but subject to this, no other Court may make an order of discharge under §96(1), except where the order for imprisonment was passed by itself.—§96(2).

§97 further provides that in cases where such imprisonment has been ordered by the Supreme Court or a District Court, and a Police Magistrate is of opinion that the respondent can be released without hazard to the community or to any other person, such Magistrate is required to make an immediate report of the case to the Court which passed the order, and such latter Court may "if it thinks fit" order the discharge of the respondent.

See §80 para. 14 *ante* and §251 *post*.

3. **Whenever a Court is of opinion.**—There must be evidence before the Court.

4. **Immediate.**—*C.f.* "Forthwith."—§§33 para. 3, 60(7) "Immediately."—§§42 - 43 para. 5, §71 para. 6 and §72 *ante*.

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5. **R. v. Dey (1905) 32 Cal. 948.**—The procedure created by §97 is neither appellate nor revisional, but an original jurisdiction. §98

6. **Pearl Fisheries Ordinance No. 2 of 1925, §12(2).**—An undesirable who has been dealt with under §12(1) of the Ordinance, may, without being committed to jail, be deported from the camp or ordered not to enter the camp.

7. **§10B(2) of Ordinance No. 4 of 1841 makes §96 applicable to proceedings under that section.**

Discharge of sureties.

98. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Police Magistrate to cancel any bond executed under this chapter within the local limits of his jurisdiction.

(2) On such application being made the Magistrate shall issue his summons or warrant as he thinks fit requiring the person for whom such surety is bound to appear or to be brought before him.

(3) When such person appears or is brought before the Police Magistrate, such Magistrate shall cancel the bond, and shall order such person to give for the unexpired portion of the term of such bond fresh security of the same description as the original security. Every such order shall have the same effect as the original order.

Peaceable conduct.—See §§80 – 81 *ante*.

Good behaviour.—See §§82 – 83 *ante*.

Police Magistrate.—See §3 *ante*.

Summons.—See §§44 – 49, 62 – 64, 84 – 85 *ante*.

Warrant.—See §§50 – 58, 62 – 65, 84 – 85 *ante*.

Security.—See §§88, 91 *ante*.

1. §98 is based upon §126 of the Indian Code which it follows closely.

2. **Scope of §98.**—Any surety has the right to apply to a Magistrate within whose jurisdiction a security bond has been executed, to cancel such bond. Upon such an application being made, the Magistrate *shall* issue a summons or a warrant for the appearance of the person bound over. When such person appears, the Magistrate *shall* cancel the bond and discharge the surety, and call upon the person to provide fresh security of the same description as the original security for the unexpired portion of the term. If such security is not forthcoming, the provisions of §§92 – 95 *ante* will apply. *C.f.* §400 *post*.

3. **The bond.**—See §§80 para. 12 *ante*, §§81 – 83 para.6(*f*),(*v*) *ante* and §§88 – 89 para. 4 *ante*.

4. **Issue his summons or warrant.**—See §§84 – 85 *ante* and §327(1) *post*.

5. **Surety.**—See §92 *ante*.

6. **Fresh security of the same description.**—This means that in acting under §98 the Court has no power to enhance or modify the security to be given. It should be the same as that originally ordered.

7. **§10B(2) of Ordinance No. 4 of 1841 makes the provisions of §98 applicable to proceedings under that section.**

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§§99-104

CHAPTER VIII.

UNLAWFUL ASSEMBLIES.

Assembly to disperse on command of Magistrate or Police officer.

99. Any Police Magistrate and any Peace Officer not below the rank of Inspector, Korala, Muhandiram, or Udaiyar may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Use of civil force to disperse assembly.

100. If upon being so commanded any such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, any Police Magistrate or any such Peace Officer as in the last preceding section mentioned may proceed to disperse such assembly by force and may require the assistance of any male person (not being an officer or soldier in Her Majesty's army or a [§2 *Ord. No.* 1 *of* 1918.] *soldier of the Defence Force* duly enrolled under the provisions of any law and acting as such) for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it in order to disperse such assembly or that they may be punished according to law.

Use of military force.

101. If any such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed, the Government Agent of the Province or any Police Magistrate having jurisdiction who is present or the Inspector-General of Police may cause it to be dispersed by military force.

Duty of officer commanding troops required by Magistrate to disperse assembly.

102. (1) When the Government Agent, Police Magistrate, or the Inspector-General of Police determines to disperse any such assembly by military force he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's army or (if the Governor so direct in writing) of any [§2 *Ord. No.* 1 *of* 1918.] *soldiers of the Defence Force* duly enrolled under the provisions of any law to disperse such assembly by military force and to arrest and confine such persons forming part of it as the

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Government Agent, Police Magistrate, or Inspector-General of Police may direct or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining such persons.

Power of commissioned military officers to disperse assembly.

103. When the public security is manifestly endangered by any such assembly and when the Government Agent, Police Magistrate, or the Inspector-General of Police cannot be communicated with, any commissioned officer of Her Majesty's army may disperse such assembly by military force and may arrest and confine any persons forming part of it in order to disperse such assembly or that they may be punished according to law; but if, while he is acting underth is section, it becomes practicable for him to communicate with the Government Agent, Police Magistrate, or the Inspector-General of Police he shall do so and shall thenceforward obey the instructions of the Government Agent, Police Magistrate, or Inspector-General of Police as to whether he shall or shall not continue such action.

Protection against prosecution for acts done under this chapter.

104. No prosecution against any Government Agent, Police Magistrate, or the Inspector-General of Police or any military officer, peace officer, soldier, or [§2 *Ord. No.* 1 *of* 1918.] *soldier of the Defence Force* for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Governor in Executive Council; and

(*a*) No Government Agent, Police Magistrate, or peace officer acting under this Chapter in good faith;

(*b*) No officer acting under section 103 in good faith;

(*c*) No person doing any act in good faith in compliance with a requisition under section 100 or section 102; and

(*d*) No inferior officer or soldier or [§2 *Ord. No.* 1 *of* 1918.] *soldier of the Defence Force* doing any act in obedience to any order which under military law he was bound to obey, shall be deemed to have thereby committed an offence.

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Police Magistrate.—See §3 *ante.*

Peace Officer.—See §3 *ante.*

Unlawful assembly.—See §138 *et seq.* Penal Code.

Disturbance of the public peace.—*C. f.* §§80–81 *ante.*

Arrest.—See §23 *et seq. ante.*

Government Agent.—See §3 *ante.*

Inspector-General of Police.—See §24 Ordinance No. 16 of 1865 as amended by §2 Ordinance No. 16 of 1867.

Sanction to prosecute.—See §147, 286(2) *post.*

The Governor in Executive Council.—See §3(7) Ordinance No. 21 of 1901 and para. 11 *infra.*

Offence.—See §3 *ante.*

Good faith.—See §51 Penal Code.

1. §§99 – 104 are based upon §§127 – 132 of the Indian Code which they follow as closely as local conditions permit.

2. **Scope of §§99 – 104.**—Every citizen has the right of defending his own person, as well as the person of another, his property, as well as the property of another, against unlawful violence.—§90 Penal Code, and in the lawful exercise of this right he may, under certain circumstances even cause the death of the aggressor, and yet be saved harmless from the consequences.—§§93, 96 Penal Code.

The provisions of *Chapter VIII.* of this Code are in addition to the right of private defence of person and property. This group of sections is concerned with the prevention by means of force of breaches of the public peace, and the danger to life and property which such breaches of the peace may cause, if unchecked by the public authorities. It is to be noted that the English Law on this branch of the law is very dissimilar from the local law which follows the Indian Law.

Analysis of §§99 – 104.—(*a*) Any Magistrate, or Peace Officer not below a certain specified rank, may lawfully command any *unlawful* assembly, or any *lawful* assembly of five or more persons who are likely to cause a disturbance of the public peace to disperse. When such order has been duly promulgated it is the duty of such assembly to disperse.—§99 and §185 Penal Code, and the *illustration* thereto. If after being so commanded to disperse, or if without any such order having been given, the assembly so conducts itself as to show a determination not to disperse, any Magistrate, or Peace Officer not below the specified rank, may proceed to disperse it by the use of force, and may call upon all male persons, not being members of the Regular Army or of the local Defence Force, for the purpose of dispersing the assembly, and if need be, to arrest and confine its members, in order to disperse the assembly, or to have them punished according to law.—§100. See §19(*b*),(*c*) *ante.*

(*b*) (i) If the assembly cannot be dispersed otherwise, and if the public safety demands that it should be dispersed at all costs, the Government Agent of the Province, or any Magistrate having jurisdiction over the locality, provided he is present at the spot, or the Inspector-General of Police may cause its dispersal by means of military force.—§101. In order to do this, they or any of them may call upon any officer, or non-commissioned officer in command of any regular troops, or (if the Governor so directs in writing*) any soldiers of the Defence Force to

*During the late war Sir Robert Chalmers issued a general direction dated October 13, 1915 under §102 (1).

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disperse the assembly by means of military force, and to arrest and confine its members, as the person making the requisition shall direct, or as it may be necessary to arrest and confine them in order to disperse the assembly, or to have them punished according to law.—§102(1). It is the duty of members of the regular forces, or of the Defence Force, to obey any such lawful requisition, and to use as little force, and to do as little damage to person and property as is possible so far as is consistent with the dispersal of the assembly, and the arrest and detention of its members.—§102(2).

(ii) Whenever the Government Agent, Police Magistrate having jurisdiction over the locality, or the Inspector-General of Police cannot be communicated with, and when the public security is manifestly endangered by the assembly, any commissioned officer of the regular army may disperse it by means of military force and may arrest and confine its members ; provided that if while so acting it becomes practicable for such officer to communicate with any of the persons referred to above, he must do so, and obey their orders as to whether he is to continue his course of action or not.—§103.

(*c*) §104 confers protection on persons engaged in the suppression of unlawful assemblies, by enacting that no prosecution against them shall be initiated in respect of any act done by them under *Chapter VIII.*, except with the sanction of the Governor in Executive Council, and even if sanction is given, acts done in good faith, or under lawful orders from superior officers, would not amount to criminal offences.

3. **Unofficial Police Magistrates have the same powers as ordinary Police Magistrates under this *chapter*.**

4. **Analagous provisions of law.**—Police Ordinance 1865 §§28 – 31.—The appointment of special constables in cases where any tumult, riot or outrage has taken place or may take place.

Police Ordinance 1865 §69.—The regulation of processions, *etc.*, in public.

Police Ordinance 1865 §87.—Assemblies of twelve or more persons carrying offensive weapons, *etc.*, penalised.

§114 *post.*—Emergency orders in cases of urgency.

§§81 – 83 *ante.*—Binding over persons to keep the peace, *etc.*

§22 *ante.*—Information to be given of offences.

§§115 – 118 *post.*—Preventive action of Peace Officers.

5. **Dicey's view.**—"Officers, Magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position ; they are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances ; they are, each and all of them, authorized to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are none of them entitled to use more; they are, each and all of them, liable to be called upon to account before a jury for the use of excessive, *i.e.*, unnecessary force ; they are, each and all of them it must be added—for this is often forgotten—liable, in theory at least, to be called to account before the Courts for nonperformance of their duty as citizens in putting down riots, though of course, the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, Magistrate, soldier or ordinary civilian. Whoever doubts these propositions should study the leading case of *R. v. Pinney* (1832) 5 *C.&P.* 254, in which was fully considered the duty of the Mayor of

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Bristol in reference to the Reform Riots of 1831." After the famous Porteous Riots in 1736, the Provost of Edinburgh was deprived of his office by Parliament and declared incapable of holding any future office during his life because he was found to have been negligent in his duty in not suppressing the riot which led to the murder of Captain Porteous of the City Guard by the mob.

The obligation on the part of the public to assist in the dispersal of unlawful assemblies is to be found in §19(*b*) and (*c*) *ante*.

See paras. 9 and 14 *infra*.

6. **The "Riot Act."**—The "Riot Act" has no application to Ceylon—see 9 Halsbury's Laws of England p. 472 note (*v*).

7. **Any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace.**—See §99.

Not only may an "unlawful assembly be dispersed by force, but even a lawful assembly of five or more persons can be broken up, if there is a likelihood of a disturbance of the public peace." Thus, a large number of people hold a meeting to consider the presentation of a petition to the State Council. Such a meeting is lawful in itself; but if the persons forming such meeting assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary firmness and courage to apprehend a breach of the peace, such an assembly may be dispersed.* Moreover, an assembly originally lawful, may subsequently become unlawful.—See para. 4 *supra*.

8. **Disturbance of the public peace.**—*C. f.* §80 paras. 3 - 4 *ante*, §§81 - 83 para. 3(*f*) *ante*.

9. **Force.**—§100, "Military Force."—§§101, 102(2).

If the military is requisitioned to quell a disturbance, the law enjoins them to use as little force, and to do as little injury to persons and property as may be consistent with the due dispersal of the assembly and the arrest of its members.—§102(2). The law, however, does not contain a similar provision in §100 where it directs Police Magistrates, Peace Officers of a certain rank, and all male members of the populace, not being soldiers, to use force in quelling disorders. The Legislature appears to have drawn this distinction advisedly, in view of the fact that soldiers are ordinarily armed with deadly weapons, which the ordinary civilian called upon to disperse an unlawful assembly would not possess, so that the mildest force which the Military could use would be immeasurably greater than the utmost force which ordinary civilians could use. In this country, where the civil police force is armed with rifles and bayonets, it would appear that the measure of force to be used by them in quelling disturbances is to be found in §102(2) and not under §100.

See para. 5 *supra* and 14 *infra*.

10. **Obey such requisition in such manner as he thinks fit.**—See §102(2).—When the Military have been lawfully requisitioned to quell a disturbance, the officer in command must comply with the requisition—§102(1)—but the law gives him a right to act "in such manner as he thinks fit" as to the mode in which the dispersal of the assembly is to be effected.† This Code, however, grafts two qualifi-

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*See *Stephen's Digest of the Criminal Law*, *Art* 75, *ill.* (*d*); and *Dicey's The Law of the Constitution*—Chapters on "The right of public meeting" and "Martial Law."

†See *Manuel of Military Law pp.* 216—233.

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cations upon the otherwise unfettered discretion of officers commanding troops. (*i*) Such troops are to use as little force, and to do as little injury to persons and property as is consistent with the due dispersal of the mob, and the arrest of the members.—§102(2), and (*ii*) if an officer of the regular forces finds himself compelled to take steps to quell a riot in the absence of the Government Agent, Police Magistrate or Inspector-General of Police, he should at the earliest opportunity communicate with one of them, and thenceforward obey their instructions "as to whether he shall or shall not continue such action." If the instructions are that he shall continue his action, the civic authorities have no right to dictate how such action is to be carried out, this discretion being vested in the military officer.

11. **Sanction to prosecute §104.**—*C.f.* §§147, 286(2) *post.*

No prosecution against any Government Agent, Magistrate, Inspector-General of Police, Military Officer, Peace Officer, regular soldier or soldier of the Defence Force, for any act purporting to be done by them under *Chapter VIII.* of this Code, may be initiated in any criminal Court, except with the sanction of His Excellency the Governor in Executive Council.—See §435 *post*, and §3(7) of Ordinance No. 21 of 1901. *Gazette No.* 7867 *of July* 6, 1931 makes no reference to §104. It would appear that the Governor can sanction a prosecution under §104 without the advice of any Minister, as he could do at the time the Executive Council existed ; but he would probably consult the Legal Secretary (or the Attorney-General). It is to be specially noted that whereas under §425 *post* no judgment of a competent Court is to be reversed or altered on appeal or revision, on account of the want of any sanction "required by §147," nothing is stated in §425 with regard to such sanction as is required by §104.

12. **Good faith.**—"Nothing is said to be done or believed in good faith, which is done or believed without due care and attention."—§51 Penal Code.

"Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be bound by law to do it."—§69 Penal Code, and see *illustration* (*a*). *C.f.* §72 (*ibid.*).

13. **Liability of soldiers acting in obedience to orders**—§104(*d*) and see §69 *illustration* (*a*), Penal Code . . . *Keighly v. Bell* 4 *F.&F.* 763, 790.—*per* Willes, J.: "I hope I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war*—at all events, as regards enemies or foreigners—and, I should think, even with regard to English-born subjects of the Crown—unless the orders were such as could not legally be given. I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders."†

14. **Phillips v. Eyre (1870) L.R. 6 Q.B. at p. 15**:—"Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion, Tindal, C.J., in his charge to the

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*See *In re Silva* (1915) 18 *N.L.R. p.* 278—280.

†See *Dicey's The Law of the Constitution*—Appendix, Note vi.—"Duty of soldiers called upon to disperse an unlawful assembly."

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§§99-104 Bristol Grand Jury on the special commission upon the occasion of the riots in 1832, there, in accordance with many authorities, stated the law as to private citizens. 'In the first place, by the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction of the Magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he may see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the Judges in the reign of Queen Elizabeth . . . although the Judges add that it would be more discreet for everyone in such a case to attend and be assistant to the justices, sheriffs or other ministers of the King in doing this . . . But, if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the Magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law.' This perilous duty shared by *the Governor* with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is difficult and may be an impossible task, and to hesitate or to temporise may entail disastrous consequences . . . " *per* Willes, J.

CHAPTER IX.

PUBLIC NUISANCES.

Chapters IX. and X. of the Criminal Procedure Code deal with public nuisances, the former with the suppression of public nuisances, and the latter with temporary orders which may be made in urgent cases of nuisance.

A " public nuisance " is some act or illegal omission which causes some common injury, danger, or annoyance to the public or to people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.—§261 Penal Code. *C. f.* Article 197 Stephen's Digest of the Criminal Law, and 21 Halsbury's Laws of England §855.

A public nuisance is a crime, and is dealt with as such; whereas a private nuisance is only a tort, and only gives rise to a civil remedy. It should however, be observed that under certain circumstances a public nuisance in addition to its being a crime may give rise to a civil action.

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If A digs a trench across a public road, this amounts to a public nuisance, but if B falls into it, the particular damage thus sustained by him will support an action. The leading case on this point is *Soltau v. de Held* (1851) 21 *L.J.Ch.* 153. S. had resided at Clapham for thirty years, and during that period the house adjoining his premises had been used as a private residence. Subsequently it was taken by a certain religious body who converted the house into a chapel, and appointed D to officiate therein. D set up a belfry with a harsh and discordant bell, and began to ring it at the most unnecessary times. In an action brought by S against D it was held that, although D's act amounted to a public nuisance, yet nevertheless as the nuisance was particularly obnoxious to a certain individual or class of individuals, in so far as he or they were concerned, it should also be regarded as a private nuisance, and that therefore this action by S was well founded. *C.f. R. v. Seneviratne* (1918) 21 *N.L.R.* 190, 5 *C.W.R.* 260 and see *Silva v. Silva* §105 para. 4(iv) *post*. It should be noted that Churches, Chapels, Temples or *Vihares* which disturb the tranquility of the neighbourhood *by day as well as by night* by the ringing of bells, *tom-toming*, *&c.*, can be proceeded against under this Chapter as well as under §§261, 283, 284 of the Penal Code. It is a mistake to imagine that liability arises only when "repose has been disturbed" *at night*—see §90 Ordinance No. 16 of 1865. §105

§105 deals with the abatement of certain specified kinds of public nuisances, while §113 deals with other kinds of public nuisances whether under the Penal Code or other laws.

§§106 – 112 provide the procedure to be followed in the suppression of public nuisances under §105. "The very exceptional jurisdiction exercisable by Magistrates under *Chapter X.* (*local—Chapter IX.*) should be used with all possible fairness and with all reasonable precautions against inflicting hardship and injustice on the party against whom it is used."—*R. v. Imam* 4 *P.R.* 1897.

If the Magistrate on receiving a report or information thinks that there are sufficient grounds for proceeding under this Chapter, he will make a conditional order calling upon the defendant to abate the nuisance complained of, or to appear and move to have the order set aside.—§105. This order, as well as all other orders made under this Chapter are to be served in the manner provided by §106. If the matter is very urgent, the Magistrate is empowered to issue an injunction as laid down by §112, and in more urgent cases he may act under §114. If the defendant fails to obey the conditional order, and does not show cause, he may be charged under §185 of the Penal Code and the order will be made absolute.—§108. This will be followed by a proceeding under §110. If the defendant appears and shows cause, the Magistrate will proceed to investigate the matter judicially, and if satisfied that the conditional order is not reasonable and proper, will rescind or modify it. If he modifies it, he will make it absolute in its modified form. If the defendant fails to satisfy the Court, the conditional order will be made absolute.—§109. Whenever the act ordered to be performed by the defendant has not been performed, the Magistrate may cause it to be performed, and the cost of such performance may be recovered as provided by §111.

In proceedings instituted under this Chapter, a Magistrate cannot make an order under §253B *post*.—See *Janse v. Costa* (1897) 2 *N.L.R.* 299.

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§105

Conditional order for removal of nuisance.

105. (1) Whenever a Police Magistrate considers, on receiving a report or other information and on taking such evidence (if any), as he thinks fit—

That any unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel, which is or may be lawfully used by the public or from any public place ; or

That any trade or occupation or the keeping of any goods or merchandise should, by reason of its being injurious to the health or physical comfort of the community, be suppressed or removed or prohibited ; or

That the construction of any building or the disposal of any substance should, as being likely to occasion conflagration or explosion, be prevented or stopped; or

That any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that, in consequence, its removal, repair, or support is necessary ; or

That any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public ;

such Police Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well, or excavation shall, within a time to be fixed by such order,

Remove such obstruction or nuisance ; or

Suppress or remove such trade or occupation ; or

Remove such goods or merchandise ; or

Prevent or stop the construction of such building ; or

Remove, repair, or support it ; or

Alter the disposal of such substance ; or

Remove such tree ; or

Fence such tank, well, or excavation as the case may be ; or

Appear before himself or some other Police Magistrate of his Court at a time and place to be fixed by the order and move to have the order set aside or modified in manner hereinafter provided.

(2) No order duly made under this section shall be called in question in any civil court.

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(3) For the purpose of this section a "public place" includes also property belonging to the Crown or vested in any public officer or department of state for public purposes and ground left unoccupied for sanitary or recreative purposes. §105

Police Magistrate.—See §3 *ante*.

1. §105 is based upon §133 of the Indian Code, which it follows very closely.

2. **Scope of §105.**—§105 applies only in the case of certain public nuisances which are specified in the section itself. Whenever a Magistrate, upon receiving a report, or other information, and upon such evidence as he may think fit to call for, considers that any such nuisance as is specified in this section should be removed, prevented, or abated, he will make an *ex parte* conditional order calling upon the defendant either to abate the nuisance, or to appear before his Court on a certain day and at a certain time, and move to have the order set aside—§105(1). No order made under §105 is to be called in question in any civil proceeding—§105(2). §105(3) defines what is meant by the expression "public place."—See *Sandrasagara v. Sinnatamby* (1923) 25 *N.L.R.* 139.

For an outline of the procedure, to be followed after making the conditional order.—See §§106 *et seq post*.

3. **Report.**—*C.f.* §148(1)(*b*) *post*. See *Ratwatte v. Owen* (1892) 1 *S.C.R. at p.* 174.

Information.—See §§81 – 83 para. 6(*a*) *ante*.

Forrest v. Leefe (1910) 13 *N.L.R. at p.* 124 ; 2 *Curr. L.R. at p.* 169. —" A public nuisance as described in §261 of the Penal Code is an offence under the Code, and this would enable the Magistrate to act on his own knowledge or suspicion under §148(*c*) (*post*), and I see no objection to his obtaining information, direct through his own sense of hearing of the fact, of its presumptive existence, and acting thereon under §105 and making a conditional order"—*per* Middleton, J.

4. **Public nuisances dealt with under §105.—(i) "Any unlawful obstruction or nuisance in any way, harbour, lake, river* or channel, which is or may be lawfully used by the public or from any public place,†"**

By the law of Ceylon, all public roadways are vested in the Crown as custodian on behalf of the public, and the same should be said with regard to all navigable rivers, lakes, etc. When, therefore, any illegal obstruction to the free user of such is caused, or any nuisance committed with regard to them, they may be ordered to be removed or abated.

Ratwatte v. Owen (1892) 1 *S.C.R.* 172.—An estate owner, across whose land there existed a public road, erected a wire-shoot which crossed the road, but at a high elevation. The owner of the estate was in the habit of slinging loads of firewood from one part of his estate to another over this wire. The Magistrate found that what amounted to a nuisance was not the existence of the wire shoot across the roadway, but the manner in which loads were slung across it, and ordered its removal. *Held*, that in view of his finding the Magistrate's order was bad. " Had he (the Magistrate) said—' The wire used as a shoot is a public nuisance. I order it to be removed'— there would then have

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* See *R. v. Jaswatsanghi* 22 *Bom.* 988.

† See *R. v. Nath* 25 *Cal.* 425. *Sandrasagara v. Sinnatamby* (1923) 25 *N.L.R.* 139.

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§105 been an intelligible order within the authority of the Code, but there is no such finding or order. The Magistrate finds the defendant 'caused a nuisance by passing goods along a wire-shoot to the danger, &c.' The Magistrate has singularly confused cause and effect; because the doing of a thing has resulted in what he holds to be a nuisance, he prohibits the defendant from using his own property in a particular way, however lawfully he might do so. I am not surprised that the Magistrate has gone wrong in this respect, for it would not be evident, without more information than is forthcoming in this suit, how a wire at that altitude in the air could be an obstruction, or be a cause of danger or annoyance to the public except by its being misused . . ." *per* Burnside, C.J. *Sed qu* —Surely the defendant had no right to take his wire-shoot across the road ? *Cujus est solum ejus est usque ad coelum.*

Andris v. Manuel (1909) 2 *S.C.D.* 69.—The foundation of an order for the removal of an obstruction to a public path is that the path or road " is or may be lawfully used by the public." There must be evidence that the path has been dedicated to the use of the public, or of public user from time immemorial.

Sandrasagara v. Sinnatamby (1923) 25 *N.L.R.* 139.—" Under this section (§105) it is essential that the person asking for an order should establish that the place from which the obstruction is to be removed is a ' public place.' It is contended for the respondent that a well, if it is a public well, falls within the term ' public place ' in §105. This may be assumed to be so for the purpose of argument. What the appellants have done is to place a fence on the land round the well, but they had placed no obstruction in or over the well, so that there was no obstruction which they could have been ordered to *remove* from the well . . . Therefore, what the respondent had to prove was that the land on which the fence stood was a ' public place,' and that the fence constructed on it was an obstruction. It may be that, if the fence is removed, the public would have free access to the well, but I do not think it was competent for the Magistrate to order, under §105, not only the removal of the fence, but also that the well should be thrown open for public use . . ." *per* Jayawardene, J.

Alwis v. Cader (1924) 2 *T.L.R.* 160.—Following *Silva v. Silva* (1905) 1 *C.W.R.* 98. Where, owing to the falling of coconuts upon the roof of a house, the Police Magistrate, under §105(1), made order for the removal of the trees, held that this was irregular.

7 *Tam.* 22.—The Magistrate must decide the question whether the obstruction should be removed or not. In coming to a decision he should act upon evidence which has satisfied him, either that the obstruction is or is not on land or water used by the public and which the public may lawfully use. When the complainant has made out a *prima facie* case, the Magistrate will be justified in making a conditional order that the obstruction should be removed.

Iveson v. Moore (1700) 1 *Ld. Raym.* 486.—The obstruction of a highway, so as to prevent persons from entering a shop, is both a crime and a tort. See *Banjamin v. Storr* (1874) 43 *L.J.C.P.* 162, but trifling delays caused by an obstruction on a highway should not be regarded, on the principle *de minimis non curat lex*—*Winterbottom v. Derby* (1862) 36 *L.J. Ex.* 194.

Lewis v. Meera Lebbe (1895) 3 *N.L.R. at p.* 140: "Of course, a person is not entitled to turn the road-side into a goods' depôt by leaving bags there an unreasonable time"—*per* Bonser, C. J.

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§105

R. v. Jones (1812) 3 *Camp.* 230.—An unreasonable user of the highway may amount to a public nuisance. Thus, it appeared in this case that the defendant occupied a timber yard abutting on a narrow street, and, owing to the fact his yard was full of timber, he had on several occasions deposited logs of timber in the street, and that he sawed them there so as to enable him to carry them into his yard. *Held*, that he was guilty of a public nuisance. "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house ; the public must submit to the inconvenience occasioned necessarily in repairing the house ; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain . . ." *per* Lord Ellenborough, C. J. See *R. v. Cross* (1812) 3 *Camp.* 224.; *Attorney-General v. Brighton & Hove Co-operative Supply Association* (1900) 1 *Ch.* 276 and *Lambton v. Mellish* §109 para. 6 (*d*) *post.*

Chellappa v. Mumkesar (1894) 3 *S.C.R* 109 ; 3. *C.L.Rec.* 73.—In proceedings for obstructing a public highway and the like, where the defendant denies the existence of the right of way and claims the land as his own, it is the duty of the Magistrate to ascertain whether such claim is *bona fide* or not. If he finds that it is *bona fide* his jurisdiction is ousted, and he should take no proceedings until the question of the right has been decided upon in a civil Court. If the defendant does not go into a civil Court within a reasonable time, or fails to prove his claim there, the Magistrate may proceed. See *Mendis v. Sri Chandrasekera* (1908) 12 *N.L.R.* 33 ; *Perera v. Donis Appu* (1901) 2 *Br.* 237.

R. v. Nath 23 *Alla.* 159.—The motive of the defendant for obstructing the highway is immaterial. Any obstruction of a public road is a nuisance, whether in point of fact it causes practical inconvenience or not.

R. v. Zaffer 32 *Cal.* 930.—A person who builds a dam across a river rendering unfordable a public right of way over the river some distance away, may be dealt with under §105.

Public Place.—See §105(3).

(ii) "Any trade or occupation or the keeping of any goods or merchandise by reason of its being injurious to the health or physical comfort of the community."

C. f. **Dangerous and offensive trades.**—See §210 *et seq.* Municipal Council's Ordinance 1910 ; §168 (10) (*k*) Local Government Ordinance 1920. There are, furthermore, many provisions of the law which penalise unwholesome and offensive trades. See *R. v. Seneviratne* (1918) 5 *C.W.R.* 260 ; 21 *N.L.R.* 190.—Where coopering was carried on at certain premises during the day and often by night, and it appeared that the noise created by the constant hammering of barrels was calculated to injure the health and physical comfort of persons residing in the neighbourhood, *held*, that this was a nuisance in respect of which proceedings could be taken under §105 of this Code. A nuisance which affects only those residing in the neighbourhood and not the public in general may be the subject of proceedings under this Chapter.—See *Soltau v. de Held* (1851) 21 L.J. Ch. 153.* *Held also*, that the word "community" in §105 means what it does in the Penal Code, which declares the word "public" to include any class of the public or any community.

Saibo v. Branha (1897) 2 *N.L.R.* 302.—An order under §105 should specify what the trade or occupation is which is to be suppressed, the

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* See *p.* 195 *ante.*

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§105 place where it is being carried on, and that it has been made to appear that it is injurious to the health or comfort of the community.

Forrest v. Leefe (1910) 13 *N.L.R. at p.* 124; 2 *Curr. L.R. at p.* 169. —"The only point on which I felt doubt was the last point raised for the appellant, *i.e.*, that the evidence did not disclose . . . the carrying on of a trade injurious to the health or physical comfort of the community . . . The existence of a noise which . . . is a nuisance to those having duties to perform in a public Court and prevents the hearing of the proceedings is sufficient to show that . . . physical comfort is interfered with and injured . . . This . . . seems to prove that the coopering in question would be and is injurious both to the health and physical comfort of the community. It affects the comfort of all who have business to transact in the public Police Court, and this is, I think, sufficient evidence of its injury to the community in general . . . In the case of a nuisance from smells, it is sufficient to prove that they are offensive to the senses, and so is the case of a noise, from analogy that it affects the hearing of things and interferes with comfort. Personally I can conceive no more intolerable nuisance than a cooperage in the close vicinity of a Court of Justice . . ." *per* Middleton, J. *Held also*, that it is no defence to show that the cooperage had existed for a considerable period, or that "the public went to the nuisance."

Azeez v. Pillai (1917) 4 *C.W.R.* 4.—The defendant carried on the trade of curing arecanuts, which involved the burning of sulphur. The trade, if properly carried on, was not injurious to health or comfort, but the defendant often did not exercise sufficient care, with the result that the fumes penetrated into the adjoining premises. *Held*, that as the trade was not necessarily injurious to health, an order under §105 was bad, but that an order under §113 could be made.

R. v. Nath 25 *Cal.* 425.—A person who places his land at the disposal of anybody desiring to cremate a dead body, and makes a profit by charging a rental to the tenant, who sells wood to the person burning such bodies, cannot be said to be "carrying on a trade or occupation."

R. v. Bareiro 47 *P.R.* 1888.—§105 only deals with trades or occupations which are *in themselves* injurious to health and physical comfort, and does not apply to an entertainment which is, in itself, innocuous, but in the course of which the manager thereof commits a public nuisance.

R. v. Basanta 5 *C.W.N.* 566.—The mere existence of the house of a prostitute by the roadside, and the mere fact that she plies her trade in such house cannot affect "the physical comfort" of the passers by.

R. v. Jan 2 *P.R.* 1900.—Where prostitutes carry on their trade on the roadside it was held that §105 would be applicable.

(iii) "Construction of any building or the disposal of any substance being likely to occasion conflagration or explosion."

Construction of buildings.—See Ordinance No. 19 of 1915. The public authorities are vested with ample powers to prevent construction of dangerous buildings. §105 of this Code is in addition to these powers, and can apply only when the construction of any building is likely to occasion a conflagration or explosion.

C.f. District Road Committee v. Bastian (1910) 13 *N.L.R.* 26, 2 *Curr. L.R.* 10; *Labrooy v. Kangany* (1898) 4 *N.L.R.* 51, 1 *Br.* 125; *Silva v. Careem* (1919) 6 *C.W.R.* 320, 1 *C.L.Rec.* 65; *Bartholomeusz v. Perera* (1919) 7 *C.W.R.* 109, 1 *C.L.Rec.* 120; *Anthonisz v. Fernando* (1919) 21 *N.L.R.* 473, 7 *C.W.R.* 58, 2 *C.L.Rec. lviii*; *Gohagoda v. Lebbe* (1918) 5 *C.W.R.* 264. See also (iv) *infra.*

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Disposal of any substance.—*C.f.* §§278–279, 315, 317, 418 Penal Code and *de Saram v. Wijeysekera* (1917) 4 *C.W.R.* 403. See also Explosives Ordinance 1902.

(iv) "Any building or tree which is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood, or passing by."

Building.—See (iii) *supra*.

Tree.—*Silva v. Silva* (1915) 1 *C.W.R.* 98.—Complaint was made to the Magistrate that a coconut tree, which stood on the defendant's premises, overhung the plaintiff's house, and that nuts and branches fell upon the roof of the house. The Magistrate, acting under §105, ordered the removal of the tree. *Held*, "the question is whether this is a case contemplated by §105 . . . The plain words of the section leave no room for doubt, for it is when a tree itself is 'in such a condition that it is likely to fall' that the Magistrate can make an order. Moreover, the evidence shows that the nuisance, if any, was of a private and not of a public character. The whole Chapter which is significantly entitled 'Public nuisances' aims at the suppression of public nuisances. All the other classes of nuisances mentioned in §105 are public nuisances, and it is impossible to isolate the words . . . and refer them to a private nuisance. Counsel . . . however, emphasized the words 'injury to persons living in the neighbourhood' and argued that, as the complainant and his family are persons living in the neighbourhood of the land on which the offending tree stands, the requirements of the section were satisfied. But the word 'neighbourhood' in the context does not imply 'nearness' but 'locality,' and it seems to me that the section provides for a case in which the part of the public living in the place where the nuisance exists are generally affected, and that a single man and his family who complain against the next-door neighbour are not within the contemplation of the section . . . I think the complainant, instead of taking these criminal proceedings, should have resorted to the civil law which provides a summary and effective remedy in the case of overhanging trees" *per* de Sampayo, J. See *Alwis v. Cader* (1924) 2 *T.L.R.* 160.

Mendis v. Sinno (1901) 2 *Br.* 342.—P instituted an action in order to remove a tree growing upon D's land, which P alleged was likely to fall upon his house and cause him injury. *Held*, that P's remedy was to proceed under §105 of the Criminal Procedure Code.

Malar v. Karithatkandar (1893) 2 *S.C.R.* 97.—An owner of land over which his neighbour's tree overhangs has the right to obtain a decree ordering such tree to be cut down.

Muttiah v. Dias (1887) 2 *N.L.R.* 83.—Under the Roman-Dutch Law, no right of servitude can be claimed in respect of an overhanging tree. The owner of the land, which such tree overhangs, has, therefore, a right to have such tree cut down without compensation to the owner. See *Hamine v. Boteju, Ram* (1863–68) 234.

Jinasena v. Engeltina (1919) 21 *N.L.R.* 444.—Overhanging coconut tree—crown of tree blown off by high wind—no negligence. *Held*, that the defendant was not liable in damages to the plaintiff. See *Giles v. Walker* (1890) 24 *Q.B.D.* 656. In this case the plaintiff should have sued the defendant to have the nuisance removed. *C.f. Nathanielsz v. Simon* (1858) 3 *Lor.* 125.

Mills v. Brooker (1919) 1 *K.B.* 555.—See 1 *C.L.Rec.* lxvii—Right of land owner to lop off branches from overhanging tree. See *Morg. Dig.* 326; *Dias v. Strong* (1878) 1 *S.C.C.* 103.

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§105 See Local Boards Ordinance, 1898 §86.

Persons living or carrying on business in the neighbourhood or passing by.—*Silva v. Silva—supra.*

R. v. Jasoda 20 *Alla.* 501.—D was ordered to repair a house which stood in a compound of its own at some little distance from the public road. *Held*, "The persons who, under the clause, require protection are 'persons living or carrying on business in the neighbourhood, or passing by.' It appears to us that it would be straining the meaning of the words to hold that the clause applies to persons living actually in the alleged dangerous building, or in the servants' houses in the compound belonging to it. It seems also to us that it would be an unnatural use of the words 'passing by' to include in it persons going to or from the house or about it for their private business or pleasure, or in the exercise of their private, and not of their public rights."

(v) "Any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public."

Tank, well, or excavation.—*R. v. Sulmanji* 22 *Bom.* 714.—A Magistrate may only order that such should be fenced; he has no power under §105 to order that they should be filled up.

R. v. Chunder 10 *W.R.* 27.—"In the case of a tank, the Magistrate's powers, no doubt, extend only to having the tank fenced in, the object being to prevent accidents, but when the tank, by reason of foulness, becomes a public nuisance 'injurious to the health and comfort of the community' the Magistrate may order it to be filled up."

Adjacent.—See *Birmingham v. Allen* 46 *L.J.Ch.* 673; *Darley Main Co. v. Mitchell* 11 *App. Cas.* 142.

Such way or public place.—*i.e.*, such way or public place as described in para. 4(1) *supra.*

Public place.—See §105(3).

(vi) Other cases.—*Ratwatte v. Owen* (1892) 1 *S.C.R.* 172.—It was not the intention of the Legislature to give Magistrates power to restrain altogether a person from using his property on the mere anticipation that a nuisance might result from his using it in an improper manner.

Kreltsheim v. Lembruggen (1917) 4 *C.W.R.* 225.—See §113 *post.*

Perera v. Sophia (1919) 7 *C.W.R.* 34.—A person who manages a brothel cannot be dealt with under §105.

5. **Conditional order.**—Such order is usually made *ex parte* and must require the defendant to abate the nuisance in one of the ways specified in §105, or to appear before the Magistrate or some other Magistrate of his Court at a time and place to be fixed in the order, and move to have such order set aside or modified "in manner hereinafter provided." *C.f.* §110 *post.* A conditional order once lawfully made cannot be vacated by the Magistrate until the respondent has shown cause.—*Silva v. Silva* (1924) 2 *T.L.R.* 180.

In manner hereinafter provided.—See §109 *post.*

Service or notification of order.—See §106 *post.*

Case law.—(i) The record should show the nature of the proceedings.

Ratwatte v. Owen (1892) 1 *S.C.R. at p.* 174.—Where the Magistrate made the following order. "Order under Chapter IX. of the Criminal Procedure Code. To T.C.O. Whereas it has been made to appear to me that you have caused a nuisance to persons using the public roadway . . . by

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passing goods along a wire-shoot, to the danger and obstruction of persons who have occasion to use the said public roadway and that such nuisance still exists, I do hereby direct that you do, within fourteen days hereof, abate the said nuisance by ceasing to pass goods along the said wire-shoot to the danger and obstruction of passengers on the road, or to appear at the Police Court of P. on . . . and to show cause why this order should not be enforced." *Held*, that the order was *ultra vires* inasmuch it did not state that the nuisance committed by the defendant was a public nuisance.

(ii) *Bona fide* claim by the defendant.—*Mendis v. Sri Chandrasekera* (1908) 12 *N.L.R.* 33.—Where a defendant against whom proceedings are taken under §105 asserts a *bona fide* claim to the property in respect of which the proceedings are taken, the Magistrate should stay the proceedings and allow him an opportunity of proving his assertion in a Civil court. *Chellapah v. Murukesar* (*infra*) followed.

Chellapah v. Murukesar (1894) 3 *S.C.R.* 109, 3 *C.L.R.* 73.—See para. 4 *supra*.

Perera v. Donis Appu (1901) 2 *Br.* 237.—See para. 4 *supra*.

C.f. Sandrasagara v. Sinnatamby (1923) 25 *N.L.R.* 139.

(iii) The procedure indicated in §105 must be observed.—See *Azeez v. Pillai* (1917) 4 *C.W.R. at p.* 5.

(iv) The Magistrate's order should be definite.—See *Saibo v. Branha* (1897) 2 *N.L.R.* 303.

(v) Upon the death of the defendant proceedings under Chapter IX. abate. It is improper to substitute the legal representatives of the deceased in the same proceeding.—*Mendis v. Fernando* (1909) 3 *Leader. Pt.* 3. 3; 5 *Bal.* 91.

(vi) Appeal.—*Forrest v. Leefe* (1910) 13 *N.L.R.* 119, 2 *Curr.L.R.* 164.—An appeal lies against an order absolute to abate a nuisance.

6. **§105(2).**—This clause only applies to orders made under §105, and not to orders absolute made under §§108, 109. See *Lall v. Kishen* 15 *Cal.* 460 ; *Secretary of State v. Jethabhai* 17 *Bom.* 293.

7. **Injunction.**—See §112 *post*.

8. **Alternative action under §81 *ante*, §§112, 114 *post*.**—See §114 *post*.

9. **See Police Ordinance 1865, §74; Local Boards Ordinance 1898, §63. Penal Code §§261, 283, 284; Ordinance No. 15 of 1862.**

Service or notification of order.

106. (1) The order and any other order or notice made or given under this Chapter shall, if practicable, be served on the person against whom it is made or to whom it is to be given in manner herein provided for service of a summons.

(2) If such order cannot be so served it shall be notified by Proclamation published in the *Government Gazette* and a copy thereof shall be posted up at such place or places as may be fittest for conveying the information to such persons.

Service of summons.—See §§45 – 49 *ante*.

Order.—See §§105 *ante*., §§108, 109, 112, 113 *post*.

Notice.—See §110.

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§107 **If practicable.**—See §45(2) *ante.*

Government Gazette.—See §3(4) Ordinance No. 21 of 1901.

1. §106 is based upon §134 of the Indian Code, but §106 is more comprehensive than the section in the Indian Code.

2. **Scope of §106.**—All orders and notices made or given under this Chapter of the Code, if this can be done, are to be served upon the defendant in the same manner as if they were summonses, *i.e.*, through the Fiscal, Peace Officers or others as indicated in §§45(1) and §48 *ante.* If personal service cannot be effected, then, instead of proceeding under §§46 – 47 *ante*, the Court will have a proclamation published in the *Gazette*, and a copy of such proclamation will be posted up "at such place or places as may be fittest for conveying the information to such person." *C.f. Silva v. Silva* (1924) 2 *T.L.R.* 180. In cases where a Magistrate has cause to make a temporary order under Chapter X. *post* such order will be served or published in the manner provided by this section.—See §§114(1),(3) *post.*

3. **Provided for service of a summons.—**

Personal service.—See §§45, 48 *ante.*

Substituted service.—See §§46 – 47 *ante.*

Proof of service.—See §49 *ante.*

Service out of jurisdiction.—See §64 *ante.*

R. v. Narayana 12 *Mad.* 475.—"Though the conditional order made under §133 (*local*—§105) was not served personally on the accused, yet there is nothing on the record before us to show that personal service was practicable, or that service in the mode prescribed by §71 (*local*—§47) was not legal in the special circumstances of the case."

N.B.—Under §134 of the Indian Code there is no provision as to the publication of the order in the *Gazette.*

R. v. Charan 16 *Cal.* 9.—An irregularity in the mode of service of an order or notice is not a fatal defect if it was duly promulgated and actually brought to the notice of the defendant. See *R. v. Bilas* 30 *Alla.* 364.

R. v. Jan 2 *P.R.* 1900 (approving *R. v. Charan supra*).—"It is immaterial that the method in which it was brought to the actual notice of those concerned was not strictly in accordance with the provisions of §134" (*local*—§106).

4. **Order.**—See §105 *ante* and §§108, 109, 112, 113 *post.*

Police.—See §§110, 114 *post.*

Person to whom order is addressed to obey or show cause.

107. The person against whom such order is made shall within the time specified therein—

(*a*) Perform the act directed thereby; or

(*b*) Appear in accordance with such order and show cause against the same.

Consequence of failing to do so.

108. If such person does not perform such act or appear and show cause as required by the last preceding section he shall be liable to the penalty prescribed in that behalf in Section 185 of the Penal Code and the order shall be

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made absolute: provided that if such person be a corporate body, it shall be liable to a fine of such amount not exceeding one hundred rupees as the Police Court thinks fit. §109

Fine.—See §3 *ante*.

Police Court.—See §3 *ante*.

Person includes a "Body Corporate."—See §3 *ante*.

1. §§107 - 108 are based upon §§135 - 136 of the Indian Code, but are not identical in their terms.

2. **Scope of §§107 - 108.**—When a conditional order under §105 has been made and the defendant has duly received notice of it, he must, in terms of §§105 and 107, and within the specified time either do the act enjoined or appear before the Court and move to have the order vacated. A failure to do either one or the other will render him liable to be charged under §185 of the Penal Code and to have the conditional order made absolute.—See §§110 - 111 *post*.

3. **Such order.**—*i.e.*, a conditional order under §105.

4. **Appear and show cause.**—See §109 *post*.

5. **The order shall be made absolute.**—See §§110 - 111 *post*.

6. **A person who fails to perform the act directed or to show cause becomes, under §108, liable to be dealt with under §185 of the Penal Code. If, on the conditional order being made absolute and notice has been served on him in terms of §110 *post*, he still fails to perform the act he again becomes liable to be charged under §185 of the Penal Code. There are, therefore, two distinct liabilities.**—See *R. v. Bishamber* 13 *Alla.* 557.

7. **R. v. Aluvala 31 Mad. 280.**—The apparent conflict between §§108 and 110 was pointed out. *Held*, that where there has been a failure to perform the act enjoined or to show cause, a prosecution could be instituted, although no notice has been given under §110.

For other cases see §110 *post*.

Procedure in case of appearance.

109. (1) If such person appears and shows cause against the order the Police Court shall take evidence in the matter.

(2) If such Court is satisfied that the order is not reasonable and proper it shall either rescind the same or modify it in accordance with the requirements of the case, and in the latter case the order as modified shall be made absolute.

(3) If such Court is not so satisfied the order shall be made absolute.

Show cause.—See §§105, 107(*b*) *ante*.

Police Court.—See §3 *ante*.

Absolute orders.—See §§108, 110 - 111.

1. §109 is based upon §137 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §109.**—This section lays down the procedure to be followed when the defendant appears in Court and shows cause against the conditional order of the Magistrate. The Court must proceed to hold a judicial investigation and to call for evidence. If, after such investi-

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§109 gation, the Court thinks that the conditional order is not "reasonable and proper" in view of the circumstances of the case, it will either rescind it entirely, or modify its terms so as to bring it into conformity with the requirements of the case. In the latter event, the order so modified will be made absolute, and the provisions of §§110 – 111 will become applicable.

If, however, the Court upon the evidence led on either side, considers that the defendant has not been able to combat the case against him, the original conditional order will be made absolute, and in this case too, the provisions of §§110 – 111 will apply to such order absolute.

3. **Such person.**—*i.e.*, the person referred to in §§105 – 108 *ante*.

4. **Show cause.**—See §§105, 107(*b*) *ante*. See para. 6 *infra*.

5. **Police Court.**—Note that the expression used is "Police Court" and not "Police Magistrate." Any Magistrate of the Police Court issuing the conditional order may investigate the case under §109.—See §105 *ante*.

6. **Defences.**—See para. 4 *supra*.

(i) Valid defences.—(*a*) *Bona fide* claim by the defendant that a place is not a public place.—See *Mendis v. Sri Chandrasekera* ; *Chellapah v. Murukesar*; *Perera v. Donis Appu.*—See §105 para. 5(ii) *ante*.

See also *R. v. Kumar* 15 *Cal.* 564 ; *R. v. Jaswatsangji* 22 *Bom.* 988.

(*b*) It is a good defence to show that the act complained of was expressly authorised by law.—*Vaughan v. Taff Vale Ry. Co.* (1860) 29 *L.J.Ex.* 247.

(*c*) It is a valid defence to show that the nuisance complained of was done in order to protect the defendant against some extraordinary danger.—See 21 *Halsbury's Laws of England*, §975 *p.* 563.

(ii) Invalid defences.—(*a*) Prescription cannot be pleaded in respect of a public nuisance.—*Forrest v. Leefe* (1910) 13 *N.L.R.* 119, 2 *Curr.L.R.* 164. See also 21 *Halsbury's Laws of England*, §974 *p.* 563.

(*b*) Nor is it a defence to prove that the public "came to the nuisance."—*Forrest v. Leefe* (*supra*). The maxim *volenti non fit injuria* has no application in cases of nuisance. *Elliotson v. Feetham* (1835) 42 *R.R.* 557; *Bliss v. Hall* (1858) 44 *R.R.* 697; *Hole v. Barlow* (1858) 27 *L.J.C.P.* 208, and *Bamford v. Turnley* (1860) 3 *B. & S.* 62.

(*c*) Absence of *mens rea* is no defence. Thus where X erected a urinal, but arranged the premises in such a way that a space left was habitually used for improper purposes.—*Chibnall v. Paul* (1881) 29 *W.R.* 536.

(*d*) The exercise of two rights may constitute a wrong.—*Lambton v. Mellish* (1894) 63 *L.J.Ch.* 929.—A and B, two rival refreshment contractors, with a view to attracting visitors to their respective merry-go-rounds and refreshment houses, made use of powerful barrel organs. The noise occasioned by the two organs combined was objected to and A was called upon to show cause. "It was said . . . that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is only responsible for the noise made by himself, and not for that made by the other . . . In my opinion each is separately liable . . . I think the point falls within the principle laid down by James, L.J., in *Thorpe v. Brumfitt* (1873) *L.R.* 8 *Ch.* 650 . . . He says 'suppose one person leaves a wheelbarrow standing on a way that may cause no appreciable inconvenience ; but if a hundred do so,

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that may cause a serious inconvenience . . . and it is no defence to any one person among the hundred to say that what he does, causes of itself no damage . . .' There is, in my opinion, no distinction in these respects between the case of a right of way and the case . . . of a nuisance by noise. If the acts of two persons, *each being aware of what the other is doing*, amounts in aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint." *per* Chitty, J. See *Polsue v. Rushmer* para. 7 *infra*.

(*d*) It is no defence to show that the nuisance is beneficial to the public at large, or that the place from which the nuisance proceeds is a convenient and suitable place for carrying on a trade or business or that the defendant was using his property reasonably.—See §261 Penal Code and *Shelfer v. City of London Electric Lighting Co.* (1895) 1 *Ch. p.* 316, *St. Helen's Smelting Co. v. Tipping* (1865) 11 *H.L.C.* 642, *Bamford v. Turnley* (1862) 3 *B. & S.* 66; *Atty. Gen. v. Cole* (1901) 1 *Ch.* 205.

(*e*) Nor is it a defence to show that in committing a nuisance not otherwise justified in law all possible skill and care was used to prevent it.—*Rapier v. London Tramway Co.* (1893) 2 *Ch. at p.* 599, *Jones v. Festinog Ry. Co.* (1868) *L.R.* 3 *Q.B.* 733, *Pavell v. Fall* (1880) 5 *Q.B.D.* 597, *Gunter v. James* (1908) 24 *T.L.R.* 868.

7. **The standard of comfort.**—*Sturges v. Bridgeman* (1879) 11 *Ch.D. at p.*865.—" Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances; *what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*, and where a locality is devoted to a particular trade or manufacture carried on by traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges . . . would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong."—*per* Thesiger, L. J.

Polsue v. Rushmer (1906) 1 *Ch.* 234, (1907) *A.C.* 121.—" The standard of comfort differs according to the situation of the property and the class of people who inhabit it . . . But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance."—*per* Cozens-Hardy, L.J. See *Lambton v. Mellish* para. 6(*d*) *supra*.

8. **The Magistrate must record his reasons.**—*R. v. Kumar* 15 *Cal.* 564 *at p.* 572.

9. **If the defendant does not perform the act enjoined, or appear and show cause, the Magistrate is bound to proceed. In the event of the failure of the complainant to appear or support his allegations, the Magistrate may rescind the conditional order.** —*Rajakariar v. Sithrapoopala Pillai* (1899) 1 *Tam.* 5.

10. **Evidence.**—*Andris v. Manuel* (1909) 2 *S.C.D.* 69.—Nature of the evidence necessary to prove that a path " is or may be lawfully used by the public."

7 *Tam.* 22.—The issue before the Court is " should the nuisance be abated or not ? " In coming to a decision he must act upon legal evidence.

11. **If an order has been made absolute under §109.**—The procedure outlined in §§110 - 111 should be followed.

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§110

Procedure on order being made absolute.

110. When an order has been made absolute under either of the last two preceding sections the Police Court shall give notice of the same to the person against whom the order was made and shall further require him to perform the act directed by the order within a time specified in the notice and inform him that in case of disobedience he will be liable to the penalties provided by Section 108.

Police Court.—See §3 *ante*.

Notice.—See §106 *ante*.

Order absolute.—See §§108 - 109 *ante*.

1. §110 is based upon §140(1) of the Indian Code.

2. **Scope of §110.**—§110 lays down the procedure to be followed whenever a conditional order has been made absolute either under §108 or §109 *ante*. In either case the Police Court is directed to give notice of the fact to the defendant and again require him to perform the act directed by the order absolute within a time to be specified in the notice, and inform him that in case of disobedience he will be liable to the penalties set out in §108 *ante* and the consequences set out in §111 *post*.

3. **Service of the notice.**—See §106 *ante*.

4. **Where a defendant, who has received notice of a conditional order, issued under §105, fails either to perform the act or to show cause, the order will be made absolute, and the defendant may be charged under §185 of the Penal Code.**—See §§107 - 108 para. 6 *ante*. When the order has been made *absolute*, and the procedure indicated by §110 duly followed, the defendant, if he again disobeys the order, can once more be charged under §185 of the Penal Code. At such trial he cannot seek to defend himself by trying to go behind the order absolute, and claim an acquittal on the ground, *e.g.*, that a well which he was ordered to fence was not his property. "It is true that under §105 the conditional order can only be made against a person owning, possessing, or exercising control over the well . . ., but it must also be remembered that when the Magistrate accepts the information and bases a conditional order upon it, and when the party against whom the order is made neither does the act commanded, nor takes action to vacate the order, the *ex parte* information becomes conclusive evidence." *R. v. Narayana* 12 *Mad.* 475.

R. v. Bishamber 13 *Alla.* 577.—"In my opinion when once an order has been made absolute under §108 it is incompetent for the party against whom that order has been made to go behind it and question its validity in any way."—*per* Straight, J.

R. v. Jasoda 20 *Alla.* 501 (distinguishing *R. v. Narayana* and *R. v. Bishamber*).—The validity of an order absolute was, in this case, allowed to be impeached on the ground that it was of such a nature that the Magistrate was not empowered by §105 to make it.

5. **Police Court.**—See §109 para. 5 *ante*.

Consequence of disobedience to order.

111. (1) If such act is not performed within the time specified in the notice issued under the last preceding section, the Police Court may cause it to be performed and may

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recover the costs of performing it either by the sale of any building, goods, or other property removed by its order or by the distress and sale of any other movable property of such person within or without the local limits of the jurisdiction of such Court. If such other property is without such limits the order shall authorize its attachment and sale when endorsed by a Police Magistrate within the local limits of whose jurisdiction the property to be attached is found. §112

(2) No suit shall lie in respect of anything done in good faith under this section.

Police Court.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

Distress and sale.—See §§312 (2), 426 *post*.

Attachment.—See §§60 – 61 *ante*.

Good faith.—See §51 Penal Code

Endorse.—*C. f.* §§56, 57, 64 *ante*.

1. §111 is based upon §140(2), (3) of the Indian Code.

2. **Scope of §111.**—This section depends upon §110 *ante*. If an act ordered to be done or performed under §110 is not effected within the time specified, the Court may cause it to be done, and recover the costs of performance by either selling any buildings, goods, or other property removed by its order, or by the distress and sale of any other movable property belonging to the defendant, whether the same is situate within or without the limits of the jurisdiction of the Court. If such goods are outside the jurisdiction of the Court, the order, when endorsed by a Magistrate having jurisdiction, will validly authorize its attachment and sale.—§111(1). *C. f.* §112(2) *post*. §111(2) enacts that no civil action shall lie against anyone for anything done in good faith under §111. *C. f.* §112(3) *post*.

3. **Distress and sale.**—See §§312(2), 426 *post*.

4. **R. v. Dass 10 W.R. 51.**—Even if an order to deepen a tank was legal, the Magistrate could not, if the order was not complied with, order it to be deepened and use the material excavated to fill up a ditch dividing the cost between the owner of the land and the owner of the ditch.

5. **Police Court.**—See §109 para. 5 *ante*.

Injunction pending inquiry.

112. (1) If the Police Court, making an order under Section 105, considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, it may issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury.

(2) In default of such person forthwith obeying such injunction, such Court may use or cause to be used such means as it thinks fit to obviate such danger or to prevent such injury.

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§112 (3) No suit shall lie in respect of anything done in good faith by a Police Magistrate under this section.

Police Court.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

Good faith.—See §51 Penal Code.

1. §112 is based upon §142 of the Indian Code. The two sections, although very similar, are not identical in their terms. Moreover, the words "pending the determination of the matter" have been added at the end of §142(1).

2. **Scope of §112.**—Where a Magistrate, making a conditional order under §105, finds that the nature of the case is such that immediate measures should be taken to prevent "imminent danger or injury of a serious kind to the public," it may further issue an injunction to the person against whom the conditional order is made requiring him to obviate or prevent such danger or injury. If such person does not "forthwith" obey the injunction, the Court may use or cause to be used such means as it thinks fit to obviate such danger or to prevent such injury. No civil action is to lie against any Police Magistrate who acts in good faith under this section. *C.f.* §111(2) *ante* and §264 Penal Code.

3. **Injunction.**—See Courts Ordinance 1889, §§22, 67, 87 – 88. An injunction is a judicial process whereby a person is ordered to refrain from doing, or to do a particular act or thing. In the former case it is called a restrictive injunction, and in the latter a mandatory injunction. A person who does not obey an injunction lawfully issued to him, commits a contempt of Court.—*Silva v. Appuhamy* (1899) 4 *N.L.R.* 179. The powers conferred by §112 are of an exceptional kind and should only be exercised sparingly and then only in proper cases. *C.f. Bamberakelle Estates Co. v. Goonewardene* (1900) 2 *Br.* 78. There must be proof that unless an injunction is issued in addition to the conditional order, imminent danger or injury to the public of a serious kind cannot be prevented. See *Ratwatte v. Owen* (1892) 1 *S.C.R. at p.* 177.

A still speedier remedy is provided by §114 *post*.

4. **Police Court.**—See §109 para. 5 *ante*.

5. **Forthwith.**—See §33 para. 3 *ante*, and §§60(7), 71 *ante*.

6. **Such Court may use or cause to be used.**—*C.f.* §111 *ante*.

7. **Alternative action under §§81, 105 *ante* and §114 *post*.**—See §114 *post*.

Magistrate may prohibit continuance or repetition of public nuisances.

113. A Police Magistrate may order any person not to repeat or continue a public nuisance as defined in the Penal Code or any special or local law.

Police Magistrate.—See §3 *ante*.

Special or local law.—*C.f.* §4 Penal Code.

1. §113 is based upon §143 of the Indian Code.

2. **Scope of §113.**—A Police Magistrate, provided he has the necessary jurisdiction, is empowered by §113 to order any person "not to repeat or continue" a public nuisance as defined in the Penal Code or any special or local law. This section is quite distinct from the cases dealt with and the procedure provided by §§105 – 112. It is to be observed that §113 does not go on to provide how the order is to be enforced and what the penalty for disobedience is. See §§185, 284 Penal Code.

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3. **Public nuisance defined in the Penal Code.**—*i.e.*, §261 Penal Code—and see §§262 – 288 *ibidem*.

Public nuisance defined in any special or local law.—

Special or local law.—See §§4, 39 – 40 Penal Code.

The following are examples of such nuisances :—

Enactment.	*Name.*	*Section.*
Ordinance No. 8 of 1844 ..	Lotteries	1
Do No. 10 of 1861 ..	Thoroughfares ..	94 see Ord. No. 22 of 1918
Do No. 15 of 1862 ..	Nuisances	
Do No. 6 of 1865 ..	Master Attendant ..	14, 30, 39, 41
Do No. 16 of 1865 ..	Police	51, 53, 60, 74, 80–85, 90–95, 97
Do No. 8 of 1866 ..	Contagious Diseases ..	8
Do No. 1 of 1869 ..	Gas	19–21, 25
Do No. 17 of 1869 ..	Customs	89–90
Do No. 5 of 1873 ..	Tramways	7, 10
Do No. 18 of 1892 ..	Sanitary Boards ..	9E, 13, 15, 17, 21, 25
Do No. 20 of 1896 ..	Nuwara Eliya Board of Improvement ..	30, 48, 49, 50, 54 56, 62, 66
Do No. 13 of 1898 ..	Local Boards ..	56, 64, 71, 73, 79, 80, 83, 86
Do No. 5 of 1901 ..	Insect Pest and Quarantine	5, 6
Do No. 8 of 1902 ..	Explosives	15–18
Do No. 9 of 1902 ..	Railways	14–16, 20
Do No. 11 of 1904 ..	Rifle & Artillery Ranges	3, 4
Do No. 27 of 1906 ..	Guides	8
Do No. 18 of 1907 ..	Colombo Municipal Council Waterworks	34
Do No. 38 of 1908 ..	Dairies and Laundries ..	6, 10, 13, 14, 16
Do No. 4 of 1909 ..	Water Hyacinth ..	3–5; 7
Do No. 25 of 1909 ..	Cattle Disease ..	4–9
Do No. 6 of 1910 ..	Municipal Councils ..	210 *et seq.*, 205 *et seq.*, 156 – 160 163, 169, 175, 179, 180 – 187, 190B
Do No. 11 of 1920 ..	Local Government ..	102, Chapter III.

4. **The following cases should be noted :—**

Muttiah v. Meera Myedin (1891) 1 *S.C.R.* 85 ; *Ratwatte v. Owen* (1892) 1 *S.C.R. at p.* 177; *Azeez v. Pillai* (1917) 4 *C.W.R. at p.* 6 ; *Kreltsheim v. Lembruggen* (1917) 4 *C.W.R.* 225 ; *Perera v. Sophia* (1919) 7 *C.W.R.* 34.

5. **§113 only authorizes a Magistrate to order a person not to "repeat or continue" a certain kind of public nuisance.** Therefore, before action under this section can be taken the nuisance should be proved to be already in existence. It would seem that, as in the case of §80 *ante*, the powers conferred by §113 would properly be invoked by a Magistrate when he convicts an accused of committing a public nuisance. He may in addition to such conviction make order that the accused is not to repeat or continue such nuisance. Disobedience to such an order would be punishable under §§284, 185 of the Penal Code.

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§114

CHAPTER X.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE.

Power to issue absolute order at once in urgent cases of nuisance.

114. (1) In cases where, in the opinion of a Police Magistrate, immediate prevention or speedy remedy is desirable such Magistrate may, by a written order stating the material facts of the case and served in manner provided by Section 106, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or danger to human life, health, or safety, or a riot or an affray.

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be made *ex parte*.

(3) An order under this section may be directed to a particular person or to the public generally when frequenting or visiting a particular place, and in the latter case a copy of the order shall be published as provided by Section 106(2) except that it shall not be necessary to notify it by Proclamation in the *Government Gazette*.

(4) Any Police Magistrate may rescind or alter any order made under this section by himself or by his predecessor in office.

(5) No order under this section shall remain in force for more than fourteen days from the making thereof unless, in cases of danger to human life, health, or safety, or a likelihood of a riot or an affray, the Governor, by notification in the *Government Gazette*, otherwise directs.

Police Magistrate.—See §3 *ante*.

Writing—Written.—See §3 *ante*.

Riot.—See §143 Penal Code.

Affray.—See §156 Penal Code.

Government Gazette.—See §3(4) Ordinance No. 21 of 1901.

Governor.—See §3(5) Ordinance No. 21 of 1901.

1. §114, with certain modifications and additions, closely follows §144 of the Indian Code.

2. **Scope of §114.**—As stated in the head note to this Chapter, §114 deals with temporary orders which may be made in urgent cases of public nuisance.

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§114

Whenever a Police Magistrate finds that in any case there is a fear of any obstruction, annoyance, or injury, or any risk thereof being caused to persons in the exercise of their lawful rights, or any danger to human life, health, or safety, or of a riot or affray, and the Magistrate is of opinion that its *immediate prevention* or *speedy remedy* is desirable he may issue an order in writing setting out the material facts of the case, and cause it to be served in the manner provided by §106 *ante* directing the person to whom it is issued to abstain from a certain act, or take order with certain property in his possession or under his management. —§114(1).

If the case is urgent, or if the circumstances do not admit of service in due time of a notice, the order can be made *ex parte*.—§114(2).

An order under §114 may be directed to a particular person or to the public generally when frequenting or visiting a particular place. When an order is directed to the public generally a copy thereof must be published as provided by §106(2) *ante* except that it is not necessary to notify it by a proclamation in the *Government Gazette*.—§114(3).

The Magistrate who makes an order under this section, or his successor in office, may rescind or alter such order.—§114(4).

No order under §114 is to remain in force for more than fourteen days from the day it is made, unless, in cases of danger to human life, health, or safety, or a likelihood of a riot or an affray, the Governor, by notification in the *Gazette*, otherwise directs.—§114(5).

§§81, 105, 112 and 114 are very similar in their scope, inasmuch as they all aim at the prevention of the commission of certain acts which are calculated to work harm upon the community. Under §81 the respondent is ordered to keep the peace, under §105 he is ordered to do or abstain from doing certain things upon a conditional order made absolute. Under §112 he is enjoined by means of an injunction to obviate or prevent a threatened danger or injury. §114 deals with cases of threatened danger or injury in which it would be dangerous to delay preventive action and gives the Magistrate the power to act at once.

3. **Alternative action under §§81, 105, 112, and 114.**—It will be seen that the provisions of these sections are designed to meet cases of threatened dangers of varying urgency. It is impossible to derive any definite principle as to when the Magistrate is expected to act under any of these sections. It would appear, however, that before making an order under §114 a Magistrate would always be safe in first considering whether he should not act under one of the other sections before calling to his aid the provisions of §114.

§114 is one which has been specially designed to meet cases where the danger threatened is so imminent that unless prompt action is taken it cannot otherwise be averted. Even when the matter is urgent the Magistrate should first consider whether an injunction should not be issued under §112.

R. v. Ramacharlu (1902) 26 *Mad.* 471.—A Magistrate has a discretion as to whether he will proceed under §81, or §114.

Roy v. Roy (1905) 32 *Cal.* 966 (following *R. v. Ramacharlu*).—Where a dispute relating to the possession of land is likely to cause a breach of the peace the Magistrate has a discretion to proceed either under §81 or §114 of the Code. See also *Elavarisu v. Vanamamalai* 3 *Mad.* 354.

4. **Object of §114.**—The object of §114 is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of

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§114 preventing an imminent breach of the peace, etc., but it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such a breach of the peace, etc., will occur. It is, therefore, incumbent on him to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient inquiry, and, if necessary, to deal with the case under the other provisions of the Code which enable him to meet cases of probable breaches of the peace, etc.—*Abdool v. Lucky* 5 *Cal.* 132. Under the English law there does not appear to be any provision of the law similar to §114. Thus in the case of *Beatty v. Gillbanks* (1882) 9 *Q.B.D.* 308, 51 *L.J.M.C.* 117, where certain people assembled for an innocent purpose and with no intention of carrying it out unlawfully, *viz.*, for the purpose of conducting a peaceful street procession, it was held that the authorities could not prevent them from so doing, although it was well known that the procession would be opposed with force by a rival body, and that a probable breach of the peace would result. It would seem that in Ceylon a Magistrate would have ample power under §114 for calling upon the persons intending to conduct the procession to abstain from doing so on the ground that such act would lead to a riot or an affray. See para. 10 *infra*.

5. **Where an order under §114 referred to " information received " without stating the details of the information which led him to believe the particular state of things, but the order itself recited the circumstances,** *held*, " it is not necessary that the information on which he acted should be on record. The circumstances on which a Magistrate is required to act under this section are frequently such, that action must be taken immediately on oral information." The High Court of Madras accepted the recitals set out in the order of the Magistrate.—*Elavarisu v. Vanamamalai* 3 *Mad.* 354.

6. **Immediate prevention or speedy remedy.**—*Talukdar v. Talukdar* (1900) 27 *Cal.* 918.—An order under §114 can only be passed on some emergency and would have effect only for fourteen days.

Gopi v. Taramoni 5 *Cal.* 7.—" We are all agreed that the circumstances of emergency must be such as to justify the Magistrate in making an order . . . and that if they are not, the order may be set aside as without jurisdiction."

Karoolal v. Lal 32 *Cal.* 935.—An order under §114 was set aside on the ground that it did not appear from the proceedings that the Magistrate was of opinion that immediate prevention or speedy remedy was necessary, and that the order made did not state the material facts of the case.

7. **Written order stating the material facts of the case.**—The information upon which the Magistrate acted need not be on the record.—*Elavarisu v. Vanamamalai* para. 5 *supra*.

R. v. Projapat 14 *C.W.N.* 234.—" It is quite clear from the schedule that the material facts may be stated with the greatest possible conciseness."

R. v. Mul Raj 36 *P.R.* (1905).—If there is no written order, but merely a verbal order to be conveyed by some person to the person concerned no prosecution under §185 of the Penal Code can stand.

R. v. Satish Chandra 11 *C.W.N.* 79.—Under §114 a Magistrate has no power to issue an intermediate or interlocutory order; nor may he issue a fresh order pending disposal of a rule issued by the High Court.

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R. v. Jokhu 8 *Alla.* 99.—§114 is only properly applicable to temporary orders and which can exist only for the term specified in §114(5), and does not cover a general order, *e.g.*, an order generally not to spread night soil.

Umatal v. Nemai 32 *Cal.* 154.—An order directing a certain division of produce cannot be justified under §114. Such an order being of an irrevocable nature, instead of having force for only fourteen days is not within §114. See para. 10 *infra.*

8. **Service.**—The order is to be served in the manner provided by §106 *ante*, but where the order is directed to the public generally when frequenting or visiting a particular place, it must also be published as provided by §106(2) *ante*, except that it is not necessary to notify it by proclamation in the *Gazette*. Where the matter is very urgent, service of notice may be dispensed with.—See §114(1),(2),(3).

9. **Direct any person.**—§114(3) declares that an order may be directed to "a particular person or to the public generally when frequenting or visiting a particular place." In point of strict construction there appears to be nothing to prevent a Magistrate directing an order to a class of persons generally, but the Indian Courts have not adopted this view.

R. v. Lakhmidas 14 *Bom.* 165.—A Magistrate by proclamation posted about the city and addressed to the public generally, in order to prevent the spread of cholera, prohibited the giving of caste dinners. The accused gave such a dinner and was convicted under §185 of the Penal Code. The Court referring to §114(3), *held*, "The power of the Magistrate is there confined to the direction to a particular person to abstain from acts of a certain character or to the public generally to abstain from similar acts when frequenting the particular place. The order . . . in its substance . . . was illegal."

R. v. Jokhu 8 *Alla.* 99.—A similar narrow construction was placed upon §114(3) by the High Court of Allahabad, where an order was issued "forbidding in general terms any person from spreading night soil on his fields so as to cause disease or annoyance", and it was held that this provision, *i.e.*, §114(3) had no application to an order which was directed to a portion of the community and which had no concern with the public generally, frequenting or visiting a particular place."

It is a question which awaits local decision whether the above rulings would be held to be applicable in Ceylon. The Indian law, if accepted, would make it very difficult if not impossible for a Magistrate to issue an order to the members of a class, *e.g.*, as in the circumstances disclosed in *R. v. Lakhmidas.* Moreover, the narrow interpretation adopted by the Indian Courts leaves the question undecided as to what constitutes the "public generally." It might be difficult to suggest any order which equally concerned all members of the public.

10. **To abstain from a certain act or to take certain order with certain property in his possession or under his management.—**

(*a*) **Certain.**—"The word 'certain' placed before the word 'act,' and afterwards repeated twice in the expression 'to take certain order with certain property' leaves no doubt in our minds that the Legislature intended to give full and ample powers to the Magistrate . . . to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to

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§114 prevent, or even tends to prevent, a riot or an affray."—*Bykuntram v. Meajan* 18 *W.R.* 47; 10 *B.L.R.* 434. See para. 10(*d*) *infra*.

(*b*) **Where the circumstances justify this being done, a Magistrate acting under §114 may interfere with the lawful exercise of rights.**—See *Beatty v. Gillbanks* (para. 4 *supra*), but he should make every endeavour to avoid interfering with such rights more than is absolutely necessary to avert the danger or injury threatened.

Bykuntram v. Meajan 18 *W.R.* 47; 10 *B.L.R.* 434.—" It has been argued that the powers vested in Magistrates . . . must be confined to those acts and modes of enjoyment of property only which are in themselves unlawful . . . Not only is this restricted construction not supported by the actual words of the section, but its adoption might in many cases lead to the most serious consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself, but the act may be done, or the property enjoyed in that particular mode under circumstances calculated to lead to a serious breach of the peace, attended even with loss of human life, and it would be by no means proper or desirable to hold that in such a case the chief Peace Officer in the district has no power to issue an order such as that contemplated by §114."

Abdool v. Lucky 5 *Cal.* 132.—An order under §114 which interferes with the exercise of the legal rights of individuals is lawful, but it is the duty of the Magistrate to limit such interference as much as possible. *Held further*, if it is found that X is doing that which he is entitled to do, and that his neighbours take exception thereat, and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his rights, but to restrain the others from illegally interfering with the exercise of that right. *C.f. Beatty v. Gillbanks supra*, and *R. v. Sunderam* 6 *Mad.* 203, *Full Court*.

(*c*) **May a Magistrate make an order which is opposed to the decree of a Civil Court** ?—The Indian Courts in two cases have answered the question in the negative,* but text writers express a doubt as to whether they lay down sound law. It is clear that under §114 an order which interferes with the exercise of private rights is perfectly valid, and it is difficult to see in what respect a private right declared to exist by a Civil Court can be held to be beyond the scope of an order under §114. The better view appears to be that the Magistrate must make every endeavour to respect and further a right declared to exist by a Civil Court exactly as he must endeavour to respect any other private right, but that the mere fact that a right has been declared to exist by a Civil Court does not, provided other circumstances exist which justify his order, debar him from passing an order under §114 in restraint of such right.

(*d*) **The order must not be vague or indefinite.**—See para. 7 and para. 10(*a*) *supra*. An order which is indefinite is bad—thus an order forbidding the commission of any act that may be likely to induce a breach of the peace is not justified by §114.—*Kulsam v. Umatul* 11 *C.W.N.* 121. See also *Abayesevari v. Sidhesevari* 16 *Cal.* 80; *Ananda v. Carr* 19 *Cal.* 127, and *c.f. Elavarisu v. Vanamamalai* 3 *Mad.* 354.

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* *R. v. Rahamatullah* 17 Alla. 485, *Gobind v. Sims* 6 *C.W.N.* 466.

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(*e*) **To abstain from a certain act.**—*R. v. Pratap* (1898) 25 *Cal.* 852.—An order regulating boat traffic at a certain landing stage on a river, and made on the ground of public health was held in the circumstances to be illegal.

Rent collecting.—*R. v. Surajnarain* (1880) 6 *Cal.* 89; *Ananda v. Carr* 19 *Cal.* 127; *Debi v. Debi* (1888) 16 *Cal.* 80.

Order dealing with produce.—An order to abstain from interfering with a crop is within the scope of §114.—*Tekait v. Bhiko* 5 *C.W.N.* 329. *C.f. Umatal v. Nemai* para. 7 *supra.*

Caste dinners.—*R. v. Lakhmidas* 14 *Bom.* 165, see para. 9 *supra.*

Spreading of night soil.—*R. v. Jokhu* 8 *Alla.* 99, see para. 9 *supra.*

Holding a market.—*In re Nath* (1876) 2 *Cal.* 293; *R. v. Parbutty* 16 *Cal.* 9; *R. v. Shyamanand* 1 *Cal.* 990.

Religious worship, processions, etc.—*Muthialu v. Bapun* 2 *Mad.* 140; *R. v. Sunderam* 6 *Mad.* 203; *R. v. Abdulla* 24 *Mad.* 262, *Ramanadhan v. Murugappa* 24 *Mad.* 45; *Palanaiappa v. Dorasami* 18 *Mad.* 402; *Elavarisu v. Vanamamalai* 3 *Mad.* 354.

(*f*) **To take certain order.**—

To rebuild a structure on private land.—*R. v. Rahamatullah* 17 *Alla.* 485.—"The words of §114 are undoubtedly very wide and equally vague, but we must assume that the Legislature in using those words in the section did not intend to give the Magistrate such extraordinary powers as would enable him to order, under that section, a building which had fallen down in private grounds to be rebuilt by the owner . . ."

To destroy the dam of a tank in the interests of public health—held not to be valid.—*R. v. Gholam* 10 *W.R.* 36.

Removal of the houses of prostitutes.—"Though it may, no doubt, be argued that the words 'such Magistrate . . . may direct any person to abstain from a certain act, or to take certain order with certain property in his possession, etc.' . . . are of such general character as may cover a case like this, and that a Magistrate is entitled to make an order of the kind . . . yet we do not think that it was ever the intention of the Legislature that orders like those with which we are concerned should be made."—*R. v. Bireshwar* 2 *C.W.N.* 70.

11. **Likely to prevent or tends to prevent**—

(*a*) obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed; or

(*b*) danger to human life, health or safety; or

(*c*) a riot or an affray.

It would be well for the Magistrate to make up his mind at the very outset as to which of these three categories the particular case he is engaged in falls, and to express himself clearly as to which object he desires to attain.

May an order under §114 be made solely for the protection of property? It has been held in India that such an order cannot be made.—*R. v. Prayag* 9 *Cal.* 103. In the Indian Criminal Procedure Code, Chapter XII. deals with orders which may be made by a Magistrate when some dispute exists with regard to immovable property. The local Criminal Procedure Code contains no such provision. Hence it would appear that no order can be made by a local Magistrate under §114 purely and solely for the protection of property.

Riot.—See §143 Penal Code.

Affray.—See §156 Penal Code.

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§§114-116

Likelihood of an affray.—Before an order under §114 can be made on the ground that an affray is likely to take place, there should be some evidence which tends to show that such is the case, *e.g.*, the existence of bitter hostility between the rival factions, preparations made for the commission of a breach of the peace, etc. The mere fact that persons have assembled in large numbers would not, in the absence of other circumstances, justify such an order being made.

12. ***Ex parte* order.**—See §114(2).—An *ex parte* order passed in the absence of an emergency is invalid and may be set aside. *R v. Mahamaddi* 2 *C.W.N.* 747; *R. v. Jokhu* 8 *Alla.* 99.

13. **Duration of the order.**—No order under §114 is to remain in force for more than fourteen days from the making thereof, unless in cases of danger to human life, health or safety, or a likelihood of a riot or affray, the Governor, by notification in the *Gazette*, directs otherwise.—§114(5). See §7 Ordinance No. 21 of 1901 as to the manner in which the time specified in §114(5) is to be computed.

Abdool v. Lucky.—See para. 4 *supra.*

Talukdar v. Talukdar.—See para. 6 *supra.*

R. v. Jokhu.—See para. 7 *supra.*

Umatal v. Nemai.—See para. 7 *supra.*

R. v. Nath 34 *Cal.* 897.—It is unnecessary to specify in the order that its duration is limited to fourteen days.

R. v. Chandra 11 *C.W.N.* 79.—A Magistrate cannot, by passing successive orders, extend the operation of an order beyond the time limit imposed by §114(5).

CHAPTER XI.

PREVENTIVE ACTION OF PEACE OFFICERS

§§115 – 119 is the last group of sections dealing with the prevention of offences. This group lays down in general terms the powers possessed by all Peace Officers for preventing offences which are about to be committed.—§§115 – 118. §119 gives Peace Officers power to inspect and seize false weights and measures. It is to be observed that while §§115 – 117 deal with cognizable offences, §§118 – 119 are concerned with certain specified kinds of offences.

Peace Officers to prevent cognizable offences.

115. Every Peace Officer may interpose for the purpose of preventing and shall, to the best of his ability, prevent the commission of any cognizable offence.

Information of design to commit such offences.

116. Every Peace Officer receiving information of a design to commit any cognizable offence shall communicate such information to the officer to whom he is immediately subordinate or to some other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

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Peace Officers may arrest without orders or warrant to prevent such offences.

117. A Peace Officer knowing of a design to commit any cognizable offence may arrest, without orders from a Police Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented. §117

Peace Officer.—See §3 *ante*.

Offence.—See §3 *ante*.

Cognizable Offence.—See §3 *ante*.

Police Magistrate.—See §3 *ante*.

Warrant.—See §§50 – 58, 62 – 65 *ante*.

Interpose and prevent.—See §118 *post*.

1. §§115 – 117 are based upon §§149 – 151 of the Indian Code which are followed with certain modifications. In India this group of sections refers solely to Police Officers and not to Peace Officers.

2. **Scope of §§115 – 117.**—§§115 – 117 deal with cases where *cognizable* offences are about to be committed. The offender is either preparing to commit such offence, or he is about to attempt to commit it. If a Peace Officer hears of an attempt to commit a cognizable offence, §115 empowers him to interpose with the object of preventing the offence being carried out, and it is his duty to do his best to prevent the offence from being committed. The penalty for cowardice on the part of Police Officers is to be found in §72 of the Police Ordinance, 1865. If the offence has already been committed the Peace Officer does not act under *Chapter* §§32 *XI*.—See §32 *ante*.

If a Peace Officer receives information of a design on the part of any person to commit a cognizable offence, such officer is, by §116, bound to communicate such information to his superior officer, or to some other officer, whose duty it is to prevent or take cognizance of any such offence. If an offence has been committed a like duty of conveying information is cast upon Peace Officers by §22 *ante*. If there is no other method by which such an offence can be prevented, §117 authorizes a Peace Officer to arrest the suspect without the orders of a Magistrate or without a warrant of arrest. See Introduction to Part V. *post*, and Appendix B.

It is submitted that the principle laid down in the case of *R. v. Imam* with reference to *Chapter IX. ante*,* is equally applicable to the special jurisdiction conferred by this Chapter. The exceptional jurisdiction here conferred upon Peace Officers should be exercised with all possible caution and fairness, so as to prevent the infliction of hardship on the person against whom it is used.

3. §115.—

(*a*) **Every Peace Officer.**—See §22 para. 5 *ante*.

(*b*) **It is the duty of all persons to assist a Peace Officer in the performance of his duty.**—See §19 *ante*.

(*c*) See Thoroughfares Ordinance, 1861 §95; Forest Ordinance, 1907, §49; Local Government Board Ordinance, 1920, §114, for other provisions similar to §115. See also §51 Police Ordinance, 1865.

(*d*) **Interpose and prevent.**—See §118 *post*.

(*e*) See §118 *post* which is very similar to §115.

4. §116.—

(*a*) **Every Peace Officer.**—See §22 para. 5 *ante*.

* See page 195 *ante*.

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§§117-118

(*b*) **Receiving information.**—*C.f.* "Reasonable complaint," "Credible information," "Reasonable suspicion,"—§32 *ante*. See also, §§81 – 83 para. 6(*a*) *ante*.

(*c*) **Design.**—*e.g.*, where the suspect has given utterance to his thoughts by acts or words, or where he has given effect to his wishes by acts, which either amount to a preparation or attempt to carry out the crime intended. *C.f.* §32(1)(*c*),(*g*) *ante*.

(*d*) **Shall communicate such information.**—If an offence has been committed the obligation to convey information is found set out in §22 *ante*,—see §21 *ante*, which casts the obligation of giving information regarding the commission of, or the intention to commit, certain offences upon all members of the public.

See para. 3(*a*) *supra* and §119 para. 7 *post*.

(*e*) **Officer whose duty it is to prevent or take cognizance of the commission of any such offence.**—*e.g.*, Magistrates, Police Officers, Excise Officers, Sanitary Officers, etc.

5. §117.—

(*a*) **Design.**—See para. 3(*c*) *supra*.

(*b*) **If the information received by the Peace Officer relates to an offence which has been committed, he can act under §32(1)(*b*)** *ante*.—§117 applies where the information received is to the effect that a person has formed a design to commit a cognizable offence.

(*c*) **Arrest.**—See §§23 – 25, 27 – 31, 34, 36 – 39, 42 *ante*.

Arrest without orders from a Police Magistrate.—See §§19, 40 – 41 *ante*.

Arrest without a warrant.—See §§32 – 33, 35 *ante*.

N.B.—The powers of arrest conferred by this section may be exercised only when it appears to the Peace Officer concerned that, except by arresting the suspect, the commission of the offence cannot be otherwise prevented.

(*d*) **Duty of the public to assist.**—See §19 *ante*.

Prevention of injury to public property.

118. A Peace Officer may, of his own authority, interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

Peace Officer.—See §3 *ante*.

Interpose to prevent.—See §115 *ante*.

Attempt.—See §490 Penal Code.

1. §118 is based upon §152 of the Indian Code, and the two sections are almost identical in their terms.

2. **Scope of §118.**—This section is very similar to §115. If any person in "the view" of a Peace Officer attempts to commit any injury to any *public* property, whether movable or immovable, or attempts to remove or to injure any *public* landmark, buoy, or other mark used for purposes of navigation, he may interpose and prevent such act from being committed.

3. **Public property.**—*e.g.*, the railway line, the seashore, etc. See §414 Penal Code.

4. **Public landmark.**—See §417 Penal Code.

5. **Buoy or other mark used for navigation.**—See §§416, 274 Penal Code.

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6. **The public are bound to assist a Peace Officer when exercising his powers under this section.**—See §19 *ante.* §119

7. **See §115 – 117 para. 2 *ante.***

Inspection of weights and measures.

[*See No.* 8 *of* 1876]

119. (1) Any Peace Officer not below the rank of Sergeant, Korala, Muhandiram, or Udaiyar may, without a warrant, enter any place for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept therein whenever he has reason to believe that there are in such place any weights, measures, or instruments for weighing which are false.

(2) If he finds in such place any weights, measures, or instruments for weighing which are false he may seize the same and shall forthwith give information of such seizure to a Police Magistrate having jurisdiction.

Peace Officer.—See §3 *ante.*

Warrant.—See §§50 – 58, 62 – 65 *ante.*

Search warrant.—See §§68 *et seq. ante.*

Inspect and search.—See §§24 – 26, 68 – 76 *ante,* 124 *post.*

Police Magistrate.—See §3 *ante.*

1. §119 is based upon §153 of the Indian Code, and the two sections are almost identical in their terms.

2. **Scope of §119.**—Ordinance No. 8 of 1876 provides the law which establishes a standard set of weights and measures for use in this Island. Ordinance No. 14 of 1878 (as amended by Ordinance No. 4 of 1919) provides for the examination of weights and measures used by the public by "examiners" appointed under the principal Ordinance. Any person using weights and measures which do not conform to the standards established by law, commits an offence. *Chapter XIII.* of the Penal Code further penalises the fraudulent use of false weights and measures.

§119 of this Code empowers certain specified Peace Officers to enter any place without a warrant and inspect or search for any weights or measures used or kept in such place, whenever there is reason to believe that any weights or measures used therein are false. If false weights or measures are found there, such Peace Officer may lawfully seize them, but he must "forthwith" communicate the fact of such seizure to the Magistrate having jurisdiction over the place of seizure.—*R. v. Appu* (1929) 10 *C.L.Rec.* 127.

3. **Without a warrant.**—*i.e.*, a search warrant. See §§68 – 71, 73 – 76, 24–26 *ante*, §124 *post.* See also §59 Police Ordinance, 1865; §9(2) Dangerous Criminals Ordinance, 1921.

5. **Reason to believe.**—See §§62 para. 9, 68 para. 10 *ante.*

6. **Forthwith.**—See §21 para. 4 *ante.*

7. **Give information.**—*C. f.* §116 *ante.*

8. **See Toussaint v. Meedin (1883) 5 S.C.C. 221;** *Perera v. de Silva* (1916) 3 *C.W.R.* 268 (see §4 Ordinance No. 4 of 1919); *Edrisinghe v. Arnolis Appu* (1918) 5 *C.W.R.* 108.

9. **Place.**—See §§24 – 25 para. 7 *ante* and §3 *ante.*

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§120

PART V.

INVESTIGATION OF OFFENCES.

Part V. of the Criminal Procedure Code deals with the procedure which is described as the "investigation of offences," and includes *Chapters XII.* and *XIII.* It is obvious that this description is faulty, inasmuch as *Chapters XII.* and *XIII.* are not the only chapters in this Code which deal with the investigation of offences. *Chapters XVI., XVIII., XXII., XXIII., XXXII.* all deal with certain branches of the law of procedure relating to the investigation of offences. The correct heading for Part V. of the Code should be "Investigation of Offences by Inquirers."

The "investigation" here referred to is one that takes place before a complaint or charge is presented to the Police Court for inquiry or trial. *Chapters XII.* and *XXXII.* together deal with the preliminary investigations which may be held before a case is presented to the Magistrate. *Chapter XII.* deals with such preliminary investigations into crime by Inquirers into crime, while *Chapter XXXII.* deals with the powers of Coroners to investigate the causes of any sudden death, etc.

Chapter XIII. which is included in Part V., deals with "Statements made to Magistrates or Peace Officers." This description is faulty. The chapter actually deals with statements made to "Peace Officers, '*persons in authority*' and Magistrates."—See §§133, 134 *post.* It would appear that *Chapter XIII.* ought more properly to have been included under *Chapter XXXVIII.*, as it solely deals with questions of procedure relating to evidence. *Chapter XXXII.* dealing with inquests into sudden deaths should have been included in Part V.

Both *Chapters XII.* and *XXXII.* are meant to be aids to the Magistrate, so that when he is called upon to investigate any complaint or charge, the facts of the case will have already been investigated and sifted by the Inquirer beforehand.

Before the Inquirer can act, he must receive information that an investigation should be held. With this end in view, the law makes it obligatory in certain cases that the public or specified persons should give information as to the happening of certain facts :—

(i) By §21(*a*) every member of the public is under a legal obligation to give information to the nearest Police Court, Officer-in-Charge of a Police Station, Peace Officer or Headman, of the commission of, or of the intention of any other person to commit certain offences.

(ii) §21(*b*) creates a similar obligation to give information regarding any sudden death, death by violence, or a death under suspicious circumstances, or whenever a dead body is discovered without it being known how such person came by his or her death.

(iii) By §22 it is enacted that every Peace Officer, who has information regarding the commission of any offence within the limits of his jurisdiction, the occurrence of any sudden or unnatural death, or of a death under suspicious circumstances, or the finding of a dead body, is to give information forthwith to the nearest Magistrate or Inquirer having jurisdiction, or to his immediate superior officer. See also §116 *ante*.

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Analysis of *Chapter XII.* (§§120 - 132). §120

1. The investigating authority—

(*a*) Persons appointed by the Governor by name or office to be "Inquirers" within a certain area.—§120.

(*b*) All "officers in charge of Police stations."—§121(1).

2. General duties of Inquirers—

(i) (*a*) They may legitimately investigate all "cognizable offences" without orders from a higher authority.—§§121, 124.

(*b*) They may similarly investigate "non-cognizable offences" upon receiving an order from the Police Magistrate as provided by §129.

(ii) They must keep an "Information Book" in such form as the Governor may prescribe.—§121(1).

On receiving information as to any cognizable offence it is their duty :—

(*a*) If the information is given orally, to reduce it to writing either himself, or under his direction.—§121(1). *C.f.* §122(1).

(*b*) Read it over to the informant.—§121(1). *C.f.* §122(1).

(*c*) Obtain the signature of the informant to such writing.—§121(1). *C.f.* §122(1).

(*d*) A copy of such writing is to be entered in the Information Book. —§121(1). *C.f.* §122(1).

(*e*) He shall not permit unauthorized persons to inspect the Information Book, which is a confidential and privileged state document.—§122(3).

(iii) Procedure in cognizable cases—

(*a*) If he is an officer in charge of a Police station, he shall forthwith make a report to his immediate superior officer.—§121(2). *C.f.* §116 *ante*. If he is an Inquirer, who is not a Police officer, he shall forthwith send a report to the local Police Court.—§121(2).

(*b*) He shall proceed in person to the scene and investigate the case and "take such measures as may be necessary for the discovery and arrest of the offender."—§121(2). In certain contingencies the officer in charge of the station may send a subordinate officer instead of proceeding himself to the spot.—§§121(2) *proviso*, 125. There is no obligation on the part of the Inquirer to hold an investigation if there does not appear to be sufficient grounds for so doing.—§121(2).

(*c*) Inquirers holding an investigation under this Chapter have the following powers in addition to any other powers which they may have either under other provisions of this Code or any other law—see §132.

(i) Power to secure the attendance of witnesses.—§121(3).

(ii) Power to make searches.—§124.

(iii) Power to arrest or direct an arrest, or to issue a warrant.—§128.

Every person examined as a witness by an Inquirer is under a legal obligation to state the truth.—§122(2).

The Inquirer is not to offer any inducement, threat, or promise, whether the same be of a temporary nature or otherwise, to any person charged before him.—§123. See §133 *post*, and §§24 - 30 Evidence Ordinance. Subject to this, however, the Inquirer is not to prevent or discourage the person accused from making any voluntary statement he may desire to make.

(*d*) Procedure after the investigation has been held—

(i) If there appear to be no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the person accused to the Police

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§120 Court under §127, he shall be released on bail to appear when directed to do so.—§126. If a case appears to have been made out against the accused, he must be forwarded to the Police Court as required by §127.

(ii) If an investigation cannot be concluded within twenty-four hours—see §37 *ante*—the Inquirer must forthwith send a report to the Magistrate, who may then either direct the further detention of the accused for a period not exceeding fifteen days, or withdraw the case from the Inquirer—see §130—and deal with it himself.—§126A.

(iii) All investigations should be concluded "without unnecessary delay," and a report in the prescribed form made to the Magistrate.—§131.

(iv) Procedure in non-cognizable cases—

The Inquirer in such a case requests the Magistrate for authority to investigate such offence, and if the Magistrate authorizes this course the Inquirer may investigate the case "and exercise all the powers conferred by this Chapter in respect of such investigation." Subject to the provisions of §37, the Magistrate may also authorize the detention of any person during such an investigation.—§129.

(v) The Magistrate has power at any time to withdraw any case from an Inquirer and deal with it himself.—§130. *C.f.* §126A(3).

Chapter XIII. deals with statements made by accused persons to Peace Officers, "persons in authority," or Magistrates. §133 deals with statements of accused persons "having reference to the charge "made to Peace Officers, or "persons in authority." §134 deals with statements made to a magistrate "at any time before the commencement of an inquiry or trial," and the manner in which such statements are to be recorded.

CHAPTER XII.

INFORMATION TO POLICE OFFICERS AND INQUIRERS AND THEIR POWERS TO INVESTIGATE.

Appointment of inquirers.

[§ 2, 37 of 1908.]

120. The Governor may appoint any person by name or office to be an Inquirer for any area, the limits of which shall be specified in such appointment.

The Governor.—See §3(6) Ordinance No. 21 of 1901.

Inquirer.—See §3 *ante*.

1. §120 is not based upon any section of the Indian Code.

2. **An "Inquirer" is defined in §3 *ante* as "a person appointed by the Governor under *Chapter XII.*"** §120 authorizes the Governor to make such appointments either by name or office. *C.f. Chapter XXXII. post.*—Inquirers into Sudden Deaths.

3. **By name or office.**—*i.e.* the appointment may be personal to the person appointed, or to the holder of a particular office.

4. **Presumption of regularity.**—See Evidence Ordinance, §91 *Exception* 1, §114 *illustration* (*e*), and §57(7). *Muhandiram v. Simon* (1928) 30 *N.L.R. at p.* 152.—"The last point urged was to the effect that the Muhandiram, upon whose report to the Court these proceedings were launched, was not a person entitled to exercise the powers given by §129(1) of the Criminal Procedure Code. No objection was taken on

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this point in the lower Court and it was not pressed. If it had been raised in the lower Court, no doubt evidence would have been forthcoming to show that the objection was groundless . . . " *per* Dalton, J. §121

Information in cognizable cases.

121. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police station or to an Inquirer, shall be reduced to writing by him or under his direction and be read over to the informant ; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and a copy thereof shall be entered in a book, hereinafter referred to as " The Information Book," to be kept by such officer or Inquirer in such form as the Governor may prescribe in this behalf.

Procedure where cognizable offence suspected.

(2) If, from information received or otherwise, an officer in charge of a Police station or Inquirer has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to the Police Court having jurisdiction in respect of such offence, or, in the case of an officer in charge of a Police station, to his own immediate superior, and shall proceed in person to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender.

Provided that an officer in charge of a Police station may depute one of his subordinate officers to proceed to the spot to make such investigation and take such measures as may be necessary for the discovery and arrest of the offender, or if it appear to him that there is no sufficient ground for entering on an investigation, he shall not be bound to investigate the case.

Power to Police officer or Inquirer to require attendance of persons able to give information.

(3) Any Police officer or Inquirer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of the station of such Police officer or any adjoining station or within the local limits of the jurisdiction of such Inquirer, who, from the information given or otherwise, appears to be acquainted with the circumstances of the case, and such person shall attend as so required.

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§121 If any person when required to attend by an Inquirer refuses or fails to do so, the Inquirer may thereupon, in his discretion, issue a warrant to secure the attendance of such person as required by such order as aforesaid.

Cognizable offence.—See §3 *ante.*
Offence.—See §3 *ante.*
Officer in charge of a Police station.—See §3 *ante.*
Police station.—See §3 *ante.*
Inquirer.—See §3, 120 *ante.*
Writing.—See §3 *ante.*
Signed.—See §3 (2) *ante.*
Governor.—See Ordinance No. 21 of 1901, §3 (6).
Police Court.—See §3 *ante.*
Arrest.—See §§23 *et seq.*, 32 *et seq. ante.*
Process to compel attendance.—See §§44 *et seq.*, §§50 *et seq. ante.*
Warrant.—See §§50 *et seq. ante.*

1. §121 (1) is based on §154, §121 (2) upon §157, and §121 (3) on §160 of the Indian Code, but the two Codes, although similar, are not identical in their scope—see *Dias v. Kiriwanthia*, *R. v. Babbi.* Very little purpose is served by an examination of the Indian Law owing to the very great points of difference between the Indian and Ceylon enactments —*R. v. Caruppen.*

2. **Scope of §121.**—§121 deals with cognizable offences, but the provisions of this section, as well as of those which follow, will apply to non-cognizable offences, provided authority has been obtained from the Magistrate as provided by §129 *post.*

At the outset the cardinal difference which exists between §121 on the one hand and §122 on the other should be grasped. §121 refers to the first information or first complaint given to a Police officer or an Inquirer, while §122 refers to the statements or the evidence recorded as a result of such a first information or complaint having been given.—*R. v. Babbi*, *R. v. Pablis*, *Binduwa v. Siriya*, *R. v. Caruppen.* If the information is given orally, the Police officer or Inquirer is required to reduce the same into writing, either by himself or by some one else under his direction. The information so recorded must be read out to the informant, who must be requested to sign the statement. A copy of the statement must be entered in a book which is called the "**Information Book.** In practice the information is entered directly in the "Information Book," which the informant signs. It is permissible for the Police officer or Inquirer to question the informant in order to obtain all the necessary particulars ; and anyone who has experience of recording the statements of illiterate witnesses will realize that it is well nigh impossible for such persons to give a clear and coherent account of what has taken place without the recording officer having to interpolate questions in order to clear up points in a confused narrative. The answers given to such questions would form part of the information given.—*R. v. Babbi.* It will thus be seen that statements under §121 are voluntarily given, while under §122 the witness is bound to answer the questions put to him. The procedure which the investigating officer has to follow at a later stage of the inquiry, when he begins to question witnesses other than the first informant, is to be found in §122, the provisions of which should be carefully contrasted with those of §121.

After the first information or complaint has been recorded, if the Police officer or Inquirer has reason to believe that no cognizable

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offence has been committed and that there are not sufficient grounds for entering upon an investigation, he need do nothing further beyond reporting the matter as required by §121(2). On the other hand, if the Police officer or Inquirer has reason to suspect that a cognizable offence has been committed, he is required to send a report to his immediate superior officer, and, if he thinks that there is sufficient ground for holding an inquiry, he will proceed to the spot in person to investigate the facts and circumstances of the case and to take the necessary steps for the discovery and apprehension of the offender.—§121(2) *R. v. Babbi.* The superior officer, on receipt of the report, will himself send a report on the matter to the local Police Court.—§121(2) and see §116 *ante.* An officer in charge of a Police Station, instead of proceeding to the spot in person, may depute a subordinate to go to the spot and hold the inquiry.—§121(2), §125 and *c.f.* §124 *post.* §121

In order to give the investigating officer the fullest facilities for holding the inquiry, §121(3) empowers him, by order in writing, to summon witnesses who are within the limits of the station of the investigating officer, or any adjoining station, or within the local limits of the jurisdiction of such Inquirer, and who appear to be acquainted with the circumstances of the case. Such persons are bound to attend.—*R. v. Babbi.* On the failure of a witness so summoned to attend, the Police officer or Inquirer is vested with a discretion to cause him to be arrested on a warrant.—§121(3). A person who ignores the summons of an investigating officer under this section renders himself liable to be charged under §§170, 171, 172, &c., of the Penal Code. §124 empowers the investigating officer to cause the production of documents or things, and, if necessary, to search for the same.—See para. 12 *infra.*

3. **Every information.**—§121 is confined to first informations, whereas §122 is concerned with statements made by witnesses at the inquiry which would follow on the first information. This distinction is of great importance, because, while the restrictions imposed by §122(3) govern statements of witnesses recorded under §122, they do not affect first informations given and recorded under §121.—*R. v. Babbi, R. v. Pabilis, Binduwa v. Siriya, R. v. Caruppen.*

Where an accused, who was employed on an estate, made a false complaint of theft against certain persons to his master, who sent for the Police, to whom the accused made a statement to the same effect, it was held that normally the statement recorded by the Police would be the first information, so as to render the accused liable to a charge under §180 or §208 of the Penal Code ; but the statement was held in this instance to fall under §122, because the accused did not ask his master to communicate his complaint to the Police.—*R. v. Caruppen.* A statement made by an injured person in hospital to a Police officer cannot be regarded as the first information, where previous information had already been given and recorded at the Police station by another person.—*R. v. Kampu* 11 *Cal. W.N.* 554. Where J gave A, the Magistrate, information that R had committed an offence, and A passed on the information to the Police, who recorded A's statement, it was held that J's statement was the first information, and that it should have been recorded under §121(1).—*R. v. Jonnalagadda* 28 *Mad.* 565 (explained in *R. v. Caruppen*) and see also *R v. Chinna* 31 *Mad.* 506, *R. v. Sivan Chetti* 32 *Mad.* 258. The position, then, appears to be this : If X tells Y to go to the Police and say that he (X) charged Z with committing theft, and it transpires that the accusation was wilfully false—the complaint, although made by Y, would nevertheless be the

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§121 complaint of X who could be charged under §180 or §208 of the Penal Code. On the other hand, if X merely tells Y that Z had committed theft but without requesting Y to go to the Police but Y does so, then Y is the first informant and not X. In the former case X's statement would be recorded under §122.—*R. v. Caruppen.* In the latter case X's statement would be recorded under §121.—*R. v. Jonnalagadda.*

There may be more than one first informant in a case—*e.g.*, where two women are simultaneously abducted and harmed, and each goes to the Police station and makes independent complaints.—*R. v. Pabilis.* It may also happen that a witness, while being examined under §122, makes some new accusation against a person. In such a case, if the investigating officer gets the deponent to sign the statement after it has been read over to him, it would amount to a statement recorded under §121, although it was in fact recorded during an investigation under §122.—*R. v. Babbi.* It would appear that all information supplied before the summoning and the examination of witnesses by the Police or the Inquirer would come within the description of "first informations" within the meaning of §121.

The first information received should be recorded at once. The investigating officer must not wait until certain facts have been ascertained. "It is apparently thought that the information on which an investigation is commenced is not the first information of an offence, and that, when in the course of the investigation something has been elicited which shows that an offence has been committed, a first information can be recorded. This is certainly not what the law contemplates. In nearly every trial it is important that it should be known to the judicial officer what were the facts given out immediately after the occurrence and reported to the Police, and the object of the first information is to render him so acquainted."—*R. v. Nath* 7 *Cal. W.N.* 345.

3A. **Are "first informations" recorded under §121 subject to the provisions of §122(3)?**—In *R. v. Babbi* for the first time it was held that §122(3) does not apply to first informations recorded under §121, so that a statement recorded under §121 can be used in evidence in a prosecution under §180 or §208 of the Penal Code, or for any other purpose for which it is relevant. So, where two women, who were proceeding along the road together, were abducted and taken in different directions, and both of them having escaped from their captors, independently went to the Police station and made two independent complaints, the Full Court held that both those statements were first informations within the meaning of §121, and could be used under §157 of the Evidence Ordinance to corroborate the two women at the subsequent trial.—*R. v. Pabilis*, and see *Silva v. Abeysekera.* But statements recorded under §122 cannot be used to corroborate the deponent at the subsequent trial.—*R. v. Soysa, Wickremasinghe v. Fernando, Hamid v. Karthan.* On the other hand, if a statement recorded under §121 is used to discredit a witness under §155(3) of the Evidence Ordinance, such statement does not thereby become substantive evidence in the case.—*Dias v. Kiriwanthia, R. v. Cooray, Binduwa v. Siriya, R. v. Silva.* Statements recorded under §121 may be used for any purpose in which the law allows a party to make use of a former statement made by a person, *e.g.*, as a dying declaration or other statement admissible under §32 of the Evidence Ordinance; to corroborate testimony under §157 of the Evidence Ordinance; or to discredit a witness—§155(3) Evidence Ordinance—or to refresh memory, &c. Moreover, the prohibition con-

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tained in §122(3) against the accused or his legal advisers from seeing the recorded statements in the Information Book does not apply to first informations under §121. It follows that they may not only inspect the same, but may also demand to be furnished with certified copies of such statements on payment of the prescribed fees. In the *Attygalla Murder Case*, where statements recorded under §122 were used in Court, Wood Renton, J., held that the defending counsel had no right to look through the book beyond the specific entry actually dealing with the point raised —see also *R. v. Hardy*, *R. v. Watson*, and *Attorney-General v. Briant* noted in *Dias on the Evidence Ordinance p.* 232. The defence may, therefore, inspect or obtain copies only of statements recorded under §121. They may also, under the circumstances referred to in §122(3), be allowed to inspect and cross-examine on certain statements recorded under §122.

4. **Cognizable offence.**—See §3 *ante*, also §129 *post.*

5. **The Information Book.**—See para. 2 *supra* and *R. v. Babbi.* An "Information Book" is a public document within the meaning of §74 of the Evidence Ordinance. Subject to what has been stated in para. 3A *supra*, it is a privileged document, and the Police officer or Inquirer would be justified in refusing to divulge its contents—see §125 Evidence Ordinance. Subject to §125 of the Evidence Ordinance, no privilege can be claimed in respect of any statements recorded under §121. With regard to statements recorded under §122, §122(3) defines the purposes for which statements recorded under §122 can be lawfully used in a Court of Law.—*R. v. Babbi*, *In re Ellawala.* Entries under §122 can be used to contradict or discredit a witness, but not to corroborate.—*Dias v. Kiriwanthia*, *R. v. Cooray*, *Binduwa v. Siriya.* It can be used to refresh the memory of the officer who recorded the statements.—§159 Evidence Ordinance. It can be used as evidence under §32(1) of the Evidence Ordinance, or as evidence in a charge under §180 of the Penal Code—see para. 5A *infra.* The Judge may call for the book and use its contents, not as evidence in the case, but to aid it in the inquiry or trial.—*Hamid v. Karthan.* The practice of individual Judges vary, but the Information Book may show that there exists a witness, whom neither side has called, able to give material evidence which should be placed before the Court ; it may indicate lines of enquiry which should be explored in the highest interests of justice, or may disclose that a witness, in giving evidence, is stating something which is materially different from the story told by him shortly after the offence.—*R. v. Cooray.* It is, however, improper for a Judge to call for the Information Book in order to make up his mind either to issue process—*R. v. Perera*— or how he is to decide the case.—*Paulis v. Davith*, *Bartholomeusz v. Velu.* The improper use of the information book, however, does not necessarily vitiate a conviction if there is other reliable evidence to support the conviction.—*R. v. Soysa.* See para. 7 *infra.*

Statements recorded in the Information Book under §122 are privileged and cannot give rise to an action for damages if what the witness says is proved to be false.—*Wijegunatileke v. Joniappu*, *Fry v. Rajaratnam.* On the other hand, subject to §125 of the Evidence Ordinance, statements recorded under §121 can be used for any purpose for which they are relevant.—*R. v. Babbi* and see para. 3A *supra.*

A judicial officer who had read the Information Book on a visit of his to the Police station should not subsequently try the case himself. —*Bandaranaike v. Rasanayaka* (1933) 35 *N.L.R.* 188.

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5A. **Statements recorded in the Information Book and charges under §180 or §208 of the Penal Code.**—From the foregoing it is clear that a first information under §121 could be made the basis of a charge either under §180 or §208 of the Penal Code.—*R. v. Babbi.* Where, however, the false information or charge was given in an investigation under §122, §122(3) indicates that while such statement may be used as evidence in a charge under §180 of the Penal Code, it says nothing about a charge under §208.—*R. v. Caruppen.* As was pointed out in *R. v. Babbi*, a witness, when under examination under §122, may give a first information which the investigating officer may lawfully convert into one under §121. In such a case, if the officer reads over the statement to the witness and gets him to sign it, this makes it a statement given under §121, and, if the information given or the charge made is false, it may be used as the basis of a charge either under §180 or §208. It is also to be noted that the mere fact that a Police officer asks questions from the first informant in order to elucidate the narrative does not cause such statement to cease to be a first information under §121.—*R. v Babbi.* With regard to statements under §122 it was held that the fact that a statement was made in answer to questions may in many cases lend strong support to a defence that it was made *bona fide* and with no ulterior motive, but it is difficult to hold that in no circumstances can statements made under §122 in answer to questions form the basis of a charge under §180 when there is express provision that such statements can be given in evidence in a charge under §180. If this were so it would be possible for a person to arrange for the initial complaint under §121 to be given by another, and that statement might be limited to a bare statement of the commission of the offence so as not to compromise the informant, and thereafter in the statements under §122 to falsely charge persons, with immunity from prosecution under §180.—*R. v. Caruppen.* See §122 para. 6 *post.*

6. **Reason to suspect.**—See §32(1) (*b*) para. 6 *ante.*

7. **Report.**—See §38 *ante* and *c.f.* §§125, 126A, 127(3), 131 *post.* Under §121(2) an Inquirer and the officer in charge of the station have to report to the Magistrate, while the latter has, in addition, to report to his own superior officer.—*C.f.* §116 *ante.* Such report must be sent whether an investigation follows or not. If an investigation does not follow, the final report to be sent is the one provided by §131 *post.* The law does not make it clear what is to happen if an investigation is commenced and then abandoned. The public are not entitled to obtain copies of such reports.—*R. v. Arumogam* 20 *Mad.* 189, *R. v. Pantulu* 19 *Mad.* 14, *c.f.* §434 *post.* Where the report is made to the Police Court of A (where the accused was arrested and remanded) and the Police Court of B (where the offence was committed) commenced proceedings against the accused before a formal plaint was filed, it was held that the resulting conviction in Court B was not vitiated.—*Pakir Ally v. Weerasuriya.*

8. **Forthwith.**—See §21 para. 4 *ante.*

9. **Proceed in person.**—An Inquirer cannot delegate his duties; but the proviso to §121(2) allows a delegation to one of his subordinate officers in the case of an officer in charge of a station.—See §125 *post.*

10. **Take such measures as may be necessary for the discovery or arrest of the offender.**—*i.e.*, to exercise the legal powers of searching for and arresting the accused.

11. **Cases in which investigations have been refused.**—See *General Order* 904 A(1).

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12. **Power to compel the attendance of witnesses.**—See §121 (3).—This refers to the investigation which has to be held after the first information has been recorded.—*R. v. Babbi.* §121(3) does not apply to the summoning of a surety under §126 *post* to appear and give information as to the whereabouts of the person for whom he stood surety—*R. v. Chattar* (1885) *Alla. W.N.* 43—nor does this sub-section authorize the summoning of an accused person to appear and answer a charge before the Police. "The intention of the Legislature seems to have been only to obtain a facility for obtaining evidence, and not for the procuring of the attendance of the accused, who may be arrested at any time . . . The Police may order any person whom they believe to be in a position to give information to attend and do so, and the person so ordered may decline to make any criminatory statement, but he cannot be summoned to answer a complaint, as he was in this instance."—*R. v. Saminada* 7 *Mad.* 274. Nor can the accused be called upon to produce documents.—*R. v. Ratan* 4 *Bom. L.R.* 644. It has been held in India that women should, if possible, be examined in their own houses and not called out in public.—*Haladhar v. Sub-Inspector* 9 *Cal. W.N.* 199.

Order in writing.—*i.e.*, a direction in writing like a summons, requiring the attendance of the witness at a certain time and place. The person summoned should be within the limits of the station of the Police officer issuing it, or any adjacent Police station; and in the case of an Inquirer, the witness should be within the local limits of his jurisdiction as set out in the notification appointing him under §120 *ante.* The witness summoned should be one who, upon information given or otherwise, appears to be acquainted with the circumstances of the case. —*C.f.* §122(1), §124 *post.*

Warrant.—See *R. v. Mukerjee* §§53 - 55 para. 12 *ante.*

Refuses or fails to attend.—See *R. v. Ram Saran* §44 para. 3. The person ordered to attend must wait for a reasonable time, if he finds that the Inquirer or Officer is not present at the time and place stated.—*R. v. Kisan* 10 *Bom.* 93, *R. v. Sutherland* 14 *W.R.* 20. The penalty for disobedience of an order to attend under this section is that a warrant may be issued and the offender charged under §§170–172 of the Penal Code.—See *R. v. Jogendra* 24 *Cal.* 320.

13. **Case Law.**—*The Attygalla Murder Case* (1907) (No. 27 Western Circuit Criminal Sessions).—The defence has the right to inspect an Information Book (i) if it has been used by a witness to refresh memory —§161 Evidence Ordinance—or (ii) if the Court uses it for the purposes of contradicting a witness.—§§145, 155 Evidence Ordinance. In such cases the defence may only inspect the particular entry actually used. In the *Attygalla Murder Case*, Wood Renton, J., *held* that the defending counsel had no right to look through the book beyond the specific entry actually dealing with the point raised.

Hamid v. Karthan (1917) 4. *C.W.R.* 363.—"But the third objection urged in support of the appeal is a good one. The record shows that the Information Book was produced on the application of the complainant's proctor and that it was used for the purpose of corroborating certain portions of the evidence. It is clear that such a use of the Information Book is a violation of the provisions of §122(3) of the Criminal Procedure Code. It was held by a Full Bench of the High Court of Allahabad in *Queen Empress v. Mannu* (1897) 19 *Alla.* 390 . . . and the ruling in that case was accepted as correct by the Privy Council in *Dal Singh v. King Emperor* (1917) 116 *L.T. at. p.* 624, that entries in such an Information

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§121 Book as we are here concerned with may be used to assist the Court by suggesting means of further elucidating points that need clearing up and that are material for the purpose of doing justice between the prosecution and the accused, but not as themselves evidence of any date, fact, or statement contained in the Information Book," *per* Wood Renton, C.J.

Dias v. Kiriwanthia (1918) 5 *C.W.R.* 187; see 29 *N.L.R.* 405.—In this case Bertram, C.J., pointed out the differences which exist between the corresponding sections of the Indian Code and our Criminal Procedure Code. "Our own section appears deliberately to have departed from that model. Our section contains words which are not in the Indian Code, and which impliedly declare that statements made to a Police officer or Inquirer in the course of an investigation under *Chapter XII.* may be used to prove that a witness made a different statement at a different time, *i.e.*, that at a time previous to that at which he is called, he made a statement different from that which he made in the box. Those statements made in the course of an inquiry under *Chapter XII.* may often prove most important in the interests of the defence, and I think it was clearly the intention of the Legislature to allow the evidence to be used in appropriate cases. It is quite true that at the end of the sub-section the draftsman appears to have forgotten the fact that he had enlarged the scope of the sub-section in its first sentence, and did not make a corresponding enlargement in the last sentence; but I do not think that this fact detracts from the effect of the words used in the first part of the sub-section. It follows then that statements made to officers conducting inquiries under *Chapter XII.* can be used to prove that a witness made a different statement at a different time. But they cannot be used as substantive evidence. They can only be used, first of all, when the Court gives permission for that purpose; and when they are used their only legitimate use is for the purpose of discrediting the witness under §155(3) of the Evidence Ordinance. Those statements are not of themselves evidence against the accused person. Their effect, if they discredit the witness, may be to eliminate that witness from the case," *per* Bertram, C. J.

Pakir Ally v. Weerasuriya (1920) 8 *C.W.R.* 71.—Application by the C.I.D. under §121(2) made to the Police Magistrate of Colombo, that the Police were investigating a charge of criminal misappropriation against the accused, who was produced; and the Police Magistrate of Colombo remanded the accused under §126A. On the same day the Police Magistrate of Kurunegala, within whose jurisdiction the alleged offence was committed, took proceedings against the accused, although the formal plaint was not filed before him till some days later, when the Colombo case was withdrawn. *Held*, that this did not make illegal the proceedings in the Police Court of Kurunegala, and that the conviction should be upheld.

Wijegunatileke v. Joniappu (1920) 22 *N.L.R.* 231; 3 *C.L.Rec.* 31; 8 *C.W.R.* 292, and see 3 *T.L.R.* 78; 27 *N.L.R.* 320.—Where, at an inquiry, under *Chapter XII.* of this Code, the defendant made a false statement to the Police implicating the plaintiff in an affray, it was held in an action for damages by the plaintiff against the defendant that the statement was made on a privileged occasion.

R. v. Babbi (1923) 25 *N.L.R.* 117; 1 T.L.R. 288; 5 *C.L.Rec.* 103; see 25 *N.L.R.* 424; 8 *C.L.Rec.* 150; 7 *T.L.R.* 142.—The difference between a first information recorded under §121 and statements of witnesses

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recorded under §122 explained. "§121(1) requires that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police station, shall be reduced to writing and be read over to the informant. It must be signed by the person giving the information. A copy of it must be entered in a book which is called the "Information Book." It is, of course, permissible for the Police officer to question the informant to obtain all necessary particulars. The answers to such questions would form part of the information given. In practice, I find that this information is entered directly in the "Information Book" which the informant signs. If, from the information so received, the officer in charge of the Police station has reason to suspect the commission of a cognizable offence, he is required to send a report to his immediate superior, and, if he thinks there is sufficient ground for entering on an investigation, to proceed in person to the spot to investigate the facts and circumstances, and to take the steps necessary for the discovery and arrest of the offender.—§121(2). The Police officer making such an investigation may, in writing, order the attendance of any person who appears to be acquainted with the circumstances of the case.—§121(3). Then comes the important section, §122, which enables the Police officer holding the inquiry to examine orally any person supposed to be acquainted with the facts and circumstances of the case. The statements made by the persons so examined must be reduced to writing; but no oath or affirmation shall be administered, nor shall such person be required to sign his statement; but such person is bound to answer truly all questions (with two specified exemptions) put to him by the officer. These statements must be recorded or entered in the "Information Book." It is to statements recorded under §122 that the sub-section (3) of that section applies. This sub-section makes these statements inadmissible in evidence, and they can be used only for the purpose of proving that a witness made a different statement at a different time, or of refreshing the memory of the person recording it . . . Then there is the proviso which I have given above. That part of the proviso is new. It is not to be found in the repealed sections 125 and 131(2) of *Chapter XII.* of the Criminal Procedure Code, or in the corresponding sections of the Indian Criminal Procedure Code, Act V. of 1898, §§162 and 173(2). Does the addition of these words to §122(3) enable statements made in the course of the examination of a person under §122(1) to be used as evidence in a charge under §180 (of the Penal Code)? *It should be clearly noted that* §122 *and its sub-sections do not apply to information given under* §121. The information given under that section is a complaint, and is presumed to be given voluntarily, although the Police officer may put questions to the informant to find out all the essential and necessary facts which go to constitute the real complaint. The information or complaint, although entered in the Information Book, is not inadmissible in evidence under §122(3), and can be used as evidence in a prosecution under §180 or §208 of the Penal Code, or for any other purpose for which it is relevant . . . (The learned Judge cited *The Sessions Judge v. Sivan Chetti* (1909) 32 *Mad.* 258; *Gowd v. Emperor* (1908) 31 *Mad.* 506; *Emperor v. Venkatiyada* (1905) 28 *Mad.* 565) . . . The same considerations do not apply to the statements made under §122(1) which provides for the examination of persons other than the informant. Such statements cannot be regarded as voluntary; but as made in answer to questions which the person is bound to "answer truly." If, in the course of such an examination (*i.e.*, an examination under §122(1)), a charge is made against a person,

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§121 it may be that the officer holding the inquiry has the power to make a record of the statement as information given under §121, and to require the person giving it to sign the information after it has been read over to him. Unless this is done, it is impossible to say that a person making a statement under §122(1) and (2) gives information, makes a charge, or institutes criminal proceedings. I find that the mere insertion of the words : " Nothing in this sub-section shall be deemed . . . to prevent such a statement being used as evidence in a charge under §180 of the Ceylon Penal Code " would not render a person who discloses information or an accusation which is proved to be false liable to be dealt with under §180 of the Penal Code. What I refer to here is to the statements being used as the foundation of a charge under §180, but they may, of course, be used for collateral purposes, such as to corroborate the evidence a witness has given in a prosecution under §180. The proviso in question cannot be construed as in any way amending §180 and enlarging its scope."—*per* Jayawardene, J. See *R. v. Caruppen infra.*

R. v. Pabilis (1924) 25 *N.L.R.* 424.—*Three Judges*, see 25 *N.L.R.* 117; 6 *T.L.R.* 109.—Two women were seized by a gang of men who carried them off separately into the fields. One woman made a statement to the Police, and, while her complaint was being investigated, the other woman, who had been ravished, came and made an independent and voluntary complaint. Held by the Full Court that there is a clear distinction between the initial voluntary complaint made to an officer under §121, reduced to writing and signed by the informant, and another subsequent statement which may be made in the course of an investigation conducted by the officer on the basis of the original complaint. Whatever may be the restrictions imposed by §122 upon the use of statements made in the course of the investigation, they do not apply to the original voluntary complaint. The Full Court gave no ruling upon the question of the restrictions imposed by §122. (Bertram, C. J., at the trial had admitted the statements of the two women to corroborate their testimony. The Full Court held that these being statements under §121 could be used for any legitimate purpose, *e.g.*, to corroborate testimony under §157 of the Evidence Ordinance).

R. v. Soysa (1924) 26 *N.L.R.* 324; see 8 *T.L.R.* 60.—*Hamid v. Karthan* (*supra*) followed.—Where a District Judge used entries in the Information Book recorded under §122 for the purpose of corroborating the evidence given by the witnesses for the prosecution, it was held that this violated the provisions of §122(3). This improper use of the Information Book would not necessarily vitiate a conviction if there is other reliable and independent evidence to support the conviction.

Fry v. Rajaratnam (1925) 3 *T.L.R.* 78.—Civil action for damages in regard to information given to the Police by the defendant, and, alleged to be falsely and maliciously given. A person who gives information to the Police at an inquiry held under §122 is in the position of a witness, and is not, therefore, liable in damages if the information turns out to be untrue.—*Wijegunatileke v. Joniappu* (*supra*) followed.—*per* de Sampayo & Maartensz, J.J.

In re Ellawala (1926) 29 *N.L.R.* 13; 7 *C.L.Rec.* 128.—Statements recorded by the Police under §122. " The law prohibits the reception in evidence of such statements except for the purposes specified in §122."

R. v. Cooray (1926) 28 *N.L.R.* 74; 7 *C.L.Rec.* 151; see 8 *C.L.Rec. xli.*; 29 *N.L.R.* 405; 6 *T.L.R.* 109.—*Full Court.*—The accused was charged

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with the murder of an Inspector of Police. At the trial the presiding Judge, at the instance of the jury, called a witness who, it was alleged, had heard the accused call to a Police Constable travelling in a passing bus to the following effect :—" There, your inspector is killed." When the witness denied that he heard such a statement, the Judge read out the statement made by him and recorded in the Information Book. *Held*, that the statement did not amount to a confession within the meaning of §25 of the Evidence Ordinance ; *held*, further :—" In the absence of a statement from the learned Judge (who presided at the trial) it is impossible to say exactly what purpose he had in view when he addressed this question to the witness ; but it is not difficult to conceive of many purposes for which the question may legitimately have been put. The Information Book is the record of an investigation into a cognizable offence made by a Police officer in charge of a station, or a subordinate officer deputed by him for the purpose, or by an Inquirer. Statements made by persons to Police officers or Inquirers and so recorded, may be used for the purpose of proving that a witness made a different statement at a different time, or to refresh the memory of persons who recorded the statements. But any criminal Court in a case under inquiry or trial in such Court may use such statements or information, *not as evidence*, but to aid it in such inquiry or trial. A Court is entitled to use the Information Book to assist it in elucidating points which appear to require clearing up, and are material for the purpose of doing justice.—*Queen Empress v. Mannu* 19 *Alla.* 390. The Information Book may show that there exists a witness, whom neither side has called, able to give material evidence which a Judge may think should be placed before a jury. It may indicate lines of inquiry which should be explored in the highest interests of justice, or may disclose to a Judge that a witness is giving in evidence a story materially different from the story told by him to the investigating officer shortly after the offence. The story told by Martin Cooray as to his meeting with the accused was different to the story he told the Police. The conduct of the accused as disclosed in the one story was materially different to their conduct as disclosed in the other. It was competent for a Judge to put such questions as he thought necessary on the point, and, if need be, to contradict the witness by his statement to the Police. The practice of individual Judges as to the use of the Information Book may vary. Some Judges may prefer not to see it at all ; others may take the view that, in the interests of justice, the fullest use should be made of the book ; others, again, may take the view that it should be resorted to only when, in their judgment, the circumstances of a particular case require such a course if justice is to be done. But there can be no difference of opinion as to the existence of the power, or the right to exercise it within the limits set to it by the law," *per* Garvin, C.J., Dalton & Lyall Grant, J.J. §121

Binduwa v. Siriya. (1926) 28 *N.L.R.* 126 ; 7 *C.L.Rec.* 175.—" Under our Evidence Ordinance, a former statement made by a witness, whether written or verbal, can be used for the purpose of contradicting a witness and, thereby, impeaching his credit—§155(3) ; or of corroborating the testimony of the witness,—§157, and under §122(3) of the Criminal Procedure Code *if the statement is not the first complaint of the commission of an offence*, a statement made by any person to a Police officer or an Inquirer in the course of an investigation under *Chapter XII.* cannot be used otherwise than to prove that a witness made a different statement at a different time. These appear to be the only purposes for which a former statement can be used under our law. Former statements cannot

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§121 be used under our law as substantive evidence.—*R. v. Charles Perera* 3 *S.C.D.* 57 (*Qu.*—§32 and §33 of the Evidence Ordinance?).

R. v. Caruppen (1927) 28 *N.L.R.* 458; 8 *C.L.Rec.* 149; 4 *T.L.R.* 193; see 7 *T.L.R.* 142.—Statements made under §122(1) in answer to questions put by the investigating officer may be made the subject of a charge under §180 of the Penal Code. In this case the accused, who was employed on an estate, gave false information of a theft to his master, who communicated it to the Police. The Police then came to the estate and recorded the statement of the accused. *Held*, (1) that such a case would be indistinguishable from one where a man sent his servant or a friend to the Police station with a request that a Police officer should be sent to him to hear a complaint that he had to make. The statement made to the Police officer would, in my opinion, be the first complaint, and, if false, would render the maker liable to a prosecution under §180 or §208 of the Penal Code. But where the accused does not ask his master to communicate the information to the Police, and the master does so, the subsequent statment of the accused recorded by the Police is one under §122. *Held* (2) *R. v. Babbi* was distinguished on the ground that the statement there was one under §121. *Held* (3) the proviso to §122(3) was enacted to relax in two cases the limitations imposed by §122(3). The first case is that of a statement made to a Police officer under §122 which would be admissible under §32(1) of the Evidence Ordinance; but which is rendered inadmissible by §122(3) if made to a Police officer in an investigation under §122. The second case is, where the statement is a false information constituting an offence under §180 of the Penal Code, in which case it can be used as evidence in the charge, and I cannot see how these words can limit its use to a collateral purpose only such as to corroborate the evidence a witness has given in a prosecution under §180. Mr. Joseph contended that the words "such statement" in the last sentence of the proviso means "such statements as fall within §32(1) of the Evidence Ordinance," but the practical application of this construction is not easy to follow. *Held* (4) it was also contended that section 180 was limited to information given voluntarily, and that there was no offence where the statements were made in answers in which the person interrogated was bound by law to answer truthfully. . . Very little purpose is served by an examination of the Indian Law on this point owing to the very great points of difference between the Indian and Ceylon enactments, of which it is not necessary to state more than one, *viz.*, that there is no express provision in the Indian Criminal Procedure Code enabling statements made to Police officers in investigations under §161 to be used in evidence in a charge under §182 of the Indian Penal Code. It should also be noted that whereas our section 122(2) requires a person questioned to answer truly all questions put to him, the word "truly" is omitted from the corresponding section of the Indian Criminal Procedure Code, with the result that there is in India no legal obligation on a witness to speak the truth in a Police investigation, except, possibly, in the limited cases mentioned in §§202 and 203 of the Indian Penal Code . . . The fact that a statement was made in answer to questions may, in many cases, lend strong support to a defence that it was made *bona fide* and with no ulterior motive, but I find it difficult to hold that in no circumstances can statements made under §122 in answer to questions form the basis of a charge under §180 when there is express provision that such statements can be given in evidence in a charge under that section. If this is so, it will be possible for a person to arrange for the initial complaint under §121(1) to be given by another;

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this information might be limited to a bare statement of the commission of the offence without mention of persons charged, so as not to compromise the informant, and thereafter falsely charge persons at the Police investigation, with immunity from prosecution under §180; it may rightly be said that a statement made in these circumstances is voluntary, *per* Drieberg, J. §122

Wickremasinghe v. Fernando (1928) 29 *N.L.R.* 403; see 6 *T.L.R.* 109; 8 *T.L.R.* 60.—Where a Magistrate referred to the Information Book for the purpose of testing the credibility of a witness by comparing his recorded statement under §122 with the evidence given by him at the trial, *held*, that this use of the Information Book was irregular.

R. v. Silva (1928) 30 *N.L.R.* 193; 6 *T.L.R.* 70; see 10 *T.L.R.* 114.—*Full Bench.*—A statement which is made by a witness to a Police officer, which is afterwards denied by him at the trial, cannot be used as substantive evidence of the facts stated against the accused. Such a statement is only relevant for the purpose of impeaching the credit of the witness.

Silva v. Abeysekera (1929) 30 *N.L.R.* 383; 6 *T.L.R.* 109.—Where voluntary information given to a Police officer alleging the commission of an offence was reduced to writing, evidence of such statement may be given under §157 of the Evidence Ordinance. *N.B.*—The information here was an original statement under §121.

Paulis v. Davith (1930) 32 *N.L.R.* 335; 8 *T.L.R.* 59; see 11 *C.L.Rec.* 110, 33 *N.L.R.* 161.—Where at the close of a case the Magistrate reserved judgment noting that he wished to peruse the Information Book, *held*, that the use of the Information Book for the purpose of arriving at a decision was irregular. *Wickremasinghe v. Fernando* (*supra*) and *R. v. Soysa* (*supra*) cited.

R. v. Perera (1931) 33 *N.L.R.* 69; 11 *C.L.Rec.* 119; 8 *T.L.R.* 169.—Where, after examining the complainant and his witnesses, the Magistrate cited the Police to produce extracts from the Information Book for his perusal before issuing process, *held*, that this use of the Information Book was irregular.

Bartholomeusz v. Velu (1931) 33 *N.L.R.* 161.—Where a Magistrate, at the conclusion of the evidence in a case, sent for and perused the Information Book for the purpose of arriving at a decision, *held*, that this use of the Information Book was irregular. Where a Magistrate wishes to use the Information Book he should call the Police officer who recorded the information.—*Paulis v. Davith* (*supra*) followed.

Examination of witnesses by police or inquirer.

122. (1) Any Police officer or Inquirer making an inquiry under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined, but no oath or affirmation shall be administered to any such person, nor shall the statement be signed by such person. If such statement is not recorded in the Information Book, a true copy thereof shall, as soon as may be convenient, be entered by such Police officer or Inquirer in the Information Book.

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§122 (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

Statements to police or inquirer not to be admitted in evidence.

(3) No statement made by any person to a Police officer or an Inquirer in the course of any investigation under this chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such Court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police officer or Inquirer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police Officer or Inquirer, the provisions of "The Ceylon Evidence Ordinance, 1895," section 161 or section 145, as the case may be, shall apply.

Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32(1) of "The Ceylon Evidence Ordinance, 1895," or to prevent such statement being used as evidence in a charge under Section 180 of the Ceylon Penal Code.

Police Officer.—See §3 *ante*.
Inquirer.—See §3, 120 *ante*.
Writing.—See §3 *ante*.
Signed.—See §3(2) *ante*.
Information Book.—See §121(1) *ante*.
Court.—See §3 *ante*.
Evidence.—See §3 Evidence Ordinance, 1895.
Inquiry.—See §3 *ante*.

1. §122(1) (2) are based on §161(1) (2) of the Indian Code, and §122(3) on §162 of the Indian Code, but very little purpose is served by an examination of the Indian law owing to the very great points of difference between the Indian and Ceylon enactments.—*R. v. Caruppen, Dias v. Kiriwanthia* (1918) 5 *C.W.R.* 187; *R. v. Babbi.*

2. Scope of §122.—The subject will be found set out in §121 paras. 2, 3, 3A, 5, 5A *ante*. The point to note is that, whereas under §121, the first information is one that is voluntarily made, the evidence recorded under §122 is not.—*R. v. Babbi.* The witness' attendance is obtained by summons or warrant, and such person is bound to answer truly all questions relating to such case as are put to him by the investigating officer, except questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.—See para. 6A *infra.*

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3. **Making an inquiry under this chapter.**—It should appear clearly that the Inquirer or Police officer was at the time holding an investigation under *Chapter XII.*—*R. v. Bauri* (1889) 16 *Cal.* 349. "It appears to have become a practice for Police officers . . . to hold a regular investigation of a *quasi*-judicial character in the presence of the accused *and their agents*. This does not seem to be contemplated by the law."—*R. v. Dadan* 33 *Cal.* 1023.

4. **Any person.**—See §121 para. 12 *ante*. Where an Inquirer or Police officer is in possession of facts upon which he is bound to arrest a person, it is improper for him to obtain a statement from him under §122 and to reduce it to writing."—*R. v. Jadub* 27 *Cal.* 295.

5. **May examine orally.**—The examination of the first informant under §121 and of a witness under §122 are not identical. In the former instance what the witness says is entered in the Information Book, read over to him, and signed by him. There is no harm in putting questions to the informant under §121 in order to elucidate the narrative. —*R. v. Babbi.* Under §122 the investigating officer has to examine the witness orally, *i.e.*, by putting questions and eliciting answers. No oath or affirmation may be administered to the witness, nor is he requested to sign the record. Where, however, in the course of the evidence the witness makes a charge or gives what amounts to a first information, it would be open to the investigating officer to treat such statement as a first information, and read it over to the witness and get him to sign the statement.—*R. v. Babbi.* The witness is bound to answer questions truly. The penalty for refusing to answer is to be found in §177 of the Penal Code.—*Van Cuylenberg v. Sellamuttu*; while the penalty for stating what is false is to be found in §175 of the Penal Code.

As to summoning the accused or suspected person as a witness.—See §121 para. 12 *ante* and para. 4 *supra*.

6. **Bound to answer truly.**—The word "truly" has been omitted from the corresponding section in the Indian Code.—*R. v. Caruppen.* In spite of *Thampu v. Nagan* (1923) 25 *N.L.R.* 69 it appears to be clear that a witness who, when examined under §122, gives false information or makes a false charge can be convicted of an offence under §180 of the Penal Code.—*R. v. Caruppen.* See §121 para. 5A. and para. 10 *infra*. It is a question whether witnesses who are not compellable to give evidence, *e.g.*, a wife against her husband, advocates and proctors, public servants claiming privilege, etc., can be compelled to give evidence at an inquiry under *Chapter XII.* It is submitted that this question should be answered in the negative. It is clear from the definition of the word "Court" in the Evidence Ordinance that that Ordinance applies to inquiries under *Chapter XII.* of this Code. That being so, not only do the rules of evidence bind an Inquirer, but also persons who are neither competent nor compellable to give evidence cannot be compelled to give evidence under *Chapter XII.* It is to be feared, however, that this rule is not observed.

6A. **Other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.**—If, as pointed out in para. 6 *supra*, the Evidence Ordinance applies to investigations under *Chapter XII.*, §132 of that Ordinance would apply to such investigations, so that it was really unnecessary to enact this exception excusing a witness examined under §122 from answering incriminating questions.

It should be noted that our law with regard to incriminating questions is different from the English law. Under the English Law a witness

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§122 need not answer an incriminating question ; whereas under our Law he will be compelled by the Court to answer. §132 of the Evidence Ordinance is confined to answers to questions which are relevant to the matter in issue, whereas under the English law the privilege is general in its application. The English law extends its protection to the spouse of the witness, while our Evidence Ordinance is silent on the point. In a *casus omissus*, the English law may be resorted to.—§100. §132 of the Evidence Ordinance draws a sharp distinction between cases in which a witness voluntarily answers a question, and those where he objects to answer on the ground that the answer might incriminate him, and is then compelled by the Court to answer. Protection under §132 can only be claimed in regard to the latter. Nevertheless, the tendency of our Judges is to follow the principles of the English law.—*C.f. R. v. Weerasinghe* (1926) 8 *C.L.Rec.* 36. The same tendency is to be seen in the recent case of *Van Cuylenberg v. Caffoor*, where the prosecuting counsel conceded that the law applicable to §122(2) of this Code, where a person on being questioned claims the privilege of silence, is the same as that applicable in the case of a witness claiming the privilege in a judicial proceeding. If so, that privilege would be claimed in Ceylon under §132 of the Evidence Ordinance ; but it will be seen from the report of the case that §132 was not referred to in the judgment, and, while reference is made to certain English decisions, no reference was made to the local cases ; and this case was followed in *Van Cuylenberg v. Sellamuttu.* Exactly what degree of evidence is required to decide whether any question has a tendency to one thing or another is difficult to say, but where the brother of a thief was asked whether he recovered that property and returned it to the complainant, Ennis, J. *held*, that the answer to such a question might possibly have a tendency to expose the witness to a charge of attempting to compound the offence; an offence punishable under §211 of the Penal Code.—*Deheragoda v. Alwis.* So where a collision between two motor cars took place and a person was killed, the Police were trying to find out who drove the car which caused the collision. The police suspected X, and questioned him at the inquiry under §122. See *R. v. Saminada* 7 *Mad.* 274—§121 para. 12 *ante.* He was asked where he was at the time the collision took place and whether he drove in a certain car. The witness refused to answer the first question and " reserved his answer " to the second. For this he was convicted under §177 of the Penal Code, but in appeal he was acquitted.—*Van Cuylenberg v. Caffoor.*

See generally *Dias on the Evidence Ordinance pp.* 250 - 256.

7. **§122(3).**—See §121 paras. 2, 3, 3A, 5, 5A *ante* where the legal principles involved will be found set out in detail.

To prove that a witness made a different statement at a different time—*i.e.*, to discredit the witness under §155(3) of the Evidence Ordinance. But when the Information Book is used to discredit a witness, the recorded statement does not become substantive evidence in the case.—*Dias v. Kiriwanthia; R. v. Cooray; Binduwa v. Siriya; R. v. Silva.* Statements recorded under §122 may not be used to corroborate a witness.—*R. v. Soysa; Wickremasinghe v. Fernando; Hamid v. Karthan.*

An accused who gives evidence on his own behalf at his trial does so " with the like effect and consequences as any other witness"—§120(6) Evidence Ordinance. Therefore, he is liable, like any other witness, to be confronted with a previous statement made by him which is inconsistent with his present testimony, whether such statement is a confession,

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or merely a statement recorded under §122 of this Code. By electing to give evidence he has surrendered the privileged position he was in, and can be treated as any other witness.

To refresh the memory of the person recording it.—*i.e.*, under §159 of the Evidence Ordinance. It should be noted that it is only the memory of the investigating officer that can be refreshed by the production of the Information Book ; the memory of the witness cannot be so refreshed. If a document is used to refresh memory, the other side is entitled to inspect the document and to cross-examine on it.—§161 Evidence Ordinance. This right is specially conserved by §122(3).

The use of the Information Book by the Court.—The Court may not use what the information book contains as evidence in the case ; it can only use the book " to aid it in such inquiry or trial."—*Hamid v. Karthan*. It is improper for the Judge to call for the Information Book in order to enable him to make up his mind on what he is doubtful about on the material before him on the record, *e.g.*, to make up his mind whether process should issue—*R. v. Perera* (1931) 33 *N.L.R.* 69—or how he is to decide the case.—*Paulis v. Davith* (1930) 32 *N.L.R.* 335; *Bartholomeusz v. Velu* (1931) 33 *N.L.R.* 161.

The practice of individual Judges vary, but the Information Book may show that there exists a witness, whom neither side has called, able to give material evidence, which ought to be placed before the Court ; or it may indicate lines of inquiry which should be explored in the highest interests of justice ; or it may disclose that a witness in giving evidence is stating something which is materially different from the story told by him shortly after the commission of the offence.—*R. v. Cooray* (1926) 28 *N.L.R.* 74. Where an Information Book is improperly used this does not necessarily vitiate a conviction if there is other reliable evidence available to support the conviction.—*R. v. Soysa*, but see *S.I.P. v. Talgahagoda*; *Wickremasinghe v. Fernando* (1928) 29 *N.L.R.* 403.

8. **The right of the accused or his agents to see the entries in the Information Book.**—See §121 paras. 3A, 5 *ante*. No privilege other than that created by §125 of the Evidence Ordinance attaches to statements recorded under §121 *ante*. The defence can only look at the Information Book entries recorded under §122, if they are used to refresh memory, or to discredit a witness under §145 of the Evidence Ordinance. In such cases the defence cannot look right through the book, but must confine the inspection to the specific entry actually dealt with—*per* Wood Renton, C. J. in the *Attygalla Murder Case* (1907) and see §121 para. 13 *ante*.

9. **Dying declarations under §32(1) of the Evidence Ordinance.**—§32 of the Evidence Ordinance makes admissible various statements of persons who are dead, or who cannot be called, &c. Under this Code, statements recorded under §121 *ante* can be used for any purpose for which it is relevant—§121 para. 3A *ante*—but statements under §122 can only be used as substantive evidence as a dying declaration under §32(1) of the Evidence Ordinance, and not under any of the other sub-sections to that section.

10. **§122 and charges under §180 of the Penal Code.**—See §121 para. 5A *ante*, and para. 6 *supra*.

11. **Case law.**—*The Attygalla Murder Case* (1907).—See §121 para. 13 *ante*.

Deheragoda v. Alwis (1913) 16 *N.L.R.* 233; see 35 *N.L.R.* 100.—" In §122(2) of the Criminal Procedure Code it is provided that a person

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§122 is not bound to answer any question which may have a tendency to expose him to a criminal charge. It has been urged that the question put in this case to the accused by the Sub-Inspector of Police was one which had a tendency to expose him to a charge under §211 of the Penal Code. Exactly what degree of evidence is required to decide whether any question has a tendency to one thing or another is difficult to say, but in this case the question put to the brother of the person, who is alleged to have stolen property, as to whether he recovered that property and returned it to the complainant would, in my opinion, possibly have a tendency to expose him to a charge of attempting to compound the offence," *per* Ennis, J.

Hamid v. Karthan (1917) 4 *C.W.R.* 263.—see §121 para. 13 *ante.*

Wijegunatileke v. Joniappu (1920) 22 *N.L.R.* 231.—See §121 para. 13 *ante.*

R. v. Babbi (1923) 25 *N.L.R.* 117.—See §121 para. 13 *ante.*

R. v. Pabilis (1924) 25 *N.L.R.* 424.—See §121 para. 13 *ante.*

R. v. Soysa (1924) 26 *N.L.R.* 324.—See §121 para. 13 *ante.*

Fry v. Rajaratnam (1925) 3 *T.L.R.* 78.—See §121 para. 13 *ante.*

R. v. Caruppen (1927) 28 *N.L.R.* 458.—See §121 para. 13 *ante.*

Van Cuylenberg v. Caffoor (1933) 34 *N.L.R.* 433.—See 35 *N.L.R.* 100.—The accused was charged and convicted under §177 of the Penal Code in that he, being legally bound under the provisions of §122(2) of the Criminal Procedure Code to answer truly the questions relating to an offence under §298 of the Penal Code, refused to answer certain questions put to him by the Inspector. The questions were: (*a*) " Where were you last evening ? " (*b*) " Did you travel in either the Hillman or the Vauxhall car ? " The accused refused to answer the first question, and to the second he replied " I reserve my answer." " At no time did the Inspector call appellant's attention to what he was doing, or caution him, or inform him that he was compelled to answer questions, or that he might incur any liability in refusing to do so. There is no reason to doubt, in my opinion, that appellant was at that stage suspected by the Inspector as being the person for whom he was looking, *viz.*, the driver of the car and responsible for the collision, that he was seeking to obtain from appellant information that might assist him (the Inspector) on this point and that appellant was in danger of a charge being brought against him . . . The law applicable in a case such as this where a person being questioned claims the privilege of silence, Mr. Ilangakoon agrees, is the same as that applicable in the case of a witness claiming the privilege in a judicial proceeding . . . (The learned Judge cited *R. v. Boyes* 30 *L.J.Q.B.* 301, and *Ex parte Reynolds* 20 *Ch. D.* 294—but note the terms of §132 of the Ceylon Evidence Ordinance, 1895) . . . Applying the law I have set out to the facts of this case, the questions set out in the charge put to the appellant by the Inspector were, in the circumstances, questions which, under the provisions of §122(2) of the Criminal Procedure Code, he was not compelled to answer as being questions which would have a tendency to expose him to a criminal charge."

Van Cuylenberg v. Sellamuttu (1933) 35 *N.L.R.* 99.—A person who refuses to answer questions under §122 may be charged under §177 of the Penal Code. *Van Cuylenberg v. Caffoor* (followed).

S.I.P. v. Talgahagoda (1934) 13 *C.L. Rec.* 211.—A conviction was quashed and a new trial ordered because the Magistrate at the conclusion of the case for the prosecution "verified the statements" of the witnesses from the Information Book.

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No inducement to be offered.

123. No Inquirer or Police officer shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement with reference to the charge against such person. But no Inquirer or Police officer shall prevent or discourage by any caution or otherwise any person from making, in the course of any investigation under this chapter, any statement which he may be disposed to make of his own free will. §123

Inquirer.—See §§3, 120 *ante.*

Police officer.—See §3 *ante.*

Offence.—See §3 *ante.*

Peace officers and persons in authority not to induce statements.—See §133 *post.*

1. §123 is based upon §163 of the Indian Code. The two sections, although similar in their scope, are not identical in their terms.

2. **Scope of §123.**—No *confession* of an accused person is admissible if it has been made by reason of any inducement, threat, or promise, having reference to the charge against him, and proceeding from "a person in authority," and which inducement, threat, or promise gives the accused reasonable grounds for supposing that by making a confession he would gain any advantage or avoid any evil of a temporal nature in reference to the charge against him—§24 Evidence Ordinance—and no confession made to a Police officer by an accused can be proved against him—§25 (*ibidem*)—but in the latter case, if the confession is made in the immediate presence of a Magistrate, such confession can be proved.—§26 (*ibidem*) and see §134 *post.* In any case where, as a result of a confession, some fact is affirmatively proved to exist, so much of the confession as relates to the fact discovered is admissible, although the whole confession itself would not be receivable.—§27 (*ibidem*). Parke B. in his charge to the jury in the case of *R. v. Thurtell** laid down the law in these terms: "A confession obtained by saying to the party 'You had better confess, as it would be the worse for you if you do not confess' is not legal evidence, but, though such a confession is not legal evidence, it is the everyday practice† that if, in the course of such a confession, the party states where stolen goods or a body may be found, *and they are found accordingly*, this is evidence, because the fact of finding proves the truth of the allegation, and his confession in this respect is not vitiated by the hopes or threats which may have been held out to him." Moreover, any confession obtained by a person in authority as stated in §24 of the Evidence Ordinance is not rendered inadmissible if it is made *after* the impression created by the inducement, threat, or promise has been removed—§28 (*ibidem*)—nor is such a confession inadmissible merely because it was made under a promise of secrecy, or in consequence of a deception practised upon the accused, or because he was intoxicated at the time, or *because he made it in answer to questions he need not have answered*, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.—§29 (*ibidem*) and see §122(2) *ante.*

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* (1824) *Notable British Trials p.* 145.

† So far as Ceylon is concerned this is law—§27 Evidence Ordinance.

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§123 An " Inquirer " is not necessarily a Police officer, so that if an accused person who is not in the custody of the Police makes a confession to the Inquirer, and the Inquirer is not a Police officer, such confession would not be inadmissible under §§25 - 26 of the Evidence Ordinance. A Police officer carrying on an investigation under *Chapter XII.* is in a different situation from an Inquirer, inasmuch as all statements made by an accused to him would be held to be inadmissible in evidence, except as provided by §§26 and 27 of the Evidence Ordinance. §123 of this Code, therefore, lays down a rule for the guidance of all persons investigating crimes under *Chapter XII.* that no inducement, threat, or promise is to be held out or offered by them to any person charged with an offence, so as to induce him to make any statement with reference to the charge against him—*c.f.* §122(2) *ante*—but they are not to discourage or prevent such person from making any voluntary statement or confession.

§123 must be read and construed in the light of §133 *post.* The latter section refers to " Peace Officers " and " persons in authority," and the terms of the section itself are identical with those of §123, save that it contains the further caution that " except as provided in *Chapter XXII.*"* No such inducement, threat, or promise is to be held out to an accused. All Police officers are Peace Officers—see §3 *ante*—but it has not been decided whether an Inquirer can be said to be a " person in authority " within the meaning of §24 of the Evidence Ordinance or §133 *post.* A " person in authority " is one who has some opportunity of influencing the course of the prosecution, *e.g.*, a person having custody of the accused.† If this view is correct, an Inquirer would be " a person in authority," for he can arrest and order the detention of the accused. Hence §§123 and 133 should be read and construed together in so far as investigations under *Chapter XII.* are concerned.

If an accused person, while an investigation is in progress, desires to make a voluntary statement or confession, the safest course would be to send him at once before a Police Magistrate and have his statement duly recorded as provided by §134 *post.* A statement so recorded would be admissible in evidence by reason of §26 of the Evidence Ordinance, and the presumption of regularity attaching to official acts will also arise in its favour.—§80 Evidence Ordinance, and see *R. v. Mudianse* (1918) 21 *N.L.R.* 48.

3. **R. v. Mistri (1909) 31 Alla. 592.**—Where an officer holding an investigation induced an accused by promises to produce certain productions connected with the charge, and it was contended that by reason of §123 the evidence relating to the conduct of the accused was inadmissible. *Held*, " It is to the Evidence Act and not to the Code of Criminal Procedure that we have to look as to whether the evidence in point is or is not admissible." Such evidence was clearly admissible under §27 of the Evidence Ordinance. See *R. v. Thurtell* para. 2 *supra.* See also *Wellapulli v. Cornelis* (1918) 5 *C.W.R.* 297.

4. **Offer or make or cause to be offered or made any inducement, threat, or promise.**—See §§24, 28, 29 Evidence Ordinance, and §133 *post.*

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* §283-286 (See para. 5 *post*)—Tender of a pardon to an accomplice. §295—Interrogation of an accused by the Magistrate.

†*Kenny on the Criminal Law p.* 397 ; 9 *Halsbury's Laws of England* §763, *p.* 394 *et seq; R. v. Wickremasinghe* (1894) 3 *S.C.R.* 75 ; *R. v. Dissanayaka* (1901) 5 *Tam.* 33 ; *Hodgson v. George* (1909) 12 *N.L.R.* 273 ; *Dionis v. Peris Appu* (1908) 7 *Tam.* 28.

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5. **Charged with an offence.**—These words do not mean that there should be a formal charge made against the accused in a Court of law, they mean "accused of or suspected of having committed or been concerned in the commission of an offence." §124

Search by Police officer or Inquirer.

124. (1) Whenever any officer in charge of a Police station or an Inquirer making an investigation in a cognizable case considers that the production of any document or thing is necessary to the conduct of the investigation, and there is reason to believe that a person to whom summons or order under Section 66 has been or might be issued will not produce such document or other thing as directed in the summons or order, or when such document or other thing is not known to be in the possession of any person, such officer or Inquirer may search or cause search to be made for the same in any place.

(2) Such officer or Inquirer shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person and there is no other person competent to make the search present at the time, he may require any headman to make the search, and he shall deliver to such headman an order in writing specifying the document or other thing for which search is to be made and the place to be searched, and such headman may thereupon search for such thing in such place.

(4) The provisions of this Code as to search warrants and searches thereunder shall, so far as may be, apply to a search made under this section.

Officer in charge of a Police station.—See §3 *ante.*

Police Station.—See §3 *ante.*

Inquirer.—See §§3, 120 *ante.*

Cognizable case.—See §3 *ante.*

Production of any document or thing.—See §§66, 68, 70, 71 *ante.*

Summons.—See §§44 *et seq. ante.*

Not known to be in the possession of any person.—*C. f.* §68(1) *ante.*

Place.—See §3 *ante.*

If practicable.—§45(2) *ante.*

Search in person.—*C. f.* §121(2) *ante.*

Headman.—See "Peace Officer" §3 *ante.*

Writing.—See §3 *ante.*

This Code.—See §1 *ante.*

Search Warrants and searches.—See §68 *et seq. ante.*

1. §124 is based upon §165 of the Indian Code, but the two sections, although similar in their scope, are not identical in their terms.

2. **Scope of §124.**—This section expressly refers only to "cognizable cases," but it would apply equally to "non-cognizable cases",

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§124 provided the necessary authority under §129 *post* has been obtained.—*Mudalihamy v. Isma* (1916) 19 *N.L.R.* 286; 3 *C.W.R.* 201, and see *Banda v. Tikka* (1917) 4 *C.W.R.* 242.

Whenever an officer lawfully holding an investigation under *Chapter XII.* considers that the attendance of certain witnesses is necessary, he can compel their attendance under §121(3) *ante*.

If he considers that the production of "any document or thing" is necessary, and there is reason to believe that "a person to whom a summons or order under §66 has been, or might be, issued" will not produce it; or when such document or thing is not known to be in the possession of any person, the person holding the investigation "may search or cause search to be made for the same in any place."—§124(1). If it is practicable for him to do so, the investigating officer should conduct the search in person—§124(2)—but if this cannot be done, and there is no other person "competent to make the search" present at the time, he may order any headman to make the search on his behalf. For this purpose the investigating officer must give the headman an order in writing, specifying the document or thing for which search is to be made, and the place to be searched. Such an order vests the headman, to whom it is directed, with lawful authority to make the search, and any obstruction offered to him, while lawfully engaged in the execution of the search would amount to an offence.—§124(3).

§124(4) enacts that the provisions of this Code relating to search warrants, and to searches made under search warrants "shall so far as may be" apply to searches made under §124.

3. **Reason to believe.**—See §§56 para. 10, 62 para. 9, 68 para. 10 *ante*, and §24 Penal Code.

Considers.—See §68 para. 10 *ante*.

N.B.—The use of the word "and" in §124(1). The officer must not only consider the production of the document or thing necessary, but he must also have reason to believe (i) that it will not be produced, or (ii) that it is not known to be in the possession of any person.

4. **A person to whom summons or order under §66 has been or might be issued.**—See §66 *ante*.

When may a summons under §66 be issued?—See §66 paras. 2, 3, 5, 6, 7.

§124 applies where the investigating officer is satisfied that the document or thing will not be produced, whether an order under §66 has or might have been made. An order under §124 may not be made with regard to documents which are privileged from production under §66, and see *R. v. Saminada* §121 para. 12 *ante*.

5. **Is not known to be in the possession of any person.**—See §68(1) *ante*.

6. **May search or cause search to be made.**—A general search is illegal. "The law does not empower a Police officer to search an accused's house for anything but the specific article which has been, or can, be made the subject of a summons . . . to produce. A general search for stolen property is not authorized and the law cannot be got over by using such an expression as "stolen property relevant to the case."—*R. v. Prankhang* 16 *C.W.N.* 1078; *R. v. Bajianji* 38 *Cal.* 304. See §68 para. 14 *ante*.

The search should as a general rule be conducted in person by the investigating officer.—See §124(2), *c.f.* §121(2), 79 *ante*. If this is not practicable, he may depute some "other person competent to make the search," and who is present, to do so.—§124(3). The

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expression " competent to make the search " in the case of an investigation held by the Police would include any subordinate Police officer —*C.f.* §§121(2) proviso *ante*, 125 *post*; and in the case of an Inquirer any person who, in the opinion of the Inquirer, is competent to make the search. If no such persons are available, the investigating authority may requisition the aid of any headman. Before the headman can make the search he must be given a written order in terms of §124(3). The section is silent as to whether a similar order should be given to any other person, not being a headman, who is deputed by the Inquirer or officer to carry out the search. By reason of the terms of §124(4), it would appear that such persons too should be duly authorized by an order in writing, in order to enable them lawfully to carry out the search, and to make any obstruction offered to them a criminal offence. Were it not so, any unauthorized person would be able to make a search without having to produce his authority, if the legality of his proceedings is called in question.—See §74 *ante* See also §§68–76 *ante*.

The search.—See §§26, 30 – 31 *ante*.

The provisions of this Code relating to searches are to apply " so far as may be " to searches made under §124.—§124(4). See §§68 – 76 *ante* and *General Orders* 991 – 994 ; 929 – 941.

7. **Gorait v. Sadhukhan (1910) 38 Cal. 68.**—See §66 para. 6 *ante*. *Clarke v. Chowdhry* (1909) 36 *Cal. at pp.* 447, 452 – 453.—For the facts see §66 para. 3 *ante*. *Held further*, that the search was not justified by §165 of the Indian Criminal Procedure Code (*local*—§124), as that section does not apply to a Magistrate.

8. **Document or thing.**—See §66 para. 4 *ante*. *C.f.* §127 para. 7 *post*.

9. **So far as may be.**—See §§64(3), 73 *ante*.

Duty of subordinate officer to report to officer in charge of station.

125. When any subordinate Police officer has made any investigation under this chapter, he shall report the result of such investigation to the officer in charge of the Police station.

Police officer.—See §3 *ante*.

Officer in charge of the Police station.—See §3 *ante*.

Police station.—See §3 *ante*.

1. §125 is based upon §168 of the Indian Code, with which it is identical in its terms.

2. **Subordinate Police officer.**—See §§121(2) proviso, §124(3) *ante*.

3. **Any investigation.**—*i.e.*, under §121, or §124 *ante*.

4. **Report.**—See §§121(2), 126A, 127(3), 131.

5. **A subordinate officer conducting an investigation under *Chapter XII*, is bound by the provisions of §§121(3), 122, 123, 124 *ante* and 129, 131 *post*.** When he has concluded the investigation, he makes a report of the result of such investigation to the officer in charge of the station, who thereupon acts under §§126, 126A, 127A.

Release of accused if evidence deficient.

126. If, upon an investigation under this chapter, it appears to the officer in charge of the Police station or the Inquirer that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding

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§126 of the accused to a Police Court, such officer or Inquirer shall, if such person is in custody, release him on his executing a bond with or without sureties as such officer or Inquirer may direct to appear if and when so required before a Police Court having jurisdiction to try or inquire into the offence.

Officer in charge of the Police station.—See §3 *ante*.

Police station.—See §3 *ante*.

Inquirer.—See §§3, 120 *ante*.

Police Court.—See §3 *ante*.

To try.—*Chapter XVIII. post.*

To inquire.—*Chapter XVI. post.*

Offence.—See §3 *ante*.

1. §126 is based upon §169 of the Indian Code, but the two sections are not identical in their terms, although similar in their scope.

2. **Scope of §126.**—After an investigation has been held the investigating authority (i) either comes to the conclusion that there is not sufficient evidence or reasonable grounds of suspicion for proceeding further, or (ii) that a case has been made out for further investigation or trial by the Police Court. The procedure to be followed in the latter event is to be found stated in §127 *post*, while §126 deals with the procedure to be followed when the investigating officer finds that it is useless to send the case to the Magistrate. §126A deals with the intermediate stage, *i.e.*, where an investigation cannot be completed within the time limit imposed by §37 *ante*.

Under §126 the investigating officer is required to release the accused, if he is in custody, on his executing a bond, with or without sureties, to appear before the Police Court, whenever called upon to do so. *C.f.* §39 *ante*. The investigating officer will thereafter make his final report to the Police Court under §131 *post*.

3. **Upon an investigation under this chapter.**—*i.e.*, whether such investigation has been held by an inquirer, officer in charge of a station, or a subordinate Police officer. See §127 *post*.

4. **Reasonable ground of suspicion.**—*C.f.* §32(1)(*b*) para. 6 *ante*. See §127 *post*.

Release from custody.—See §39 *ante*, which only refers to Peace Officers. §126 makes no reference to "bailable offences."—See §127 para. 5 *post*.

6. **Bond, with or without sureties.**—See §39 para. 3 *ante* and *Chapters XXXVI.* and *XXXIX. post*. *C.f.* §126A(3) *post*.

Procedure when investigation cannot be completed in twenty-four hours. [§6, 31 of 1919.]

126A. (1) Whenever an investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by Section 37, and there are grounds for believing that the information is well founded, the officer in charge of the Police station or the Inquirer shall forthwith transmit to the Police Magistrate having jurisdiction in the case a report of the case, together with a summary of the statements, if any, made by each of the witnesses examined in

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the course of such investigation relating to the case, and shall at the same time forward the accused to such Magistrate. §126A

(2) The Magistrate to whom an accused is forwarded under this section may, from time to time, authorize the detention of the accused in the custody of the Fiscal for a term not exceeding fifteen days in the whole.

(3) If the Magistrate considers further detention unnecessary, he may either withdraw the case from the Inquirer and himself try such case, or inquire into it with a view to committal, or may require the accused to execute a bond, with or without sureties, to appear if and when so required.

Officer in charge of the Police station.—See §3 *ante*.

Police station.—See §3 *ante*.

Inquirer.—See §§3, 120 *ante*.

Police Magistrate.—See §3 *ante*.

Try.—See *Chapter XVIII. post*.

Inquire.—See *Chapter XVI. post*.

Committal.—See §§158 *et seq. post*.

1. §126A is based upon §167 of the Indian Act, but the two sections are not identical in their terms, though similar in scope.

2. **Scope of §126A.**—This section was added to the Code by §6 of Ordinance No. 31 of 1919. Under the law, as it existed prior to the amendment, if the *Police* were making an investigation under *Chapter XII.*, they were only given twenty-four hours within which to make up their mind to charge the accused, who had been arrested without a warrant or not—see §37 *ante*, and §129(2) *post*. At the end of that period they were bound to forward the accused to the Magistrate, who would have no option but to discharge the accused, if there was no available evidence against him. §126A was, therefore, enacted authorizing all officers investigating offences under this chapter to produce the accused before the Magistrate and to ask for a remand pending further investigation. This section should more logically have been placed before §126.

If the investigating officer finds that he is unable to complete the investigation within twenty-four hours from the time the accused was arrested—see §37 *ante*, and the case appears to be a true one, he should "forthwith" forward a report of the case to the Magistrate together with a summary of the evidence recorded, and also forward the accused to the Magistrate.—§126A(1). The Magistrate may thereupon, "from time to time", authorize the detention of the accused not by the Police, but **by the Fiscal** for a period not exceeding fifteen days *in the whole*.—§126A(2). *C.f.* §289 *post*. If at any time the Magistrate considers that any further detention of the accused is unnecessary, he may withdraw the investigation from the Inquirer, nothing is stated about an officer in charge of a station, and deal with the case himself, or release the accused on bail.—§126A(3). See §129 para. 6 *post*.

§126A cannot apply to non-cognizable cases, inasmuch as in such cases, there is no accused in custody, or if an accused has been arrested upon a warrant, he would have been duly produced before the Magistrate. §37 *ante* only applies to persons arrested without a warrant.

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§126A If any person has been lawfully arrested without a warrant §126A applies, but not otherwise.

Even where the Magistrate makes an order under §126A(2), it is the duty of the investigating authority to complete the inquiry without unnecessary delay—see §131 *post.*

3. **The distinction between §126A and §289 *post.***—§289 relates to inquiries and trials held by a Judge acting in his judicial capacity and has nothing to do with investigations under *Chapter XII.*—*R. v. Krishnaji* 23 *Bom.* 32. See also *R. v. Engadu* 11 *Mad.* 98.

4. **Forthwith.**—See §33 para. 3 *ante.*

5. **Report.**—See §§121(2), 125, 127(3), 131.

6. **Forward the accused.**—See §§36, 37, 126 *ante*, §127 *post.*

7. **Authorize the detention of the accused.**—As the investigating officer cannot ask for a remand at all under this section unless there are grounds for believing that the information is well founded, this is clearly the first point on which the Magistrate should satisfy himself before considering whether there are grounds for directing a remand. The accused should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody, or to order a remand without some reason made manifest to him.—*Kadir v. Magistrate of Purneah* 20 *W.R.* 23. There should at least be something to satisfy the Magistrate that the remand would assist in some discovery of fresh evidence.—*R. v. Kampu* 11 *C.W.N.* 554.

8. **Not exceeding fifteen days in the whole.**—*i.e.*, the total periods for which the accused is remanded under §126A(2) must not in the aggregate exceed fifteen days.—See *R. v. Engadu* 11 *Mad.* 98; *R. v. Krishnaji* 23 *Bom.* 32. *C. f.* §289 (2) *post.*

9. **In the custody of the Fiscal.**—*i.e.*, the accused may not be remanded into Police custody under §126A(2). In certain cases, where the investigation under *Chapter XII.* had not been completed, it was the practice of Magistrates to remand the accused back to Police custody. This practice is obviously open to criticism :—(i) it would tempt the Police to influence the accused to make confessions in the hope of getting off, and (ii) even if no such inducement was offered, and an accused voluntarily confessed his guilt to the Magistrate at a time when he was produced from Police custody, it allows room for the defence at the trial to allege that the confession was made to the Magistrate upon undue influence exercised by the Police. It is for this reason that §126A(2) has been framed in these terms. Once an accused is produced before the Magistrate, he should not remand him back to Police custody. If a remand is required, it should be made to the custody of the Fiscal. This rule may work hardship upon the prosecution in two instances :—(i) Take the case of a Police Court situate in a place where no remand jail exists, or where such a remand as specified in §126A(2) cannot be made ? (ii) Suppose a case, where an accused volunteers to point out certain places or things material to the case, *e.g.*, the place where stolen property or a murdered body has been hidden, or to point out persons whom the accused states saw certain facts take place ? It would be impossible to have this done, unless the accused was remanded to the custody of some Police officer. In a Sessions case tried before Bertram, C.J., in Negombo* (1922), the learned Judge intimated that in such circumstances it was desirable that the investigating Magistrate himself should accompany the accused and the Police. This, no doubt,

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* *R. v. Saiya* (1922) 4th Western Criminal Sessions Negombo, December, 1922.

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may be done in places where there is more than one Magistrate, or where the only Magistrate available is not a busy official, but it is easy to conceive of cases where the Chief Justice's view cannot be given effect to. See also *R. v. Krishnaji* 23 *Bom.* 32, *R. v. Rama* 4 *B.L.R.* 878—§289 para. 6 *post.* §127

10. **Withdraw the case from the Inquirer.**—It should be observed that §126A(3) makes no reference to an officer in charge of a station.—See §126A(1). This appears to be an omission.—See §130 para. 4 *post.*

11. **Bond with or without sureties.**—See §39 para. 3 *ante* and *Chapters XXXVI.* and *XXXIX. post. C.f.* §126 *ante.*

Duty of officer or Inquirer to forward case to a Police Court if evidence sufficient.

127. (1) If, upon an investigation under this chapter, it appears to the officer in charge of the Police station, or the Inquirer, that there is sufficient evidence or reasonable ground as aforesaid, such officer or Inquirer shall forward the accused under custody before a Police Court having jurisdiction in the case, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Court.

When the officer in charge of a Police station or an Inquirer forwards an accused person before a Police Court or takes security for his appearance, he shall send to such court any weapon or other article which it may be necessary to produce before such court, and shall require the complainant (if any) and so many of the persons who appear to such officer or Inquirer to be acquainted with the circumstances of the case, as he may think necessary, to execute a bond to appear before a Police Court therein named and give evidence in the matter of the charge against the accused.

(2) The officer or Inquirer in whose presence the bond is executed shall send such bond to the Police Court.

(3) If any complainant or witness refuses to execute such bond, such officer or Inquirer shall report the same to the Police Court, which may thereupon, in its discretion, issue a warrant or summons to secure the attendance of such complainant or witness before itself to give evidence in the matter of the charge against the accused.

Officer in charge of the Police station.—See §3 *ante.*
Police station.—See §3 *ante.*
Inquirer.—See §§3, 120 *ante.*
Police Court.—See §3 *ante.*
Offence.—See §3 *ante.*
Bailable.—See §3 *ante.*
Warrant.—See §50 *et seq. ante.*
Summons.—See §§44 *et seq. ante.*

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§127

1. §127 is based upon §170 of the Indian Code, but the two sections are not identical in their terms or their scope.

2. **Scope of §127.**—See §126 para. 2 *ante.*

§127 lays down the procedure to be followed when the investigating officer, at the termination of the inquiry, comes to the conclusion that there is sufficient evidence or reasonable grounds of suspicion to justify the case being submitted to the Magistrate for further investigation, or trial. In such an event he must forward the accused in custody to the Magistrate—see §§36 – 37 *ante.* or if the offence with which the accused is charged is bailable, and the accused is able to give bail, he shall release the accused after taking security for his due appearance before the Police Court—see §39 *ante.* The investigating officer will also have to forward to the Magistrate his final report—see §131 *post,* and *c.f.* §38 *ante.* At the same time he should send to the Court any weapon or other article which it may be necessary to produce before the Court —*c.f.* §31 *ante*—and shall require the complainant and other necessary witnesses to execute bonds to appear before the Police Court and give evidence. He should forward all bail bonds to the Magistrate. If the complainant or any witness refuses to execute a bail bond, the investigating officer should report the fact to the Magistrate, who may thereupon issue a summons or a warrant on the defaulter.

3. **Upon an investigation under this chapter.**—See §126 para. 3 *ante.*

4. **Reasonable ground as aforesaid.**—*i.e.*, as in §126. See §126 para. 4 *ante.*

5. **Bail.**—(i) the accused may be released on bail only if the offence is " bailable " and the accused is able to give security. *C.f.* §126 *ante.* See also §39 *ante.* (ii) the witnesses should always be required to execute bail bonds—see §397 – 400 *post.* Every bail bond taken under §127 should be forwarded to the Police Court. If any complainant or witness refuses to execute a bail bond, the investigating officer has to report the fact to the Magistrate, who may thereupon issue a summons or warrant.—See §62 *ante* and *Chapters XXXVI.* and *XXXIX. post.*

6. **Forward the accused.**—See §§36 – 37, 126 – 126A *ante.*

7. **Any weapon or other article.**—*C.f.* " Document or thing." —§124 *ante.* See §§29, 31, 75 *ante.*

8. **Report.**—See §§121(2), 125, 126A(1), 131.

9. **Summons.**—See §§44 *et seq. ante.*

Warrant.—See §§50 *et seq. ante* and §62 *ante* as to when the Court would be justified in issuing a warrant.

Additional powers of Inquirers.

128. Every Inquirer shall, in addition to the powers hereinbefore mentioned within the local limits of his jurisdiction, have the following powers :—

(*a*) Power to arrest or direct the arrest in his presence of any offender.

(*b*) Power to issue a warrant or to order the removal of an accused person arrested under a warrant.

Inquirer.—See §§3, 120 *ante.*

Within the local limits of his jurisdiction.—See §120 *ante.*

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§129

Arrest.—See §23 *et seq.*, §32 *et seq. ante.*

Warrant.—See §§59 *et seq. ante.*

Offender.—See "**Offence.**"—§3 *ante.*

1. §128 is not based upon any section of the Indian Code.

2. **Scope of §128**—This section is solely concerned with Inquirers. It is unnecessary to refer to Police officers, as they are Peace Officers, and as such are vested with most of the powers hereby conferred upon Inquirers.

3. **In addition to the powers hereinbefore mentioned.**—

(i) **Power to receive informations regarding the commission of offences.**—See §121 *ante.*

(ii) **Power to investigate such informations.**—See §121 *ante.*

(iii) **Power to summon witnesses.**—See §121(3) *ante.*

(iv) **Power to take steps for the discovery and arrest of the offender.**—See §121(2) *ante.*

(v) **Power to examine witnesses.**—See §122 *ante.*

(vi) **Power to compel the production of necessary documents or things.**—See §124 *ante.*

(vii) **Power to order searches.**—See §124 *ante.*

(viii) **Power to take bail from accused persons and witnesses.**—See §§126, 127 *ante.*

(ix) **Power to investigate non-cognizable offences.**—See §129 *post.*

4. **Power to arrest.**—*i.e.*, without a warrant. See §§32 *et seq.* §23 *et seq. ante.*

Power to direct arrest in his presence.—*C.f.* §§40–41 *ante.*

Power to issue a warrant.—See §§55 *et seq. ante.*

Power to order the removal of an accused person arrested under a warrant.—*C.f.* §§54, 58 *ante.*

Powers of Police officers and Inquirers in non-cognizable cases.

129. (1) Every Inquirer and Police officer shall have power, upon receiving an order from a Police Magistrate, to investigate a non-cognizable offence and to exercise all the powers conferred upon them by this chapter in respect of such investigation.

(2) Subject to the provisions of Section 37, every Inquirer and officer in charge of a station shall have power to authorize the detention of a person during an investigation.

Inquirer.—See §§3, 120 *ante.*

Police officer.—See §3 *ante.*

Police Magistrate.—See §3 *ante.*

Non-Cognizable .—See §3 *ante.*

Offence.—See §3 *ante.*

Officer in charge of a station.—See §3 *ante.*

Police station.—See §3 *ante.*

1. §129 is not based upon any section of the Indian Code.

2. **Scope of §129.**—§129(1) deals with the power of Inquirers and all *Police officers*, not only "officers in charge of stations," to investigate non-cognizable offences, upon receiving an order from the Magistrate. *C.f. Gunawardene v. Samarakoon* (1920) 21 *N.L.R.* 411; 7 *C.W.R.* 169.

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§129 §129(2) provides that, subject to the provisions of §37 *ante*, every Inquirer and *Officer in charge of a Police station* shall have power to order the detention of persons during an investigation.

3. **Mudalihamy v. Isma (1916) 19 N.L.R. 286; 3 C.W.R. 201.** —When an aratchi, acting on the orders of his superior officer, for the purposes of an investigation, seized a wild buffalo captured by the accused and the latter rescued the animal by force, *held*, that the seizure was unlawful, and that, therefore, the obstruction offered to the Aratchi was not an offence under §183 of the Penal Code. "The offence which the . . . accused may be said to have committed is one under §12(4) of the Game Protection Ordinance, 1909 . . . But that is not a "cognizable" offence as defined in the Criminal Procedure Code. In the case of a non-cognizable offence . . . the person who searches for and seizes anything necessary for an investigation must act under the orders of a Police Magistrate. The Ratamahatmaya, therefore, had no authority to issue the order in question to the complainant . . ." *per* de Sampayo, J. Had the Magistrate authorized an Inquirer or Police officer to investigate the offence under §129, and had the person to whom such order had been issued given the order to the aratchi in this case—see §124(3) *ante*—the search and seizure would have been perfectly lawful. *C.f. Banda v. Tikka* (1917) 4 *C.W.R.* 242.

4. **The rule in §126A *ante* cannot apply to investigations into non-cognizable cases authorized under** §129.—See §126A para. 2 *ante*. See also para. 6 *infra*.

5. **All the powers conferred . . . by this chapter.**—See §128 para. 3 *ante*, and §124 para. 2 *ante*.

6. **§129(2).**—This sub-section authorizes the investigating officer to detain any person during an investigation, "subject to the provisions of §37" *ante*. This means that such officer may lawfully detain any person for a space of twenty-four hours, but if the investigation has not been concluded by then, he may not detain the person any longer, and, if further detention is required, he should take steps to obtain a remand under §126A *ante*.

7. **Referring a case to the Police "for report."**—See *Gunawardene v. Samarakoon* (1920) 21 *N.L.R.* 411; 7 *C.W.R.* 169, and see 2 *C.L.Rec. p. xxxv.*

Magistrate may withdraw case from Inquirer.

130. Any Magistrate having jurisdiction to hold an inquiry into any offence which is being investigated by an Inquirer may withdraw the case from such Inquirer and himself inquire into and try such case or commit the same for trial.

Magistrate.—See §3 *ante*.
Offence.—See §3 *ante*.
Inquirer.—See §§3, 120 *ante*.
Inquiry.—See *Chapter XVI. post.*
Try.—See *Chapter XVIII. post.*
Commit for trial.—See §§158 *et seq. post.*

1. §130 is not based upon any section of the Indian Code.

2. **Scope of §131.**—This section is very loosely worded. Any Magistrate who has jurisdiction "to hold an inquiry into any offence" which is under investigation by an Inquirer, nothing is stated about

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officers in charge of Police stations, may at any time withdraw the case from the Inquirer and himself inquire into and try such case, or commit the accused for trial. The provisions of this section, therefore, furnish an example of another mode whereby proceedings in a Police Court can be initiated.—See §§148-149 *post*. §132

3. **Having jurisdiction to hold an inquiry into any offence.**—The exact meaning of these words is not very clear. Do they refer to the jurisdiction to hold a non-summary inquiry under *Chapter XVI. post*, or the jurisdiction to hold a summary trial under *Chapter XVIII. post*, or to both ? The fact that the words "himself inquire into and try the case or commit the same for trial" seems to imply that the words under consideration mean nothing more than "having jurisdiction to entertain the plaint."

4. **May the Magistrate withdraw an investigation from a Police officer holding an investigation** ?—The terms of §130 do not make this clear. The same difficulty occurs in §126A (3). In §126A it is to be noticed that, while the draftsman made use of the words, "*the officer in charge of the station or* the Inquirer" in §126A (1), he nevertheless deliberately omitted the words italicised in §126A (3). It would appear, therefore, that a Magistrate cannot lawfully withdraw a case which is being investigated by an officer in charge of a Police station or his subordinate officer.

Report of Inquirer and Police officer.

131. Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the Police station or Inquirer making the same shall forward to the Police Court within whose division such investigation was made a report in the prescribed form.

Officer in charge of the Police station.—See §3 *ante*.

Police station.—See §3 *ante*.

Inquirer.—See §§3, 120 *ante*.

Police Court.—See §3 *ante*.

1. §131 is based upon §173 (1) of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §131.**—Every investigation under *Chapter XII.* is to be completed without unnecessary delay, and, as soon as it is completed, whether the officer thinks that no case has been established—§126 *ante*—or otherwise—§127 *ante*—he must forward his final report to the local Police Court in the prescribed form. If the officer thinks that the case is one for judicial investigation, he will, in addition to sending the report, carry out the directions contained in §127 *ante*. See §§126 para. 2, 127 para. 2 *ante*. *C.f.* §§36-39 *ante*.

3. **Unnecessary delay.**—See §35 para. 8, §36 para. 3 *ante*.

4. **Report.**—See §§121 (2), 125, 126A (1), 127 (3) *ante*. *C.f.* §§22, 38 *ante* and *General Orders* 885A, 905B.

Powers of this chapter to be cumulative.

132. Nothing in this Chapter contained shall be construed to restrict the powers or duties vested in or imposed on Police officers by this Code or any other enactment.

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§132 **Police officers.**—See §3 *ante*.
This Code.—See §1 *ante*.
1. §132 is not based upon any section of the Indian Code.
2. **Powers or duties vested in or imposed.**—
(*i*) **By this Code.**—See §§19, 22, 25, 26-31, 32-39, 52, 78, 99-102, 115-119.
(*ii*) **Under other laws.**–*e.g.*, see Ordinance No. 16 of 1865.

CHAPTER XIII.

STATEMENTS TO MAGISTRATES OR PEACE OFFICERS

No inducement to be offered.

133. Except as provided in Chapter XXII., no Peace Officer or person in authority shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement having reference to the charge against such person. But no Peace Officer or other person shall prevent or discourage, by any caution or otherwise, any person from making any statement which he may be disposed to make of his own free will.

Peace officer.—See §3 *ante*.
Offence.—See §3 *ante*.
Police officers and Peace Officers not to induce statements.—See §123 *ante*.
1. §133 does not appear to be based upon any section of the Indian Code.
2. **Scope of §133.**—See §123 para. 2 *ante*, where the effect of §133 is discussed.
§133 is confined to Peace Officers and "persons in authority," whereas §123 *ante* refers to Inquirers and Police officers. Moreover, §133 contains the words "except as provided in *Chapter XXII.*" which are not contained in §123.—See §123 para. 2 *ante*, and §134 *post*.
See also §§283-286 para. 5 *post*.
3. **Person in authority.**—See §24 Evidence Ordinance, and §123 para. 2 *ante*.
4. **Inducement, threat, or promise.**—See §§24-29 Evidence Ordinance, and §123 paras. 2, 4 *ante*.
5. **R. v. Hawadia (1920) 21 N.L.R. 499.**—Where X was arrested by a Peace Officer, who addressed him as follows: "Tell the truth without fear. One need not be afraid to tell the truth," and X thereupon made an incriminating statement, *held*, that the words addressed to X were merely moral exhortations, and were, therefore, not an infringement of §133.* But a confession obtained by a Police officer would in any case be inadmissible—See §25 Evidence Ordinance—unless made before a Magistrate.—§26 (*ibidem*) and §134 para. 3 *post*.

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* See *Dias on the Evidence Ordinance pp.* 30-31.

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Power to record statements and confessions.

134. (1) Any Police Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial. §134

(2) Such statement shall be recorded and signed in the manner provided in Section 302 and dated, and shall then be forwarded to the Police Court by which the case is to be inquired into or tried.

(3) No Magistrate shall record any such statement being a confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect :—

> I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.
>
> (*Signed*) *A.B.*
> Magistrate of the Police Court of ——

Police Magistrate.—See §3 *ante.*
Inquiry.—See *Chapter XVI. post.*
Trial.—See *Chapter XVIII. post.*
Police Court.—See §3 *ante.*

1. *C.f.* §164 of the Indian Code.

2. **Scope of §134.**—See §123 para. 2 and §133 *ante* §134 is primarily meant to give effect to §26 of the Evidence Ordinance, subject to the terms of §27 (*ibidem*); but a statement recorded under §134 may also be receivable under §10 of the Evidence Ordinance as evidence by one conspirator against another, provided the person whose statement is recorded under §134 is not jointly charged along with the accused at the trial. This was the effect of a considered judgment pronounced by Bertram, C. J., at the Kandy Assizes in May, 1922.—*vide R. v.*—(1922) 1 *T.L.R.* 2. No confession made by an accused while in Police custody is admissible in evidence unless it is made in the immediate presence of a Magistrate. §134 of this Code provides the procedure whereby such statement or confession could be recorded to make it admissible as evidence. Even where an investigation is being held by an Inquirer under *Chapter XII. ante*, if the accused desires to make a confession, the best and safest course is to produce him forthwith before a Magistrate and have his statement duly recorded. —See §123 para. 2 *ante.*

§134 only applies to statements made **before** the judicial inquiry or trial has commenced, and **any** Magistrate may record the statement, which should be recorded and signed as required by §302 *post*, and should be dated. After the statement has been recorded the Magistrate has to append his certificate thereto in legal form and sign it. He then forwards the statement to the Police Court which is to hold the investigation or trial. It matters not that the Magistrate who records the statement under §134 is later the trial Judge. No confession is to be recorded under §134 unless the recording Magistrate is satisfied by

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§134 questioning the declarant that it is made voluntarily. The presumption of regularity attaching to judicial acts under §80 of the Evidence Ordinance will arise in favour of a statement duly recorded under §134. *R. v. Bilinda* (1926) 27 *N.L.R.* 390 furnishes an example of the results, which follow a confession irregularly recorded under §134, and the judgment of this case should be carefully studied by every Police Magistrate.

Qu.—**May an Unofficial Police Magistrate record a statement under §134 ?**—See §3 *ante* under " Police Magistrate," also note the form of certificate appended to §134.

3. **R. v. Mudianse (1918) 21 N.L.R. 48.**—*Full Bench.*—A confession made by a person arrested upon suspicion was recorded under §134, but the Magistrate recorded it after administering an oath to the declarant. Subsequently, when charged before the investigating Magistrate under §155 *post*, he stated " Yesterday I made a full statement to the Magistrate, that is the statement I wish to make now." *Held*, that the statement as recorded under §134 was irregular, in that it had been recorded after administering an oath to the declarant, and that, therefore, it was not in accordance with the terms of §§134 and 302, and inadmissible in evidence ; but as the accused had subsequently adopted it and adhered to it, the statement became incorporated with the statutory statement under §155, and was not merely admissible but had to be put in at the trial as part of the statutory statement of the accused. *C.f. R. v. Rahiman* (1905) 9 *N.L.R.* 71. In this case the declarant was not an accused at the time he made the statement. This fact distinguishes this case from *R. v. Mudianse.*

R. v. Hawadia (1920) 21 *N.L.R.* 499 *at p.* 500.—See §133 para. 5 *ante* for the facts. In this case the Police officer who arrested the accused induced him to confess by moral exhortations, and thereafter had his statement recorded by a Magistrate under §134. *Held*, that in the circumstances the confession should be excluded. " In my opinion §134 of the Criminal Procedure Code was intended to give effect to the principle embodied in §24 of the Evidence Ordinance. The word ' voluntary ' must be interpreted there as meaning a statement not only made without fear of menaces, but also a statement not induced by any promise or observation in the nature of a promise proceeding from a person in authority. §24 is intended to give effect to the English principle that confessions must be voluntary in the sense I have explained. It has been repeatedly held in England, that if a person in authority says ' It might be better for you to tell the truth and not to lie'; or ' You had better tell the truth, it may be better for you,' no statement so induced is admissible in evidence . . ." *per* Bertram, C. J.

4. **Voluntary.**—See *R. v. Hawadia* para. 3 *ante.*

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PART VI.

PROCEEDINGS IN PROSECUTIONS.

§135

Part VI. of the Criminal Procedure Code embraces within itself the whole law of procedure dealing with criminal prosecutions, and includes fifteen chapters :—

Chapter XIV.—**The territorial jurisdiction of Courts.**—See §§135 - 146.

Sanction to prosecute.—See §147 and see §§175, 286(2).

Chapter XV.—**Initiation of proceedings in Police Courts.**—See §§148 - 151.

Mixed jurisdiction of Police Courts.—See §152 and §166.

Incidental powers.—See §§153 - 154.

Chapter XVI.—**The non-summary investigation of cases before Police Courts.**—See §§155 - 165.

Chapter XVII.—**The law relating to the charge or indictment.**—See §§167 - 186.

Chapter XVIII.—**Summary trials before Police Courts.**—See §§187 - 199.

Chapter XIX.—**Trials before District Courts.**—See §§200 - 215.

Chapter XX.—**Trials before the Supreme Court.**—See §§216 - 281.

Chapter XXA.—**Of the expenses of witnesses, etc., costs and compensation.**

Chapter XXI.—**The procedure applicable to the summoning of Jurors and Assessors.**—See §§254 - 281.

Chapter XXII.—**General provisions applicable to all inquiries and trials.**—See §§282 - 296.

Chapter XXIII.—**Rules of procedure relating to the taking and recording of evidence in inquiries and trials.**—See §§297 - 303.

Chapter XXIV.—**Of the judgments of criminal Courts.**—See §§304 - 308.

Chapter XXV.—**The sentences of criminal Courts, and the mode of executing them.**—See §§309 - 324.

Chapter XXVI.—**The release of offenders on probation.**—See §§325 - 327A.

Chapter XXVII.—**The prerogative of mercy.**—See §§328 - 329.

Chapter XXVIII.—**The plea of *autrefois acquit* and *autrefois convict*.**—See §§330 - 331.

CHAPTER XIV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

Before any criminal Court can lawfully try an offender, or investigate the facts of an offence, it must be vested with the necessary jurisdiction to do so. Whenever it is stated that a particular Court has jurisdiction to try or investigate a criminal case, this may mean one or more of several things. It may refer to the powers conferred by §§10 - 11

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§135 *ante* upon certain Courts exclusively to deal with certain offences, or to the jurisdiction or capacity which certain Courts possess to punish offenders —see §§13 – 17 *ante*, or again it may refer to the territorial jurisdiction of a Court to try an offender, or to investigate an offence. *Chapter XIV.* deals with the "territorial jurisdiction" of Courts to try or investigate offences.

Certain offences cannot be tried or investigated in any Court of law without the sanction of some public officer obtained beforehand. §147 *post* deals with the law relating to sanctions to prosecute. In offences needing such sanction, the jurisdiction of the Court to try or investigate such offence is ousted, until the sanction is duly produced before it.

Unless a criminal Court has the necessary jurisdiction to try or investigate the offence, or to try and punish the offender, it may not proceed.

The tertitorial jurisdiction of criminal Courts.—As to the territorial jurisdiction of—

(1) **The Supreme Court.**—The general rule, which is very simple, is to be found stated in §§135 – 136.

(2) **The District Court.**—See the Introduction to *Chapter XIX.* para. 2 *post.*

(3) **The Police Court.**—See §§5, 6, 83 Courts Ordinance 1889, and §9 *ante* and §§135 *et seq. post.*

Several exceptions and qualifications to the general rule exist:

(*a*) An Ordinance creating an offence may itself create an exception to the rule.

(*b*) Certain Imperial Acts applicable to this Colony create exceptions to the general rule—see §§135 – 136 *post.*

(*c*) §§137 – 145 are all qualifications of the general rule.

(*d*) These exceptions and qualifications are not exhaustive—see §§135 – 136.

§146 enacts that no sentence or order of any criminal Court in the trial of an offence shall be liable to be set aside in appeal or revision, merely because the non-summary investigation of the case was made by a Police Court not empowered under *Chapter XIV* to do so. With §146 should be read and construed §423 *post*, which declares that no judgment of any criminal Court shall be set aside merely because "the inquiry, trial, or other proceeding in the course of which it was passed, took place in a wrong local area" unless it appears that such error has lead to a miscarriage of justice.

Sanctions to prosecute.—§147, together with §§104, 175, 286(2), 380, 384 and various other enactments creating offences, provide that certain offences are not to be tried or investigated except upon the previous sanction obtained ot a certain public officer.

A.—Place of Inquiry or Trial.

Ordinary place of inquiry and trial.

135. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

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Any District or Police Court to have jurisdiction over offences committed on territorial waters.

136. Any District Court or Police Court within the local limits of the jurisdiction of which an accused may be or be found shall have jurisdiction respectively in all cases of offences, otherwise within their respective jurisdictions which have been committed on the territorial waters of the Colony. §136

Offence.—See §3 *ante*.

Inquired into.—See *Chapter XVI. post.*

Tried.—See *Chapters XVIII., XIX., XX.* and §§152, 166 *post.*

Court.—See §3 *ante*.

District Court.—See §3 *ante*.

Police Court.—See §3 *ante*.

The Colony.—See §3(18) Ordinance No. 21 of 1901.

1. §135 is identical with §177 of the Indian Code, while §136 is not based upon any section of that Code.

2. **Scope of §§135 - 136.**—See the Introduction to *Chapter XIV. ante.*

§§135 - 136 lay down the general rule as to the territorial jurisdiction of Courts of Criminal Judicature in this Colony to try offenders, or to hold non-summary investigations into criminal cases, provided such Courts have the other necessary qualifications to do so—see §§9, 10 - 11, 13 - 17 *ante.*

The general rule here laid down is of a two-fold character. (i) Every offence must as a general rule be inquired into or tried by some Court within the local limits* of whose jurisdiction, such offence was committed—see §135. (ii) If the offence is committed on the sea upon the "territorial waters" of the Colony, any District Court or Police Court within the local limits of whose jurisdiction the accused may be, or be found, can try him, or in the case of a Police Court, take non-summary proceedings in respect of such offence—see §136.

To this general rule there are several exceptions and qualifications :—

(1) **Exceptions created by local Ordinances.**—*e.g.*, Ordinance No. 17 of 1869, §116; Ordinance No. 9 of 1902, §39. See §144 *post.* Ordinance No. 1 of 1909, §29; Penal Code §360A.

(2) **Certain Imperial Acts of Parliament vest our Courts with jurisdiction to try offences committed upon the high seas or abroad.**

(3) §§137 - 145 *post* are all qualifications of the general rule laid down in §§135 - 136.

(4) **A court not otherwise having jurisdiction, may lawfully be vested with jurisdiction to entertain a charge by a transfer of the case**—*e.g.*, under §422 *post*, §46 Courts Ordinance 1889; or by means of the *fiat* of the Attorney-General, *e.g.*, §§145, 387 *post*, §47 Courts Ordinance 1889. *C.f.* §97 (*ibidem*).

(5) **In proceedings for taking security for keeping the peace, the Magistrate has jurisdiction to act, although the respondent may only be preparing to commit a breach of the peace at a place outside the local limits of the Magistrate who binds him over**—see §81 *ante.* *C.f.* §91 *ante.*

*See the Introduction to *Chapter XIV. ante* and Ordinance No. 12 of 1890 and §153 para. 2 *post.*

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§136 6. **In cases before a District Court if the accused pleads to the charge without objecting to the jurisdiction, he may not thereafter object to the Court trying him.**—see §73 Courts Ordinance 1889. In proceedings before the Supreme Court in the exercise of its original criminal jurisdiction, an accused may be tried, although the evidence shows that the offence was committed outside the limits of the Circuit for which the Sessions are being held.—§32 (*ibidem*).

No sentence, or order of any Criminal Court in the trial of an offence is to be set aside in appeal or revision, merely on the ground that the non-summary investigation, which preceded such trial was held before a Police Court, which was not empowered under *Chapter XIV.* to hold such investigation—§146 *post.* No judgment of any Criminal Court is to be set aside merely on the ground that the non-summary investigation, trial, or other proceeding in the course of which, it was passed took place in a wrong local area, unless it appears that such error has occasioned a failure of justice—§423 *post.*

In non-summary cases when the investigating Magistrate entertains a doubt as to the Police Court, which has lawful jurisdiction to hold such investigation, the law vests the Attorney-General with the right of deciding which Police Court is to have jurisdiction, and such decision is final—§145 *post.* He has no such right under this Code in the case of summary trials, but he may move the Supreme Court to have the case transferred to another Court under §422 *post*, see §46 Courts Ordinance 1889, He may also acting under §47 of the Courts Ordinance, designate the Court of trial by means of his *fiat*, subject to confirmation by the Supreme Court—*C. f.* §93 Courts Ordinance.

3. **Every offence.**—*i.e.* every act or omission made punishable by any law for the time being in force in this Island—§3 *ante*, provided that special provisions have not been made either by some other section of this Code, or some other enactment.—see *Weerasinghe v. Perera* (1922) 4 *C.L.Rec.* 67. Maintenance cases under Ordinance No. 19 of 1889 are not regulated by the Criminal Procedure Code with regard to the jurisdiction of the Court.—*Nona v. Van Twest* (1929) 10 *C.L.Rec.* 51; 6 *T.L.R.* 140; 30 *N.L.R.* 449.

4. **Ordinarily.**—*R. v. Lakhmi* 24 *P.R.* 1901 *at p.* 72.—*Held, per* Chatterji, J., that the use of the word "ordinarily" together with §423 *post*, show that *venue* is not a question of jurisdiction in the true sense of the word, and that a wrong *venue* does not necessarily invalidate the proceedings.

See §§45, 52, 56 *ante.*

5. **Within the local limits of whose jurisdiction.**—This expression is nowhere defined in the Criminal Procedure Code. It is the Courts Ordinance to which one should look for guidance.

Supreme Court.—The original criminal jurisdiction of the Supreme Court is defined in §21(1) of the Courts Ordinance.—see §27 (*ibidem*). On grounds of convenience, the Island is divided into four "Circuits," within which criminal sessions are to take place at certain stated periods.*—§28 (*ibidem*), and in the manner set out in §31 (*ibidem*). The fact that an accused is indicted at a criminal session of the Supreme Court, for an offence committed beyond the limits of such circuit, does not oust the jurisdiction of the Court to try the offender—§32 (*ibidem*). The various districts and divisions comprised within each circuit is set out in *Schedule II.* of the Courts Ordinance.

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* See para. 6 *infra.*

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§136

District Courts.—§64 of the Courts Ordinance vests District Courts with an original criminal jurisdiction to try offenders. §66 (*ibidem*) declares that such Courts shall have power to hear, try and determine "in manner in the Criminal Procedure Code or any Ordinance amending the same provided" all prosecutions and charges against any person for or in respect of any crime or offence "committed wholly or in part within the district in and for which it is held, and which crime or offence is by the said Code or by any law in force in the Colony made cognizable by District Courts."

Where an accused has pleaded to any indictment presented to a District Court, without objecting to the jurisdiction, he is debarred thereafter from raising the question subsequently, except where it appears to the Court that the defect was intentional and committed with previous knowledge of the irregularity, in which event, the Judge may declare the proceedings to be *null and void*, and refuse to proceed further—§73 (*ibidem*).*

Schedule II. of the Courts Ordinance defines the limits of each judicial district.

Police Courts.—§83 of the Courts Ordinance vests Police Courts with jurisdiction to have and exercise "all duties which Police Courts are empowered and required to have, exercise, and perform by virtue of the provisions of the Criminal Procedure Code, or of any other Ordinance for the time being in force in any way empowering or requiring them in that behalf"—see §§9, 11(*b*), 15 *ante*, §84A Courts Ordinance and *Weerasinghe v. Perera* (1922) 4 *C.L.Rec.* 67.

Schedule II. of the Courts Ordinance defines the limits of the various judicial divisions in the Island.

6. **On the territorial waters of the Colony.**—It is an established principle of international law that every state is considered as having territorial jurisdiction over the sea which washes its coasts, as far as a cannon shot would carry from the shore, or at least for a distance of three miles or a marine league measured from low water mark. It is manifest that in view of modern conditions this definition is defective, inasmuch as a state is able to protect a much wider area of the sea than a distance of three miles; but such is the law. For the purposes of the Territorial Waters Act 1878, which is applicable to this Colony, the expression "territorial waters of Her Majesty's Dominions" has been defined for the purposes of the Act as meaning "such part of the sea adjacent to the coast of some part of Her Majesty's Dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty"—§7. In Ceylon the position is rendered somewhat complicated, by reason of the fact that the local Government claims on behalf of His Majesty to be vested with ownership in the pearl banks which are situate beyond the three-mile limit. There are Ordinances on the local Statute Book which legislate in respect of such pearl banks. If an offence is committed at sea on the pearl banks, our local Courts would yet have jurisdiction to try the offender, by reason of the provisions of the Admiralty Offences (Colonial) Act 1849—see *Sinappu v. Silva* (1918) 20 *N.L.R.* 347; 5 *C.W.R.* 123.

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* See *R. v. Perera* (1916) 19 *N.L.R.* 310, 3 *C.W.R.* 176; *R. v. Silva* (1911) 14 *N.L.R.* 336—Two Judges; *R. v. Fernando* (1905) 8 *N.L.R.* 354; *R. v. Appuhamy* (1878) 1 *S.C.C.* 23; *R. v.* ——— (1879) 2 *S.C.C.* 50; *R. v. Nikkajutiya* (1880) 3 *S.C.C.* 96; and *c.f. Paul v. Sinniah* (1918) 5 *C.W.R.* 143.

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§136 Various Imperial Acts, which are applicable to Ceylon, vest our Courts with jurisdiction to try offenders in respect of offences committed upon the high seas beyond the territorial waters of the Colony.

Sinappu v. Silva (1918) 20 *N.L.R.* 347; 5 *C.W.R.* 123.—Certain fishermen of K were charged in the Police Court of K with having committed the offence of robbery on the high seas, *i.e.*, beyond the territorial waters of the Colony. *Held*, that by reason of the provisions of the Admiralty Offences (Colonial) Act 1849, and §136 of this Code, the Police Court of K had jurisdiction to try the offenders, inasmuch as the accused were found within the local limits of the jurisdiction of the Police Court of K.

It is to be observed that §136 is silent as to the jurisdiction of the Supreme Court to exercise jurisdiction over offences committed upon the territorial waters of the Colony. The section makes no reference to this, simply because the criminal jurisdiction of the Supreme Court extends throughout the Island, and unlike the inferior Courts such jurisdiction is not confined to a particular local area. It necessarily follows, therefore, that such jurisdiction includes the jurisdiction to try offenders in respect of offences committed upon the territorial waters of the Colony—see §21 of the Courts Ordinance 1889.

7. **Case law.**—*R. v. Sengina* (1905) 8 *N.L.R.* 102.—The "Itinerating Police Magistrate" of Colombo, who had concurrent jurisdiction over parts of the judicial districts of Colombo, Negombo and Avisawella, had entertained within his jurisdiction in the Colombo district an offence alleged to have been committed within the Negombo district. *Held*, that the Magistrate having lawful jurisdiction over that part of the Negombo district within which the offence was committed, the mere fact that he entertained the case while holding his Court in another judicial district did not render the proceedings illegal inasmuch as §146 *post* applied, and that the irregularity had in no way occasioned a failure of justice.

Sampihamy v. Carolis (1914) 3 *B.N.C.* 55.—Proceedings under the Maintenance Ordinance—respondent residing at G—proceedings instituted at M, *held*, that there was no failure of justice occasioned to either side, and that §423 *post* cured the irregularity. *Held also* that §423 applied to proceedings under the Maintenance Ordinance.

Gunawardene v. Abeywickreme (1914) 2 *Crim. App. R.* 7 (*Two Judges*).—Maintenance case instituted in the Police Court of G by a wife against her husband, who resided at M. Objection to the jurisdiction of the Police Court of G was taken for the first time* at the second trial held by the Police Court in pursuance of an order made by the Supreme Court in appeal. *Held*, that in these circumstances there was no prejudice caused to either side, and that the irregularity, if any, was cured by §423 *post*.

R. v. Silva (1919) 7 *C.W.R.* 55—see §§138, 142, 146 and 423 *post*.

Pakir Ally v. Weerasuriya (1920) 8 *C.W.R.* 71.—The Police, acting under §121(2) *ante*, produced X before the Police Court of C and asked for a remand pending further investigation of the offence, and this was done. On the same day the Police Court of K, within the limits of whose jurisdiction the alleged offence by X was committed, entertained a plaint against him, and commenced proceedings. *Held*, that the conviction of X by the Police Court of K was not unlawful.

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* See *Paul v. Sinniah* (1918) 5 *C.W.R.* 143. Had the objection been taken at an earlier stage, the result would have perhaps been different.

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§136

Halliday v. Kandasamy (1911) 14 *N.L.R.* 492. (*Two Judges*).— The accused, a cooly, entered into a contract of service with the Superintendent of an estate at N upon "a Ragama certificate" in which it was stated that he had not been previously employed on any estate in Ceylon. This statement was false in fact, and the Superintendent charged the accused in the Police Court of N, under §17 of Ordinance No. 11 of 1865. *Held*, that the Police Court of N had no jurisdiction to try the case; but the conviction was affirmed upon the ground that no prejudice had been caused to the accused. "With regard to the question of jurisdiction, it is contended that, as it was at Ragama that the accused falsely pretended not to have been employed before on an estate, the offence was not within the local jurisdiction of the Police Court of N, but should have been tried within the judicial division . . . within which Ragama is situated. For the respondent it was argued that the offence was a continuing one, and that the false pretence was carried on up to the time and after the accused reached Condegalle Estate. In my opinion this argument is untenable . . . I think the offence was clearly committed at Ragama . . . and that the Police Court of N had no jurisdiction to try the offence" *per* Lascelles, C. J., & Middleton, J. See §423 *post*.

Manuel v. Lasaru (1908) 3 *A.C.R.* 127.—By an agreement in writing made at N, L agreed with M to proceed to X and catch and cure fish for M for a certain payment. On a failure on L's part to carry out his promise, M sought to file a plaint against him in the Police Court of N, but the Magistrate refused process. *Held*, "By §11 of Ordinance No. 11 of 1865, the offence is punishable by the Police Court of the district wherein the offence is committed or wherein the offender is apprehended. L has not been apprehended, and there is no evidence as to where he is, and, in my opinion, the Magistrate was right in holding that the offence, if any, was committed at X," *per* Hutchinson, C. J. But see *Halliday v. Kandasamy supra*.

Weerasinghe v. Perera (1922) 4 *C.L.Rec.* 67—see §9 para. 8 *ante*.

R. v. Faiz Ali 37 *Cal.* 27.—The accused induced X to leave C in order to go to Fiji to work. At A, where they halted on the way, the accused told X that he would have to go first to S and then sent him there in charge of B. The accused was charged with the offence of inducing X to emigrate from any district in Bengal to another labour district. *Held*, that the accused was rightly tried at A, that if X had been originally induced at C to go to S, he would have had to be tried at C, for "it would be difficult to hold that there was a fresh emigration at every place, at which he might stop on his journey," that there was in fact no offence committed at C, because at that place X was induced to go to Fiji, which was not an offence known to the law, whereas the inducement to go to S was an offence.

R. v. Raja 14 *P.R.* 1889.—Where a person sends a defamatory petition to a public officer, who, in the course of ordinary official routine, sends it to a subordinate for inquiry; there is a publication to the latter at the place, where he receives it, and the writer may be charged at such place.

Jane Nona v. Van Twest (1929) (*Two Judges*) 10 *C.L.Rec.* 51, 6 *T.L.R.* 140.—The failure to maintain a wife or mistress is not an offence within the meaning of §3 of this Code. Therefore, the jurisdiction of the Court in such cases is governed by the Civil Procedure Code and not by the Criminal Procedure Code.

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§136 8. **Where an accused has been regularly committed for trial before a District Court, it is not open to the Judge to question the validity of the indictment, or to refuse to try the accused ; and it is only in extreme cases that the Supreme Court would feel justified in interfering with the discretion vested in the Attorney-General in this matter—see §§11, 12 *ante* and §387 *post*.**

Accused is triable in district where act is done or consequence ensues.

137. When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by any Court within the local limits of the jurisdiction of which any such thing has been done or any such consequence has ensued.

Illustrations.

(*a*) A is wounded within the local limits of the jurisdiction of the Police Court of X and dies within those of the Police Court of Z ; the offence of culpable homicide of A may be inquired into by the Police Court of either X or Z.

(*b*) A is wounded within the local limits of the jurisdiction of the Police Court of X and is, during ten days, within the local limits of the jurisdiction of Police Court Y, and during ten days more, within the local jurisdiction of Police Court Z, unable in the local limits of the jurisdiction of Police Court Y or Z to follow his ordinary pursuits ; the offence of unlawfully causing grievous hurt to A may be inquired into by the Police Court or tried by the District Court of either X, Y, or Z.

(*c*) A is put in fear of injury within the local limits of the jurisdiction of the District Court and Police Court of X and is thereby induced within the local limits of the jurisdiction of the District Court and Police Court of Y to deliver property to the person who put him in fear ; the offence of extortion committed on A may be inquired into by the Police Court and tried by the District Court of either X or Y.

Offence.—See §3 *ante*.

Inquired into.—See *Chapter XVI. post*.

Tried.—See *Chapters XVIII.–XX.*, and §§152(3), 166 *post*.

Court.—See §3 *ante*.

Territorial jurisdiction.—See §§135–136 *ante*.

1. §137 is based upon §179 of the Indian Code, which, with a few modifications, it follows closely.

2. **Scope of §137.**—See the Introduction to *Chapter XIV. ante*, and §§135–136 para. 2 *ante*.

§137 applies whenever an offence has been committed by reason of the offender doing something and thereby causing a certain chain of consequences to ensue ; in such cases the offender can be tried and the offence may be investigated by any Court within whose territorial jurisdiction the act was done, or the consequences resulting from the act ensued. The three illustrations make the position quite clear. In the

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first case A is wounded at X and dies at Z; either of the Police Courts of X and Z may investigate the offence of murder. The act is committed at X and the consequence ensued at Z. In the second case, A is wounded at X, and he thereafter remains for ten days at Y, and for another ten days at Z, but unable during such time to follow his ordinary pursuits. The person who wounded A has, therefore, caused grievous hurt to him—see §311 Penal Code. By reason of the rule in §137 any of the Police Courts at X, Y, or Z may investigate the charge, and any of the District Courts at X, Y, or Z may try the offender.—See *Sirdar v. Jethabhai* para. 3 *infra*. §137

In the third case A is put in fear at X, and by reason of such fear is induced to deliver over property to the accused at Y; the Courts at X and Y have concurrent jurisdiction to try the accused for the offence of extortion. Supposing, however, that the original act was committed at some place outside the Colony, and the subsequent consequences took place within the Colony, and that the accused too is found within the Colony, can the local Courts try the offender—*e.g.*, as in the case where A is wounded in India, and dies at Colombo ? It would appear that in such a case the local Court within whose territorial jurisdiction the deceased died would have jurisdiction to try the offender, provided the offence, if committed within the local jurisdiction, would have amounted to an offence punishable here, and that even if the accused is outside the Colony he may lawfully be extradited—see *R.v. Jaimal* para. 3 *infra*. *C. f.* §§186, 179 *ill.* (*d*), 188 of the Indian Criminal Procedure Code.

3. **Any consequence which has ensued.**—*R. v. O'Brien* 19 *Alla.* 111.—An agent of a Cawnpore company at an agency office of the firm at Bombay failed to account at Cawnpore for certain goods received by him. *Held*, that he could be tried at Cawnpore. "The case comes within §179 (*local*—§137). The consequences of the applicant having made away with, for his own purposes, goods of his employers in lower Bengal . . . was that a loss of the value of those goods ensued to his employers at Cawnpore. It might be very difficult to prove where the actual offence of breach of trust was committed"—see *R. v. Uttam* §140 *post*; *R. v. Mahadeo, Langridge v. Atkins, infra.*

Colville v. Kristo 26 *Cal.* 746.—Where offences of cheating under §§400, 401 of the Penal Code were committed at H, but the money was received from the complainant at C, it was held that §137 applied to such a case.

Babu v. Ghausham (1908) *A.W.N.* 115.—*Held*, that the words "of any consequence which has ensued" are intended to embrace only such consequences as modify or complete the act alleged to be an offence —see *Ganeshi v. Kishore, Langridge v. Atkins, infra.*

Gokul v. Phul Chand, 7 *P.R.* 1910.—"The words 'any consequence that has ensued' mean 'some consequence modifying or completing the act or acts constituting the offence,' and do not include the loss resulting to an employer from criminal breach of trust by his servant." In this case the complainant despatched goods from D to C to the accused for sale on commission, and the latter misappropriated the goods, *held*, that the mere fact that the money should have been paid at D did not give the Courts at D jurisdiction—see §140 *post.*

R. v. Mahadeo 32 *Alla.* 397 (following *R. v. O'Brien supra*).—The accused was an agent of a firm at M. Goods were entrusted to him for sale, but he finally failed to account to his employers for some of the

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§137 monies received by him. It was held that by reason of §137 the accused could be convicted at M. "§182 (*local*—§142) would apply equally well. It is impossible to state exactly where the act of embezzlement took place"—see *Langridge v. Atkins infra.*

Ganeshi v. Kishore 34 *Alla.* 487 (approving *Babu v. Ghausham supra*).—"The word 'consequence' in this section . . . means a consequence which forms part and parcel of the offence. It does not mean a consequence which is not a direct result of the act of the offender as to form no part of the offence"—see *Langridge v. Atkins infra.*

Langridge v. Atkins 35 *Alla.* 29 (approving *R. v. O'Brien* and *R. v. Mahadeo*, and distinguishing *Babu v. Ghausham* and *Ganeshi v. Kishore supra*).—A complaint filed in C alleged that the accused had been entrusted with goods to be duly returned at C, or its value accounted at C, and that the accused had failed to do either. *Held*, that the Courts at C had jurisdiction.

R. v. Ali 7 *P.R.* 1900.—X and Y sent goods by train from A to B under a misdescription which secured a cheaper freight, *held*, that the accused could be tried at B.

R. v. Jaimal 1 *P.R.* 1901.—The accused kidnapped a girl outside British India and was arrested within British India, while conveying her to a foreign state. It was proved that the girl was a willing party, and that there was no "concealment" or "confinement" within the meaning of §368 (*local*—§359) of the Indian Penal Code. *Held*, that the accused could not be tried within British India by virtue of §179 (*local*—§137) as "no consequence" ensued in British India such as would bring the case within the section, the *illustrations* to the section showing the consequences contemplated to be something modifying or completing the act. Had the accused kidnapped the girl in such circumstances as are described in the *illustrations* to §355 of the Ceylon Penal Code, and if some act was done within India to give effect to the object of the kidnapping, the result would have been otherwise.

Sirdar v. Jethabhai 8 *Bom. L.R.* 513.—Where the offence is already complete within the jurisdiction of one Court, a further consequence ensuing elsewhere will not give a Court of the latter place jurisdiction, *e.g.*, A fractures B's leg at K. The offence under §316 of the Penal Code is completed at K. B, however, is removed to C, and is in hospital there for over twenty days. This does not vest the Courts at C with jurisdiction to try A for an offence under §316. If B died at C, the result would be otherwise.

R. v. Tilak (1897) 22 *Bom. at p.* 129.—Charge of sedition—newspaper published at Poona—publication in Bombay. *Held*, that the Courts at Bombay had jurisdiction to try the offender. See *R. v. Dial* §138 para. 3 *post.*

R. v. Perera (1916) 19 *N.L.R.* 310; 3. *C.W.R.* 176.—The accused wrote a threatening letter addressed to X at Batuwatta and posted it at Polgahawela. Battuwatta was within the jurisdiction of the District Court of Kegalle, whereas Polgahawela was outside the jurisdiction of that Court. The charge against the accused was that he "did at Batuwatta," within the jurisdiction of the District Court of Kegalle, commit the offence of criminal intimidation. The Judge refused to hear the case, holding that he had no jurisdiction to do so as the letter was posted at Polgahawela, *held*, that the order was premature—see §§135 – 136 para. 5 *ante.*

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Place of trial where act is offence by reason of relation to other offence.

138. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of the jurisdiction of which either act was done. §138

Illustrations.

(*a*) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(*b*) A charge of receiving or retaining stolen goods may be inquired into or tried, either by the Court within the local limits of whose jurisdiction the goods were stolen, or by the Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(*c*) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into by the Police Court within the local limits of whose jurisdiction the wrongful concealing or by the Police Court within the local limits of whose jurisdiction the kidnapping took place.

Act.—See §31 Penal Code.

Offence.—See §3 *ante*.

Inquired into.—See *Chapter XVI. post.*

Tried.—See *Chapters XVIII.-XX.* §§152, 166 *post.*

Court.—See §3 *ante*.

Territorial jurisdiction.—See §§135-137 *ante*.

1. §138 is based upon §180 of the Indian Code, which it closely follows.

2. **Scope of §138.**—See Introduction to *Chapter XIV. ante*, §§135 - 136 para. 2 *ante*.

§138 provides an alternative local jurisdiction in regard to secondary or related offences. Alternative local jurisdiction in regard to primary offences is provided by §§140 - 141 *post.*

When any act or omission is an offence by reason of its relation to any other act or omission—see *illustrations* (*a*), (*b*) and (*c*)—or which would by itself be an offence, if the doer of the act is capable of committing an offence, as where a person commits a crime by means of an innocent agent, such relative offence may be investigated or tried by any Court within whose territorial jurisdiction either the main act or the relative act was done.

Thus if X being at A, abets Z at B to murder C, which he does, X may be charged and tried either at A or B—*Illustration* (*a*). The other illustrations furnish examples of the same principle. Again if X, at Colombo, instigates A, a minor under the age of seven, to shoot at B, and A shoots at and kills B in Kandy, X can be charged at Kandy—see *R. v. Brisac* (1803) 4 *East.* 164 and para. 5 *infra*. It would appear that the same would apply in cases as, for example, where an act is abetted outside Ceylon and it is committed within Ceylon. The abettor in such a case would be liable to be dealt with in Ceylon—see §§137 para. 2 *ante*: §139 para. 2 *post*. *C.f.* §101A Penal Code.

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3. **Relation to any other act.**—The offence of abetment, &c., dealt with under §138 may, of course, be investigated or tried at the place where the offence was committed; but, if considered desirable, §138 authorizes the abettor, receiver of stolen property, &c., being dealt with at the place where the principal offence, *viz.*, the offence abetted, the theft, &c., was committed. Thus, A, B and C conspire together to commit an offence at Kandy and the offence is committed. A, from Jaffna, sends money to B and C at Kandy in pursuance of their common design. A can be charged and tried at Kandy, although he was not at Kandy when the offence was committed. So, where a person instigates another by means of a letter sent by post to commit an offence, the offence of abetment is completed as soon as the addressee reads the letter, and the sender may be tried at the place where the letter was received, provided the offence abetted is committed.—*R. v. Dial* 16 *Alla.* 389. *C.f. R. v. Tilak* §137 para. 3 *ante.*

Again a person who retains, within India, property which has been stolen in Ceylon may be tried in Ceylon.—*R. v. Jafar* 30 *P.R.* 1894. See *Illustration* (*b*) and see §141 *post.*

Egan v. Selambaran (1908) 3 *A.C.R.* 109.—The offence of harbouring a cooly who has deserted his employer may be charged before and tried by the Court having jurisdiction over the place of desertion, as well as by the Court having jurisdiction over the place where the harbouring took place—see *Illustration* (*c*) and *R. v. Ram Dei* 18 *Alla.* 350.

R. v. Silva (1919) 7 *C.W.R.* 55.—The accused were charged with unlawfully transporting *kurakkan* from the Hambantota to the Matara district. They were also charged with being members of an unlawful assembly with the common object of unlawfully transporting the *kurakkan* and of overawing the Police by show of force. The accused were stopped by the Police as they crossed the district boundary, and were convicted by the Police Court of Tangalle. *Held*, that §138 did not apply to a case like this. "That section enacts that when an act is an offence by reason of its relation to any other act which is also an offence, the offence may be tried by the Court within whose local limits either act was done. The act of removal of the *kurakkan* was not an offence by reason of its relation to the unlawful assembly, it was an offence independently of the unlawful assembly . . ." *per* de Sampayo, J. See §§142 para. 5, 149, 423 *post.*

4. **If the doer were capable of committing an offence.**—*R. v. Brisac* (1803) 4 *East.* 164.—Where an offence is committed by means of an innocent agent, the principal may be charged at the place where the agent acted, or at the place where the principal procured the act.

Innocent agent.—*e.g.*, a child under seven years.—§75 Penal Code, or an animal.

Either act was done.—These words clearly presuppose the commission of the principal offence, *e.g.*, the offence abetted, the theft, or the kidnapping. If an offence is abetted, but the offence is not committed, §138 will have no application and the abettor will come under the general rule laid down in §§135 - 136 *ante.*

Escape from custody.

139. The offence of having escaped from custody may be inquired into or tried, either by the Court within the local limits of whose jurisdiction the person charged is, or by the Court within

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the local limits of whose jurisdiction the offence was committed. §140

Offence.—See §3 *ante*.
Inquired into.—See *Chapter XVI. post.*
Tried.—See *Chapters XVIII.-XX., pp.* 152, 166 *post.*
Court.—See §3 *ante*.
Territorial jurisdiction.—See §§135–136 *ante*.

1. §139 is based upon §181(1) of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §139.**—§§139–141 provide further qualifications of the general rule contained in §§135–136 with regard to certain particular offences. §139 is concerned with the offence of escaping from lawful custody. The rule provided here is that such offenders may be charged or tried, either by a Court having jurisdiction over the place where he is found, or by a Court exercising jurisdiction over the place where the escape took place. See Introduction to *Chapter XIV.*, §§135–136 para. 2 *ante*, §140 para. 2 *post.*

3. **The offence of having escaped from custody.**—See Penal Code §§126 *explanation*, 213, 219, 220A, 221, and the Vagrancy Ordinance No. 5 of 1907, §11; Prisons Ordinance, 1877, §63; Youthful Offenders, Ordinance, 1886, §39.

"Custody" as used in §139 means "lawful custody," *i.e.*, some custody which the law of this Colony regards as lawful. Therefore, a slave who escapes to Ceylon from a country where slavery is recognized cannot be apprehended or dealt with locally, for it is a principle of British law that, as soon as a slave enters upon British soil, he becomes free. Moreover, it would appear that §139 deals solely with the case of persons escaping from lawful custody within the Colony, so that an accused who excapes from lawful custody in India and flees to Ceylon cannot as a rule be tried here, but should be extradited. The case of persons in Ceylon who harbour such an offender* would be different, for here the offence of harbouring is committed within the Colony, and §138 *ante* would apply. It would also appear that no person who harbours a political prisoner who escapes to Ceylon from a *foreign* state can be punished by our law, nor can such offender be extradited.—See Extradition Act, 1870, §3(1).†

Criminal misappropriation and criminal breach of trust.

140. The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried, either by the Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by the accused person, or by the Court within the local limits of whose jurisdiction the offence was committed.

Offence.—See §3 *ante*.
Inquired into.—See *Chapter XVI. post.*

*See Penal Code §§124–126, 133–134, 154, 209, 216–218, 220.
†See *Dias on the Law of Extradition p.* 49-50.

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§140 **Tried.**—See *Chapters XVIII.–XX* ; §§152, 166 *post.*

Court.—See §3 *ante.*

Territorial jurisdiction.—See §§135 - 136 *ante.*

1. §140 is based upon §181(2) of the Indian Act, which it closely follows.

2. **Scope of §140.**—See Introduction to *Chapter XIV.*, §§135 - 136 para. 2, §138 para. 2 *ante.*

§140, together with §§139 and 141, provide a qualification to the general rule contained in §§135 - 136 by making the offender in certain cases liable to be dealt with by a Court other than the one within whose jurisdiction the offence was committed. A person who commits criminal misappropriation or criminal breach of trust may not only be dealt with by a Court within whose local jurisdiction the offence was committed, but also by Courts within whose jurisdiction any part of the property which is the subject of the offence was received by the offender. It would appear that a person who, in Ceylon, misappropriates property for which he would have to account in India may be dealt with locally.—*C.f. R. v. Rowlands* (1906) 1 *A.C.R.* 34. In this case no question as to the jurisdiction of the local Courts to try the offender was raised, but the case illustrates the proposition that an accused who, in Ceylon, collects money for despatch to India, but misappropriates some of it in Ceylon, may be dealt with in Ceylon.

§§137, 139, 140, 141, overlap to a great extent.—See the cases cited under para. 4 *infra.*

3. **The offence of—**

(*a*) **Criminal misappropriation.**—See Penal Code §§386 - 387, *c.f.* Ordinance No. 11 of 1908, §62.

(*b*) **Criminal breach of trust.**—See Penal Code §§388 - 392A. *C.f.* Ordinance No. 7 of 1853, §147 ; Ordinance No. 7 of 1863, §§51, 73(8) ; Ordinance No. 11 of 1865, §22 ; Ordinance No. 17 of 1869, §65 ; Ordinance No. 22 of 1889 ; Ordinance No. 15 of 1890, §8 ; Ordinance No. 15 of 1891, §22 ; Ordinance No. 18 of 1907, §§27, 28 ; Ordinance No. 11 of 1908, §63.

4. **Case Law.**—*R. v. O'Brien.*—See §137 para. 3 *ante.*

R. v. Uttam 2 *P.R.* 1902.—Where a firm whose head office was at K had a branch office at F, and this branch appointed a sub-agent at S, and the agent at S failed to account for a general balance shown to be due, *held*, that the offender was triable at F under §181(2) (*local*—§140) it being different from a case where specific sums were embezzled.

Gokul v. Phul Chand.—See §137 para. 3 *ante.*

R. v. Mahadeo.
Ganeshi v. Kishore.
Langridge v. Atkins.
} See §137 para. 3 *ante.*

Stealing.

141. The offence of stealing anything may be inquired into or tried by any Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who receives or retains the same knowing or having reason to believe it to be stolen.

Offence.—See §3 *ante.*

Inquired into.—See *Chapter XVI. post.*

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Tried.—See *Chapters XVIII.–XX.*, §§152, 166 *post.*
Territorial jurisdiction.—See §§135 – 136 *ante.*
Court.—See §3 *ante.*

1. §141 is based upon §181(3) of the Indian Code which it follows closely.

2. **Scope of §141.**—See Introduction to *Chapter XIV.*, §§135 – 136 para. 2 ; §138 para. 2 and §139 para. 2 *ante.*

A thief may be charged and tried in a Court having jurisdiction over the place where the theft took place or wherever the thief or any guilty receiver thereof was found in possession of the things stolen. So, if the accused committed theft at Kandy, was found to be in possession of the things stolen at Colombo the next day, and which were on the day following traced to the possession of a guilty receiver at Matara, the Courts at Kandy, Colombo and Matara would have concurrent jurisdiction to deal with the charge of theft.

It is to be observed that §141 only speaks of theft, so that, where a theft is accompanied by another offence such as a burglary, it is doubtful whether the rule in §141 can apply to the combined offences, if they are to be dealt with together.

See §138 illustration (*b*) for the case which is the converse of that dealt with by this section.

3. **Stealing.**—The use of this word is peculiar, inasmuch as our law invariably describes such offences under the comprehensive term of "theft."—See §§366 – 371 Penal Code.

See also Ordinances No. 6 of 1865, §39 ; 1 of 1869, §16 ; 17 of 1869, §105 ; 12 of 1884 ; 9 of 1876, §12 ; 9 of 1885, §3 ; 8 of 1904 ; 16 of 1907 ; 11 of 1908, §§62, 63, 79 ; 21 of 1908.

4. **Receives or retains the same knowing or having reason to believe it to be stolen.**—See Penal Code §§393 *et seq.*

Having reason to believe.—See §24 Penal Code, and §§56 para. 10 ; 62 para. 9 ; 68 para. 10 *ante.*

R. v. Jafar.—See §138 para. 3 *ante.*

Place of inquiry or trial in various cases.

142. When it is uncertain in which of several local areas an offence was committed ; or

Where an offence is committed partly in one local area and partly in another ; or

Where an offence is a continuing one and continues to be committed in more local areas than one ; or

Where it consists of several acts done in different local areas ;

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

When it is uncertain.—*C. f.* §181 *post.*
Offence.—See §3 *ante.*
Acts.—See §31 Penal Code.
Inquired into.—See *Chapter XVI. post.*
Tried.—See *Chapters XVIII.–XX.*, §§152, 166 *post.*
Territorial jurisdiction.—See §§135 – 136 *ante.*

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§142

1. §142 is identical in its terms with §182 of the Indian Code, but the marginal notes are not the same.

2. **Scope of §142.**—See Introduction to *Chapter XIV.*, §§135 - 136 para. 2 *ante.*

Section 142 provides for four different contingencies :—

(i) Where it is uncertain in which of several local areas the offence was committed, *i.e.*, (*a*) where it is uncertain *at what place* the offence was committed, and, therefore, uncertain in which local area it was committed ; and (*b*) where the place where the offence was committed is known, *but it is uncertain as to what local area the place comes under.*—See para. 4 *infra* and §145 *post.*

(ii) Where the offence is committed partly in one local area and partly in another.—*C.f.* §§137, 138, 139 *ante*, §143 *post.* See para. 5 *infra.*

(iii) Where the offence is a continuing one and continues to be performed in several local areas.—*C.f.* §143 *post.* See para. 6 *infra.*

(iv.) Where the offence itself is made up of several acts which are done in different local areas.—*C.f.* §138 *ante.* See para. 7 *infra.*

3. **Local area.**—See §423 *post.*

Bitchitranund v. Bhugbat 16 *Cal.* 667.—A "local area" means an area over which this Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which this Code has no application. In commenting upon this construction an Indian commentator states: "The restriction placed on the meaning of the phrase 'local area' is not beyond question. If it were uncertain whether an offence committed was committed in a 'local area' in a Native State, there seems no reason why §182 (*local*—§142) should not apply."*

4. **Where it is uncertain, etc.**—See para. 2 *supra* and §§143, 145 *post.*

R. v. Mahadeo.—See §137 para. 3 *ante.*

Bitchitranund v. Bhugbat 16 *Cal.* 667.—Section 142 in reality intends to provide for the difficulty which would arise where there is a conflict between different areas in order to prevent an accused from getting off entirely, because there may be some doubt as to which particular Judge had jurisdiction to try the case.

Punardeo v. Sarup 25 *Cal.* 858.—"The learned *vakil's* contention is that 'local area' . . . means a spot, and not a district or province. He may be right so far that the expression 'local area' may comprehend not only a district or province, but also a 'spot' : but his contention is not right so far as it seeks to restrict the expression 'local area' to the spot where the offence was committed . . ."

5. **Offence committed partly in one local area and partly in another.**—See para. 2 *supra.*

R. v. Silva (1919) 7 *C.W.R.* 55.—See §138 para. 3 *ante.* *Held further*, "I think, however, that the case may be brought under §142, which, *inter alia*, enacts that where an offence is committed partly in one local area and partly in another, it may be tried, &c. . . . . Here, at the point of time when the carts were crossing the border, the act must, I think, be regarded as having taken place partly in the local area over which the Police Court of Tangalle has jurisdiction . . ." *per* de Sampayo, J.

**Boys Criminal Procedure Code Vol.* 2 *p.* 332.

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6. **Continuing offence.**—See para. 2 *supra.*

Is kidnapping a continuing offence? *Held* in the affirmative in *R. v. Samia* 1 *Mad.* 173, but dissented from in *R. v. Ram Dei* 18 *Alla.* 350.

7. **Several acts done in different local areas.**—*C.f.* §138 *illustration* (*a*) *ante.* See para. 2 *supra.*

Offence committed on a journey.

143. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence was committed passed in the course of that journey or voyage.

Offence.—See §3 *ante.*

Inquired into.—See *Chapter XVI. post.*

Tried.—See *Chapters XVIII.–XX.*, §§152 (3), 166 *post.*

Court.—See §3 *ante.*

Territorial jurisdiction.—See §§135 – 136 *ante.*

1. §143 is identical in its terms with §183 of the Indian Code.

2. **Scope of §143.**—See Introduction to *Chapter XIV.*, and §§135 – 136 para. 2 *ante.*

This section is meant to apply to a case like this: X is going on a journey to Bandarawela from Colombo by train. During the journey he murders Y, a fellow passenger, but it cannot be ascertained with any degree of certainty at what particular phase of the journey the offence was committed. Under §143 X may be charged in any Police Court having jurisdiction over the various places through which the train proceeded. It will be seen, therefore, that §143 is a particular example of the case dealt with under §142 *ante.*

In considering §143 the effect of §39 of the Railway Ordinance, 1902, should not be overlooked. This section enacts that "for the purposes" of the Railway Ordinance certain specified Police Courts and any other Courts, which the Governor may hereafter specially authorize, shall "each have jurisdiction over all offences, acts, matters and things cognizable by Police Courts, although such Magistrates may otherwise have no jurisdiction in the place where the offence was committed, or where the act, matter, or thing, took place." See also para. 3 *infra.*

3. **Journey or voyage.**—*R. v. Bapu* 5 *Mad.* 23.—"The words 'journey or voyage' . . . do not include a voyage on the high seas or in foreign territory, but are confined in their meaning to a journey or voyage within the territories of British India."

R. v. Malony 1 *Mad. H.C.* 193.—In this case the Court construed §35 of the Indian Criminal Procedure Code, which was later repealed. "The words '*on a* journey or voyage' must, we think, be read as if the provision had been 'while a journey or voyage or any part of it is being performed' by a ship or carriage, without particular reference to the terminus." *Held*, that the words meant "while a journey or voyage is going on." *C.f.* "In the course of performing a journey" in §143.

Peerun v. Field 21 *W.R.* 66.—An offence committed during a stoppage of the journey, which was not necessary, was held to prevent

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§143 the application of §183 (*local*—§143) of the Indian Code ; but if the halt was necessary or incidental, this fact was held not to prevent the applicability of §183.—*R. v. Abdul* 25 *W.R.* 45.

In the course of that journey or voyage.—These words must be read to mean " In the course of the voyage or journey which either the offender, injured person, or the subject-matter of the offence was making at the time the offence was committed."

It should be noted that, while it is essential for the applicability of §143 that the offence should be committed while the offender is on a journey, on the other hand it is not essential that the person injured, or the subject matter of the offence should be on a journey as well. Thus, A is travelling from Colombo to Kandy. X robs A of his watch. §143 would apply if X was a fellow traveller of A even for a short distance ; but the section will not apply if X merely entered the train at an intermediate station, robbed A and immediately made off. Again, X, while on a train journey alights at a wayside station and robs a person standing on the platform and continues the journey. §143 would apply to such a case. These are the facts of an actual case. X was travelling from Wattegoda to Colombo by train. At Gampola, the accused, having purchased a ticket to Kadugannawa, entered the train. At some stage of the journey between Gampola and Polgahawela, accused, who had not alighted at Kadugannawa, robbed X of his purse, which was discovered in the possession of the accused before the train left Polgahawela. The accused was arrested and brought to Colombo and charged before the Police Court of Colombo. The question then arose whether the Police Court of Colombo had jurisdiction to try an offence which obviously and demonstrably had been committed outside its jurisdiction. In such a case the test of jurisdiction appears to depend on the question whether the offender, in being brought to Colombo, was " performing a journey " within the meaning of §143. In this case it was clear that the accused had originally intended to journey from Gampola to Kadugannawa only, but, seeing X, the accused made up his mind to rob him and extended his journey. It could be expected that, having robbed X, the accused would take the earliest opportunity of terminating his journey and leaving the train This he might have easily done had he not been detected and thereafter compulsorily made to perform a journey to Colombo. It would appear that in a case like this §143 would not justify the accused being charged in Colombo. He might have been charged in any of the Police Courts between Gampola and Polgahawela, through whose jurisdiction the train passed. The matter, however, is not free from doubt.

R. v. Silva (1919)7 *C.W.R.* 55.—See §138 para. 3, §142 para. 5 *ante*.

Offences against Railways, Post Office, Telegraphs and Arms Acts.

144. All offences against the provisions of any law for the time being in force relating to railways, telegraphs, the post office, or arms and ammunition may be inquired into or tried by any Court, whether the offence is stated to have been committed within the local limits of the jurisdiction of such Court or not, provided that the offender is found within such local jurisdiction.

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Offences.—See §3 *ante*.

Inquired into.—See *Chapter XVI. post.*

Tried.—See *Chapters XVIII.–XX.*, §§152, 166 *post.*

Court.—See §3 *ante*.

Territorial jurisdiction.—See §§135 - 136 *ante*.

1. §144 is based upon §184 of the Indian Code, but the two sections are not identical in their terms.

2. **Scope of §144.**—This section furnishes a further qualification of the general rule stated in §§135 - 136 *ante* in so far as offences relating to railways, telegraphs, the post office, or arms and ammunition are concerned. Any Court, within the limits of whose territorial jurisdiction the offender *is found*, can entertain the charge or try him, whether it is alleged that the offence was committed within such limits or not. See Introduction to *Chapter XIV.*, §§135 - 136 para. 2 *ante*.

3. **All offences.**—

(i) **Railways.**—See Ordinance No. 9 of 1902, and see §143 *ante*.

(ii) **Telegraphs.**—See Penal Code, §§164 - 167; Ordinance No. 35 of 1908, §§20 - 35, 41; Ordinance No. 19 of 1898.

(iii) **The Post Office.**—See Penal Code, §§165 - 167; Ordinance No. 11 of 1908, §§59 - 89, 95 - 97 (see Ordinance No. 3 of 1916).

(iv) **Arms and ammunition.**—See Ordinance No. 12 of 1900; *c.f.* Ordinance No. 8 of 1902, and see Ordinance No. 33 of 1916, §§9 *et seq.* See §39.

4. **Provided the offender is found.**—These words are peculiar to §144. There are Imperial Acts vesting our Courts with jurisdiction to try offenders found in Ceylon, but who have committed offences beyond the local territorial waters.

If the accused "is found" within the jurisdiction it is sufficient to empower the Court to deal with the offender. The fact that the accused was brought within such jurisdiction against his will does not debar the Court from dealing with him.—*R. v. Lopez* (1858) 1 *Dears. & B.* 525.

Attorney-General to decide, in case of doubt, district where inquiry shall take place.

145. Whenever any doubt is entertained by a Police Magistrate as to the Police Court by which any offence should be inquired into, such Magistrate may embody the ascertained facts in the form of a case and transmit the same to the Attorney-General for his opinion, and the Attorney-General shall thereupon decide in which Court the offence shall be inquired into and such Court shall thereupon have jurisdiction to inquire into such offence.

Police Magistrate.—See §3 *ante*.

Police Court.—See §3 *ante*.

Offence.—See §3 *ante*.

Inquired into.—See *Chapter XVI. post.*

Attorney-General.—See §§3 *ante* and §§148(1)(*e*), 387, 158(2), 390, 391 *post.*

Case stated.—*C.f.* §§353, 355, 381 *post.*

Jurisdiction.—See §§135 - 136 *ante*.

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§145

1. §145 is based upon §185 of the Indian Code, but the local section departs from the terms of §185 in many particulars.

2. **Scope of §145.**—See Introduction to *Chapter XIV.* and §§135–136 para. 2 *ante*.

§142 *ante* dealt with a case where it was *uncertain* in which of several local areas an offence was committed, and empowered Courts within every such local area to exercise concurrent jurisdiction to investigate the offence *or try* the offender. §145 provides for a case where, during any *non-summary investigation* under *Chapter XVI. post*, the Magistrate holding such investigation entertains a doubt as to whether his Police Court or some other should more properly hold the investigation. In such a case the Magistrate may embody the ascertained facts "in the form of a case" and submit it to the Attorney-General for his opinion. The Attorney-General then decides in which Court the offence should be investigated, and "such Court *shall* thereupon have jurisdiction to inquire into such offence." See §422(1)(*a*) and §46 Courts Ordinance, 1889. *C.f.* §§47, 93 Courts Ordinance, 1889.

3. **Whenever any doubt is entertained.**—*e.g.*, if, in the case of *R. v. Silva** (1919) 7 *C.W.R.* 55, the offence had been non-summary, the Police Magistrate of Tangalle might well have entertained a doubt as to whether the offences could be investigated in his Court.† The discretion vested in the Attorney-General under §145 is final and may not be questioned—the words of the section being "*shall* thereupon have jurisdiction." *C.f.* §47 Courts Ordinance 1889, and para. 4 *infra*.

4. **In the form of a case.**—*C.f.* Form 13, *Schedule III. post*. See §§353(2), 355 *post*.—"Case stated"; §318 *post*.—Case stated to the Supreme Court in cases of contempt. Under §47 of the Courts Ordinance, 1889, the Attorney-General may, by his *fiat*, transfer any non-summary investigation from any Court or place to any other Court or place, subject to the review of his decision by the Supreme Court. *C. f.* §93 (*ibidem*).

5. **Transfer of non-summary investigations by the orders of the Supreme Court.**—See §422 (1)(*a*) *post*, §46 Courts Ordinance 1889.

Sentence not to be set aside because inquiry held by wrong Police Court.

146. No sentence or order of any criminal Court in the trial of an offence shall be liable to be set aside merely on the ground that the inquiry into the commission of the offence to which the sentence or order relates was made by a Police Court not empowered under this Chapter so to do.

Criminal Court.—See Preamble to this Code and §3 *ante*.

Trial.—See *Chapters XVIII.–XX.*, §§152, 166 *post*.

Offence.—See §3 *ante*.

Set aside.—See §§177, 347, 354 - 357 *post*.

Police Court.—See §3 *ante*.

Irregularities in proceedings.—See §§171, 309(*h*), 423 - 426 *post*. *C.f.* §39 Courts Ordinance, 1889.

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* See §§138 para. 3, 142 para. 5 *ante*.

† *C.f.* the facts in *R. v. Perera* (1916) 19 *N.L.R.* 310 ; 3 *C.W.R.* 176.

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§146

1. §146 does not appear to be based upon any section of the Indian Code.

2. **Scope of §146.**—§§146 and 423 *post* should be read and construed together. §146 declares that no *sentence* or *order* imposed by the Court of *trial* in any criminal case shall be set aside merely because the *non-summary investigation* which preceded the trial was held before a Police Court which was not lawfully empowered under *Chapter XIV.* to investigate the offence, *e.g.*, by not possessing the necessary jurisdiction—§§135 – 145 *ante*—or because the offence was one needing sanction, and such sanction had not been given.—§147 *post.* It is to be observed that §146 says nothing about any prejudice which such irregularity may have caused to either side.*

On the other hand §423 enacts that no *judgment* of *any* criminal Court is to be set aside merely on the ground that the *inquiry, trial,* or other proceeding, in the course of which such judgment was passed, took place in a wrong local area "unless it appears that *such error* occasioned a *failure of justice* to either side." See *R. v. Babasinno* (1919) 6 *C.W.R.* 10.

§39 of the Courts Ordinance, 1889, enacts that no judgment, sentence or order pronounced by *any* Court shall, on appeal or revision, be reversed, altered, or amended "on account of any error, defect, or irregularity which shall not have prejudiced the substantial rights of either party."

After an accused has pleaded to the indictment in trials before the Supreme Court or a District Court, he may not thereafter object to the jurisdiction of the Court to try him.—See §§32, 73 Courts Ordinance, 1889.

See Introduction to *Chapter XIV.* and §§135 – 136 para. 2 *ante.*

3. **R. v. Sengina (1905) 8 N.L.R. 102.**—The "Itinerating Police Court of Colombo" exercised concurrent jurisdiction over parts of the judicial districts of Colombo, Negombo and Avisawella. The Magistrate entertained within the Colombo district a charge of robbery alleged to have been committed by the accused within the Negombo district, and committed him for trial before the District Court of Negombo. *Held,* "The order of committal, in the circumstances found, is not liable to be set aside under §146 . . ., as there is no proof that the irregularity has occasioned a failure of justice", *per* Layard, C.J. *N.B.*—§146 does not require that the irregularity should occasion a failure of justice.

R. v. Silva (1919) 7 *C.W.R.* 55, *at. p* 57.—"The objection in any case is highly technical, and the trial of the appellants in the Police Court of Tangalle in no way prejudiced them, and I think that the provisions of §§146 and 423 . . . are quite applicable to the case, and save the conviction," *per* de Sampayo, J. See §§138 para. 3, 142 para. 5, §145 para. 3 *ante.*

4. **Empowered under this Chapter.**—*i.e.*, being empowered with jurisdiction under §§135 – 145 *ante,* or with the necessary sanction under §147 *post.*†

5. **Appeal.**—See §§347 – 348 para. 6 *post.*

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*See *R. v. Sengina, R. v. Silva* para. 3 *infra.*

†See (1905) *Lem.* 39 ; *Sourjah v. Pannaloka* (1916) 2 *C.W.R.* 133 ; *R. v. Meera Saibo* (1916) 3 *C.W.R.* 149 ; *Rodrigo v. Fernando* (1909) 1 *Curr. L.R.* 129 ; *Ranghamy v. Yahapathamy* (1920) 7 *C.W.R.* 245 ; *Peris v. Munasinghe* (1906) 9 *N.L.R.* 323 ; *Silva v. Appu* (1895) 1 *Br.* 150 ; *Appu v. Surawal* (1910) 5 *Bal.* 27 ; *R. v. Amerasuriya* (1899) *Koch* 31 ; (1899) *Koch* 52 ; *Wijeysinghe v. Ekanayaka* (1906) 3 *Bal.* 168 ; *R. v. Harmanis* (1903) 8 *N.L.R.* 140 ; *Atty.-Gen. v. Wijeysinghe* (1916) 2 *C.W.R.* 31.

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§147

The conditions necessary for the initiation of prosecutions for certain offences.

147. (1) No Court shall take cognizance—

(*a*) Of any offence punishable under sections 170 to 185 (both inclusive) of the Penal Code except with the previous sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate.

(*b*) Of any offence punishable under sections 190, 191, 192, 193, 196, 197, 202, 203, 204, 205, 206, 207 and 223 of the same Code when such offence is committed in or in relation to any proceeding in any Court except with the previous sanction of the Attorney-General or on the complaint of such Court.

(*c*) Of any offence described in section 452 or punishable under sections 459, 463, 464 of the same Code when such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding except with the previous sanction of the Attorney-General or on the complaint of such Court.

(*d*) Of any offence punishable under *Chapter VI.* of the Penal Code or punishable under section 288 of the same Code unless upon complaint made by the Attorney-General or by some other person with the previous sanction of the Attorney-General.

[§2, 5 of 1903.]

(*e*) Of any offence falling under *Chapter XIX.* of the Penal Code, unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction.

[§2 (1), 1 of 1910.]

(*f*) Of any offence punishable under the section which was added by section 5 of "The Penal Code Amendment Ordinance, 1909," as section 291A of the Penal Code, unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction.

[§2 (2), 1 of 1910.]

(2) The complaint of a Court shall be in writing under the hand, in the case of the Supreme Court, of the Registrar

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and, in the case of any other Court, of the District Judge, the Commissioner of Requests, or a Magistrate of such Court. §147

(3) Where complaint is made by a Court such Court may cause the accused to be arrested and sent in custody before the Police Court having jurisdiction.

(4) When sanction is given in respect of any offence referred to in this section the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts, but no such sanction shall remain in force for more than six months from the date on which it was given.

Court.—See §3 *ante.*
Offence.—See §3 *ante.*
Attorney-General.—See §3 *ante.*
Public servant.—See §19 Penal Code.
Document.—See §3 Evidence Ordinance.
Evidence.—See §3 Evidence Ordinance.
Writing.—See §3 *ante.*
Supreme Court.—See §3 *ante.*
Registrar.—See §3 *ante.*
District Judge.—See §3 *ante.*
Commissioner of Requests.—See Ordinance No. 1 of 1889, §§3, 55.
Magistrate.—See §3 *ante.*
Power of Judge to direct arrest.—See §§40 - 41 *ante.*
Police Court.—See §3 *ante.*
Jurisdiction.—See §§10 - 11, 13 - 17, 135 - 145 *ante.*
Frame a charge.—See §§167 - 185 *post.*
Charge amended to one needing sanction to prosecute.—See §175 *post.*
Six months.—See Ordinance No. 21 of 1901, §7.
Complaint.—See §3 *ante.*

1. §147 has been adapted from §§195(1)(*a*),(*b*),(*c*),(6), 196 and 198 of the Indian Code, but our law is widely different from the Indian law on the subject matter of §147 of this Code.

2. **Scope of §147.**—As a general rule, unless the offence is statute barred under §444 *post*, any private person is at liberty to initiate criminal proceedings—*Nonis v. Appuhamy* (1926) 4 *T.L.R.* 71; *R. v. Saravanamuttu* (1927) 8 *C.L.Rec.* 117; *Zakir v. Usoof* (1930) 8 *T.L.R. at p.* 36; *Erskine v. Muttu* (1914) 2 *Crim. App. R.* 6, 17 *N.L.R.* 449; provided he conforms to the rules of procedure regulating the institution of such proceedings, and subject to the risk of being charged with or sued for making a false charge, or being cast in Crown costs and compensation for instituting a frivolous or vexatious charge—see §253B *post.* In most systems of jurisprudence, however, the Legislature intervenes and imposes a fetter upon this unrestricted right of the subject, by requiring him, in certain cases, to obtain the sanction of some public officer or Court before commencing a prosecution. The object of such legislation is two-fold, *viz.*, (i) to prevent the process of the criminal Courts from being prostituted for the purpose of harassing an enemy by way of revenge,* or out of spite, and (ii) to enable the authorities to discourage

*See Ord. No. 20 of 1919—vexatious institution of *civil* proceedings. See also §§253 B–C *post.*

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§147 false and vexatious cases, and to keep under control the number of prosecutions, by requiring some public officer or Court to examine the facts of the case before a prosecution is sanctioned. Such legislation is "a precautionary measure, in order to prevent frivolous or otherwise undesirable proceedings by private persons."—*R. v. Meera Saibo* (1916) 3 *C.W.R.* 149.

The English law on the point is to be found mainly in the Vexatious Indictments Act, 1859 (22 & 23 *Vict.* c17). The law of this Colony is chiefly to be found in §147 and in §§104, 175, 183(3), 286(2), 380, 384 and 425 of this Code, and various other Ordinances which curtail the free right of private persons to institute criminal prosecutions in certain cases. Over and above this, it should be realised that, when once a non-summary investigation has commenced at the instance of a private person, it is the right of the Attorney-General to conduct the prosecution, or, in his absence, for some advocate or proctor specially authorized on his behalf, or, failing such person, for the Magistrate to act as prosecutor.—§392 *post*. Moreover, all prosecutions in District Courts and in the Supreme Court are conducted by the Crown—see §§186, 291, 216(2) *post*—or by some advocate or proctor specially authorized by the Attorney-General. Again, when once criminal proceedings have commenced, the law imposes a fetter upon the free right of the parties to compound the case—see §290 *post*. In summary trials before a Police Court, the complainant is given the right to request the Magistrate to allow him to withdraw the case under certain contingencies—see §195 *post*—and in certain other circumstances to do so with the sanction of the Attorney-General—see §196 *post*. The right of ordering a discharge in a non-summary case is vested in the Magistrate and the Attorney-General, but the Attorney-General, even if the Magistrate has discharged the accused, can order the case to be reopened—see §§388, 391 *post*.

The right of entering a *nolle prosequi*, or of withdrawing an indictment duly presented to a Court is vested in the Attorney-General alone—see §§196, 202, 217, 388 *post*.

Analysis of §147.—The section directs that no Court is to take cognizance of :—

(i) Any offence punishable under §§170 – 185 of the Penal Code except (*a*) with the previous sanction of the Attorney-General, or (*b*) on the complaint of the public officer concerned, or the superior officer of such public servant—see §381 *post*. All the offences specified here are contempts of the lawful authority of public servants, and the law imposes a fetter upon the right which any private person would otherwise have had of instituting proceedings under any one of these sections of the Penal Code—see §381 paras. 3 – 6.

(ii) Any offence punishable under §§190 – 193, 196 – 197, 202 – 207, 223 of the Penal Code, "*when such offence is committed in or in relation to any proceeding in any Court*" except (*a*) with the previous sanction of the Attorney-General, or (*b*) on the complaint of "such Court."—See §286(2) *post*.

The offences here specified comprise perjury and cognate offences, false personations in Court for fraudulent purposes, obstructions to the process of the Court as by removing property in order to prevent its seizure, etc., and the offence of interrupting judicial proceedings. §§380 and 384 *post* should be read and construed together with this sub-section. See also §293 para. 2 *post*.

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(iii) Any offence "*described in*" §452, or "*punishable*" under §§459, 463 – 464 of the Penal Code "*when committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding*" except (*a*) with the previous sanction of the Attorney-General, or (*b*) on the complaint of "such Court." This sub-section comprises all the sections of the Penal Code dealing with forgery as defined in §452, *viz.*, §§454 – 457, the offence of uttering forged documents and of counterfeiting documents, etc. In construing this sub-section, §§380 and 384 *post* should be considered. See also §293 para. 2 *post.* §147

(iv) Any offence punishable under *Chapter VI.* of the Penal Code or under §288 of the same Code, (*a*) unless upon complaint made by the Attorney-General, or (*b*) by a private person with the previous sanction of the Attorney-General. This sub-section comprises all "Offences against the State" and the offence of keeping a lottery.—See Ordinance No. 8 of 1844, §7.

(v) Offences falling under *Chapter XIX.* of the Penal Code, unless (*a*) upon complaint made with the previous sanction of the Attorney-General "by some person aggrieved by such offence," or (*b*) by some other person with the like sanction. This sub-section embraces the whole of the law of criminal libel.

(vi) Any offence punishable under §291A of the Penal Code, unless (*a*) upon complaint made with the previous sanction of the Attorney-General "by some person aggrieved by such offence," or (*b*) by some other person with the like sanction. This sub-section deals with the offence of uttering words with the intention of wounding religious feelings.

Over and above the provisions contained in §147, which only refers to offences under the Penal Code, this Code in two other places, imposes further fetters upon the free right of private persons to institute criminal proceedings. Under §104 *ante* no prosecution against any Government Agent, Police Magistrate, or the Inspector-General of Police, or any Military Officer, Peace Officer, soldier, whether of the Regulars or of the local Defence Force, can be instituted in respect of any act purporting to be done under *Chapter VIII. ante*, except with the sanction of the Governor.—See §104 para. 11 *ante.* Again under §286(2) *post*, it is provided that no prosecution for the offence of giving false evidence shall be entertained against a pardoned accomplice without the sanction of the Attorney-General. See §835 Civil Procedure Code, *Cader v. Fernando* (1932) 34 *N.L.R. at p.* 195, and *c.f.* §§175, 183(3) *post.* There are, also, many Ordinances creating offences, in which some kind of sanction is required before a person can institute criminal proceedings—for examples see para. 10 *infra.* See also the commentaries on §§380—384 *post.*

Sanction to prosecute should only be given with the object that the ends of justice may be served, and not in order to assist private persons to harass their opponents. No sanction ought to be given unless a *prima facie* case has been made out, or unless there exists a reasonable chance of a conviction following the prosecution. Great care and circumspection should be observed in granting sanction so that it might not be used by the person to whom it is granted as a weapon of oppression, or for purposes of blackmail. §147(4) declares that a sanction, once given, lapses after six months from the date it is given. It is the practice, however, to require the person to whom sanction is granted to institute proceedings within a certain short period after the sanction

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§147 has been granted. As a rule the sanction should be granted before the prosecution is launched, but our Courts have held that in certain cases §425 *post* cures a breach of this requirement. The use of the word " previous " in some of the sub-sections of §147 clearly indicates that in such cases the sanction should be given prior to the criminal proceedings being instituted. When sanction is granted, the Court may proceed to frame any charge in respect of any other offence disclosed by the facts.—§147(4). If a charge not needing sanction is altered into one which needs sanction, §175 *post* provides that the case cannot proceed until such sanction as the law requires has been obtained. The granting or not granting of sanction is not an appealable order.—*Cader v. Fernando* (1932) 34 *N.L.R. at p.* 195.

§425 *post* enacts that no judgment of a criminal Court is to be disturbed on account of the want of sanction required by §147. It is to be noticed that the section is silent with regard to sanctions required under §104 *ante*, and §§175, 286(2) *post*. It also says nothing about cases needing sanction under Ordinances other than this Code. It would appear that in all the cases not covered by §425 the absence of sanction, certainly prior to an indictment or charge being preferred, would be a fatal irregularity to the whole proceedings.—See para. 10 *infra*.

§147(2) and (3) deal with " complaints " made by a Court. Sub-section (2) defines how the complaint is to be made in the case of the various Courts, while sub-section (3) defines the powers of such Courts to cause the arrest of the offender and to have him produced before the Police Court.—See also §§148(1)(*f*), 380 *post* and §835 Civil Procedure Code. §384 declares that no District Judge or Magistrate is to try a person for any offence referred to in §147(1)(*a*) or (*b*), when such offence " is committed before himself, or in contempt of his authority, or is brought under his notice as such District Judge or Magistrate in the course of a judicial proceeding."

Qu.—May offences needing sanction to prosecute be withdrawn under §195 *post* or compounded under §290 *post* ?—See §195 para. 2, §290 para. 8 *post*.

3. **No Court shall take cognizance.—**

Court.—*i.e.*, " Courts of criminal judicature of this Island "—see the preamble to this Code. The word is not defined.

Take cognizance.—This expression is not defined, but it would seem that power " to take cognizance " is not the same thing as " trying " (*Chapters XVIII.—XX.* and §§152, 166 *post*) or " inquiring " (*Chapter XVI. post*). Thus, under §445 of the Indian Act a Magistrate may " take cognizance " of a case against a European British subject, but §443 of the Act imposes a restriction upon all Magistrates to inquire into or try such a charge, unless he is a Magistrate of a particular class. It is submitted that this expression means " entertain the charge and issue process."

C.f. **Entertain.**—See §286(2) *post*.

When a charge needing sanction or a particular kind of complaint is presented, the Court may not " take cognizance " of such charge and exercise jurisdiction.—See *Norman v. Perera* (1900) 4 *N.L.R.* 85, 1 *Br.* 144, unless such charge is supported by the necessary sanction, or is preferred by a person lawfully entitled to make the complaint. An objection that the charge is not supported by the required sanction or complaint should be taken at the earliest possible stage.—*R. v. Meera Saibo, Rodrigo v. Fernando, R. v. Kalimohan* para. 12 *infra*, and *c.f.*

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§§32, 76 Courts Ordinance, 1889. Where the Attorney-General commits an accused for trial upon a valid commitment and upon an indictment duly presented to the Court, it has been held that §425 *post* cured any defects in the Magisterial proceedings which might have existed under §147, and that the Court was bound to entertain and try the indictment.—*R. v. Boosa* and *R. v. Harmanis* para. 12 *infra*. It should be noted, however, that §425 only cures defects existing under §147, but is silent with regard to defects which may exist under §§104, 175, 286(2) of this Code or under any other Ordinance making sanction necessary. From the terms of §§175, 183(3) *post* it would appear that in any of these cases a District Court or the Supreme Court would be justified in refusing " to take cognizance " of the indictment until the necessary sanction has been obtained. The point, however, is not quite free from doubt, and an authoritative decision is awaited. §147

Again, under §384 *post* no District Judge or Police Magistrate may " try " any person for any offence referred to in §147(1) (*b*) or (*c*) when the offence has been committed before himself, or in contempt of his authority, or is brought under his notice in the course of a judicial proceeding.—See para. 14 *infra*.

4. **§147(1) (a).**—See para. 2 *supra* and §§381, 383 *post*.

Julis Appu v. Surawel.—Charge under §172 Penal Code. See para. 12 *infra*.

Silva v. Appu. (1905) *Leembruggen* 35. (1906) *Leembruggen & A.* 43. *R. v. Boosa.* *R. v. Meera Saibo.* *Murphy v. Punchappu.*	Charge under §180 Penal Code. See para. 12 *infra*.
Rodrigo v. Fernando. *Peris v. Munasinha.*	Charge under §183 Penal Code. See para. 12 *infra*.

(1899) *Koch* 52.—Charge under §185 Penal Code. See para. 12 *infra*.

Previous sanction.—See para. 13 *infra*.

On the complaint of the public servant concerned, or of some public servant to whom he is subordinate.—

Complaint.—See sub-sections (*b*) - (*f*) *infra* and §148(1)(*a*) (*f*). The word is defined in §3 *ante*.

The public servant concerned.—

Public servant.—Defined §19 Penal Code.

Subordinate.—Where the public servant concerned, *e.g.*, a Police Sergeant, communicates information to his superior officer, *e.g.*, the Sub-Inspector, who prefers a complaint, this would be a compliance with §148(1)(*a*)—see (1905) *Leembruggen* 35 para. 12 *infra*;—but the successor in office of the public servant concerned cannot lawfully make a complaint under this sub-section.—(1906) *Leembruggen & A.* 43. In such cases §425 *post* may cure the defect.—See para. 12 *infra* and *Peris v. Munasinha* (1899) *Koch* 52, *Silva v. Appu* para. 12 *infra*. It is incorrect for the public officer concerned to cause some other person, on his behalf, to endorse upon the Police plaint that the prosecution has been " authorized " by him; but even in such a case §425 might cure the irregularity.—*R. v. Meera Saibo, Rodrigo v. Fernando* para. 12 *infra*.

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5. §147(1) (*b*).—See para. 2 *supra* and 10 *infra*, see §§380, 384 *post*.

Attorney-General v. Wijeysinghe.—Charge under §190 Penal Code. See para. 12 *infra*.

When such offence is committed in or in relation to any proceeding in any Court.—*C.f.* para. 6 *infra*.

Chandra v. Balfour 26 *Cal.* 359.—Where X instigated a witness to give false evidence in a case, *held*, that the alleged offence "was in relation to proceedings" in that Court. Had the instigation taken place before the case was filed, would sanction yet be necessary, in view of the fact that there was no Court then in existence, to whose proceedings the offence could be said "to relate?" The Indian Courts have gone the length of deciding that, though at the time the offence was committed there may be no existing proceeding pending in any Court, yet, if the act constituting the offence might naturally lead to a proceeding in Court, then the offence may be said to have been "committed in relation to a proceeding in a Court."

R. v. Khanderao 15 *Bom. L.R.* 362.—"It may be that the instigation was committed *before* the proceedings in Court were begun, but, none the less, I am of opinion that the instigation was an act committed in relation to the proceeding held by the Magistrate." See also *R. v. Hardwar* 34 *Alla.* 522. This decision in effect goes the length of construing the words "any proceeding" to mean "any existing proceeding, or one which may come into being in the future." It is submitted that this is far too strict a construction of §147(1) (*b*) and would probably not be followed in Ceylon, were the question to arise here for decision. In the case of *R. v. Chandra* 26 *Cal.* 786, it was held that no sanction was required in regard to an offence under §190 of the Penal Code where the false evidence was fabricated not "in relation to any proceeding in a Court," but in the course of a Police investigation.

Previous sanction of the Attorney-General.—See para. 13 *infra*.

Complaint of such Court.—

Complaint.—See §147(1) (*a*), (*c*)-(*f*), §148(1) (*a*), (*f*) and §3 *ante*.

Complaint of such Court.—See §147(1) (*c*).

The complaint of a Court under §147 should conform with the requirements of §147(2).—The powers of the Court making the complaint are set out in §147(3).—*Re Kitnan Chetty* para. 12 *infra*. See also §§380 – 383 and §384 *post*. §835 of the Civil Procedure Code confers similar powers upon Civil Courts.

6. §147(1) (*c*).—See para. 2 *supra* and §§380, 384 *post*.

Offence described in Section 452.—These words would include §§454 – 457 of the Penal Code.—See *R. v. Tulja* 12 *Bom.* 36.

Wijeysinghe v. Ekanayaka.—Charge under §452 of the Penal Code. See para. 12 *infra*.

R. v. Haramanis.—Charge under §459 of the Penal Code. See para. 12 *infra*.

Committed by a party to any proceeding.—*C.f.* para. 5 *supra*.

R. v. Haramanis.—See para. 12 *infra*.

Wijeysinghe v. Ekanayaka.—See para. 12 *infra*.

An offence specified in this sub-section, or an attempt or any abetment to commit such offence by a person, who is not a "party" needs no sanction.—See *R. v. Eadara* 3 *Mad.* 400; *R. v. Ayyar* 30 *Mad.* 226; *R. v. Devji* 18 *Bom.* 581; *R. v. Ganasham* 32 *Alla.* 74; *R. v. Latta* 34 *Alla.* 654. See para. 11 *infra*.

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"To any proceeding" means "to any judicial proceeding."— *Adhar v. Ablakh* (1895) *A.W.N.* 145. §147

Given in evidence.—Under the Indian Code the words are "*Produced or* given in evidence." Thus in *Charan v. Ginja* 29 *Cal.* 887, a bond was filed in Court, but not considered at the trial. It was held that the document had been "produced" although not "given in evidence" and that sanction was necessary. In such a case no sanction would be needed in Ceylon. See *R. v. Haramanis; Wijeysinghe v. Ekanayaka* para. 12 *infra.*

Previous sanction.—See para. 13 *infra.*

On the complaint of such Court.—See para. 5 *supra.*

7. §147(1)(*d*).—See para. 2 *supra.*

Unless upon complaint made by the Attorney-General.—See §148(1) (*e*) *post* and *Attorney-General v. Wijeysinghe* para. 12 *infra.*

Previous sanction.—See para. 13 *infra.*

8. §147(1)(*e*).—See para. 2 *supra.*

Complaint made with the previous sanction of the Attorney-General.—

Complaint.—See para. 7 *supra.*

Previous sanction.—See para. 13 *infra.*

By some person aggrieved.—*Das v. Adhar* 32 *Cal.* 425.—Where a sister has been defamed, her brother may lawfully apply for sanction.

Chotalal v. Nathabhai (1900) 25 *Bom.* 151.—Where a wife has been defamed, the husband may apply for sanction. See *Naidu v. Ramasami* (1891) 14 *Mad. at p.* 381, §290 para. 9 *post.*

9. §147(1)(*f*).—See para. 2 *supra* and para. 8 *supra.*

10. **Other offences needing sanction.**—No prosecution may be instituted against public servants engaged in quelling disturbances under *Chapter VIII. ante* except with the sanction of the Governor §104 *ante.* No prosecution for perjury against a pardoned accomplice —(see para. 5 *supra*) shall be entertained without the sanction of the Attorney-General.—§286(2) *post.*

There are many Ordinances creating offences which enact that no prosecutions for such offences are to be instituted, except with the sanction of some specified public officer. The following are examples :—

Enactment.	*Title.*	*Section.*
Ordinance No. 4 of 1841 ..	Vagrants	10H.
Do No. 8 of 1844 ..	Lotteries	7*
Do No. 16 of 1865 ..	Police	98†
Do No. 17 of 1869 ..	Customs	115
Do No. 2 of 1889 ..	Civil Procedure Code ..	835‡
Do No. 13 of 1889 ..	Indian Coolies ..	30
Do No. 17 of 1889 ..	Gaming	20
Do No. 15 of 1890 ..	Fortifications and Official Secrets ..	12
Do No. 13 of 1898 ..	Local Boards ..	107
Do No. 15 of 1898 ..	Criminal Procedure Code	104, 147, 175, 384 286(2)

*See §288 Penal Code.

†*Ossen v. Amarasuriya* (1899) *Koch* 31 ; *Sourjah v. Pannalokka* (1916) 2 *C.W.R.* 133. See para. 12.

‡*Cader v. Fernando* (1932) 34 *N.L.R.* 193.

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Enactment.	*Title.*	*Section.*
Ordinance No. 9 of 1900 ..	Census	20
Do No. 9 of 1902 ..	Railways	40
Do No. 16 of 1902 ..	Printing Presses Regulation	7
Do No. 5 of 1906 ..	Town Schools	14
Do No. 6 of 1907 ..	Plant Pests	16
Do No. 16 of 1907 ..	Forests	39*
Do No. 11 of 1908 ..	Ceylon Post Office ..	72(2), 89(1),(2)
Do No. 35 of 1908 (15 of 1914) ..	Ceylon Telegraphs ..	20(2), 41
Do No. 38 of 1908 ..	Dairies and Laundries ..	19
Do No. 22 of 1909 ..	Stamps	65
Do No. 6 of 1910 ..	Municipal Councils ..	230
1 & 2 Geo. V. C. 28 ..	Official Secrets ..	8
Do No. 8 of 1912 ..	Excise	49
O-in-C. (State Council Elections) 1931	.. .. Elections ..	55(2), 69(2)
Ordinance No. 27 of 1927 ..	Labour	13
Do No. 17 of 1929 ..	Poisons	74(6)
Do No. 2 of 1932 ..	Income-Tax ..	89
Do No. 11 of 1933 ..	Tea Control	36(2)

It is to be observed that §425 *post* only refers to any "want of sanction required by §147." It would appear, therefore, that any defect regarding the sanction in any of the cases referred to in this paragraph would be fatal, unless cured by an indictment duly presented.

11. **Attempts and abetments to commit offences specified in §147.**—See para. 6 *supra*, and the cases cited in para. 5 *supra*.

R. v. Shaib.—See para. 12 *infra*.

12. **Case law.**—*Julis Appu v. Surawel* (1910) 5 *Bal.* 27.—A Magistrate when trying certain persons for the offence of theft, convicted a witness in the case under §172 of the Penal Code, because he did not attend on a summons which had been served upon him. *Held*, "It is evident that if the witness had committed an offence under §172 the Magistrate should not have proceeded against him in the summary way he has done, but should have charged him, if he desired to be the prosecutor, before another Magistrate, who would then have heard and determined the charge . . . Besides, an offence under §172 cannot be taken cognizance of by any Court except with the previous sanction of the Attorney-General . . ." *per* Grenier, J.

(1905) *Leembruggen* 39.—Charge under §180 of the Penal Code. *Held*, "It was then objected that sanction under §147 of the Criminal Procedure Code had not been obtained for this prosecution. The prosecutor is the Police Inspector, to whom it is clear the Police Sergeant, to whom information was given was subordinate, and that being so, sanction of the Attorney-General was not necessary. Anyway the absence of such sanction is not a fatal irregularity, considering that it cannot be said that it has occasioned a failure of justice . . ." *per* Pereira, J.

**Mahawellatenna v. Mohotihamy* (1910) 5 *Bal.* 85 ; *R. v. Joronissa* (1909) 5 *A.C.R.* 9 ; *Lushington v. Mohamaddu* (1913) 16 *N.L.R.* 366.

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(1906) *Leembruggen & A.* 43.—Charge under §180. *Held,* "Various points were urged before me—under §147(1) (*a*) of the Criminal Procedure Code. A prosecution under §180 of the Penal Code requires the previous sanction of the Attorney-General, unless it is instituted on the complaint of either 'the public servant concerned' or 'of some person to whom he is subordinate.' Here, the false information was communicated to Mr. B, the Government Agent . . . The complaint is preferred by Mr. C, his successor in office. The previous sanction of the Attorney-General has not been obtained. The requirements of §147(1) (*a*) have, therefore, not been complied with. But §425 of the . . . Code provides that the want of any sanction required by §147 is not to vitiate a judgment unless it has caused a failure of justice. No such failure has been caused. This objection fails . . ." *per* Wendt, J.

Silva v. Appu (1895) 1 *Br.* 150.—The original complaint made to the Magistrate was that the accused used criminal force upon the complainant and falsely charged him with theft (§208 ?). The Magistrate, however, convicted the accused under §180. *Held,* "The Magistrate had no jurisdiction to take cognizance of an offence under §180 except with the consent of the Attorney-General, or on a complaint made by a public servant. There was no sanction by the Attorney-General and no complaint lodged by the public officer to whom the false information is said to have been given." Conviction quashed, and case sent to Attorney-General for sanction, if he thinks fit to grant it—see §175 *post.*

R. v. Boosa (1908) 11 *N.L.R.* 355, 2 *S.C.D.* 15.—The District Judge refused to accept an indictment duly presented to him by the Attorney-General charging the accused under §180 of the Penal Code on the ground that no sanction under §147 had been granted when the magisterial proceedings were initiated. *Held,* that the indictment cured the irregularity. "A District Court, before which an accused person is brought for trial upon a warrant of commitment regular on its face and to which an indictment is presented by the Attorney-General, is not competent to inquire whether the proceedings which culminated in the committal were regularly instituted or regularly conducted. It is its duty to try the accused . . ." *per* Wendt. J. See *R. v. Harmanis infra. C.f.* §384 *post.*

R. v. Meera Saibo (1916) 3 *C.W.R.* 149.—Charge under §180 of the Penal Code. There was no sanction of the Attorney-General produced, nor was there a complaint by the public servant concerned. The Police report presented to the Court had an endorsement made upon it "Prosecution authorized," which was signed by some person on behalf of the public officer concerned. *Held,* "There has undoubtedly been a want of care in the institution of the proceedings, but §425 . . . appears to me to apply . . . All that §147 does is to declare that the Police Court shall not exercise jurisdiction except upon the conditions therein mentioned. The only question is whether the provisions of §425 save these proceedings. It is contended that, though the want of sanction of the Attorney-General may be excused, the section does not dispense with the necessity of a complaint by the public officer concerned. I do not think that this contention is sound. §147 does not require both these conditions, but only one or other of them; consequently, when, as in this case, there is no complaint by the public officer, §147 requires the sanction of the Attorney-General, and then §425 comes in and excuses the want of that sanction unless it has occasioned a failure of justice . . . The provisions of §147 are a precautionary measure, in order to prevent frivolous or otherwise undesirable proceedings by private parties. In

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§147 this case the Government Agent (the public officer concerned) not only authorized the prosecution, but appeared in Court and gave evidence, and there is no doubt that the purposes of §147 were practically satisfied. The objection was taken only at the close of the case, and the irregularity in no way occasioned a failure of justice . . ." *per* de Sampayo, J.

R. v. Kalimohan 13 *Bom. L.R.* 47.—An objection as to the want of sanction must be taken promptly, otherwise the defect will be held to be cured under §425, unless it has occasioned a failure of justice.—*R. v. Sundar* 28 *Cal.* 217.

Rodrigo v. Fernando (1909) 1 *Curr. L.R.* 129 (approved in *R. v. Meera Saibo supra*).—Charge under §183 of the Penal Code. There was no previous sanction of the Attorney-General obtained in the case, nor was there a complaint made by the public servant concerned. *Held*, that as no objection regarding the irregularity had been taken in the Court below, §425 saved the conviction. "In spite of the strong terms of the clause 'No Court shall take cognizance' in §147, §425 expressly provides that the want of sanction shall not of itself vitiate criminal proceedings. I see no reason why this rule should not be applied to an 'irregularity in the complaint,' which is also mentioned in §425." *Mozumdar v. Mozumdar* (1894) 22 *Cal.* 176 distinguished.

Peris v. Munasinha (1906) 9 *N.L.R.* 323.—Charge under §183 of the Penal Code. In quashing the conviction on other grounds, *held*, "I understand from . . . counsel that neither the sanction of the Attorney-General has been obtained, nor was a complaint made by the Government Agent under §147 previously to the institution of this case . . ." *per* Middleton, J.

(1899) *Koch* 52.—Charge under §185 of the Penal Code. No sanction of the Attorney-General was obtained, nor was the charge made by the public servant concerned, but by a private person. Conviction quashed.

Attorney-General v. Wijeysinghe (1916) 2 *C.W.R.* 31.—Charge under §190 of the Penal Code. The proceedings in this case were initiated under §148(1) (*e*) of the Code upon a warrant under the hand of the Attorney-General. Objection was taken that under §147(1) (*b*) the Attorney-General can only become a complainant in respect of offences punishable under *Chapter VI.* of the Penal Code or §288, and that, therefore, the proceedings in the present case were not properly constituted. The Magistrate overruled the objection. *Held*, that there was no appeal from this decision of the Magistrate. *The point argued, therefore, was not decided.*

Ranghamy v. Yahapathamy (1920) 7 *C.W.R.* 245.—Charge of theft in the Village Tribunal. Complainant withdrew case from the Village Tribunal and initiated proceedings in the Police Court. *Held*, "There is no formal reference by the President or his councillors to the Magistrate, but there is a note made by the Magistrate . . . to the effect that this case has been referred to him by the Village Tribunal, and that he thought, having regard to all the circumstances, that he ought to try it, because, in his opinion, a fine of Rs. 20·00 was not an adequate punishment for the alleged offence . . . The question that arises, therefore, is whether the Magistrate had the right to exercise jurisdiction over this matter . . . seeing that it had not been referred to him by the President . . . as provided by *proviso* 2 to §28 of Ordinance No. 24 of 1889 . . . Even if there be any technical irregularity in the Magistrate assuming jurisdiction over the case, it would certainly be covered by the provisions of §425 of the Criminal Procedure Code . . ." *per* Dias, J.

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Re Kitnan Chetty (1900) 4 *N.L.R.* 23.—"§147 of the Criminal Procedure Code enables a Magistrate to complain to a Court of any of the offences mentioned in §147(1)(*b*),(*c*), and §147(3) provides that where the complaint is made by a Court, such Court may cause the accused to be arrested and sent in custody before the Police Court having jurisdiction . . ." *per* Bonser, C.J.

Wijeysinghe v. Ekanayaka (1906) 3 *Bal.* 168.—Charge under §452 of the Penal Code. A headman, in making up a crime report, added the name of a witness thereto after forwarding it to the Court. *Held*, that such offence needed no sanction under §147(1)(*c*) as the headman was not "a party to any proceedings in any Court in respect of any document given in evidence in such proceedings . . ." *per* Wood Renton, J.

R. v. Harmanis (1903) 8 *N.L.R.* 140.—A person who offers himself as a surety for an accused is not "a party to any proceedings in a Court," nor does a document produced by him to prove his worth as a surety amount "to giving evidence." Therefore, if the document tendered amounts to a forgery under §459 of the Penal Code, no sanction for the prosecution of the accused is required under §147(1) (*c*) of this Code. *Note*, that in this case the District Judge refused to try the Attorney-General's indictment on the ground that the magisterial investigation had been held without sanction.—See *R. v. Boosa supra.*

Ossen v. Amarasuriya (1899) *Koch* 31.—Charge under §69 of the Police Ordinance, 1869. Absence of Attorney-General's certificate sanctioning the prosecution. Conviction quashed. See *Sourjah v. Pannalokka infra.*

Sourjah v. Pannalokka (1916) 2 *C.W.R.* 133 (following *Ossen v. Amarasuriya supra*).—Charge under §69 of the Police Ordinance, 1869. Absence of Attorney-General's certificate sanctioning prosecution. *Held*, that §425 of this Code could not cure the irregularity, as the sanction there referred to is the sanction required by §147.

R. v. Shaib (1896) 20 *Mad.* 8.—*Held* that the abetment of an offence which requires sanction is itself an offence and punishable under various sections of the Penal Code of which no reference is made in §147 of this Code. Therefore, the offence of abetment needs no sanction, even although the offence abetted requires sanction. See, however, *Tambyah's Penal Code*, *pp.* 208 – 9, and the cases cited in para. 5 *supra.*

Murphy v. Punchappu (1921) 23 *N.L.R.* 274.—The absence of the Attorney-General's sanction to prosecute in respect of offences specified in §147(1) (*a*) may be cured by §425 *post.*

13. **Previous sanction.**—

See Julis Appu v. Surawel (1906) *Leembruggen & A.* 43.
Silva v. Appu.
R. v. Meera Saibo.
Rodrigo v. Fernando.
Peris v. Munasinha (1899) *Koch* 52.

} See para. 12 *supra.*

See also *R. v. Jiva* 10 *Bom.* 190 and *R. v. Ahmed* 27 *Cal.* 692.

14. **§147(2), (3).**—§147(2) requires that where a complaint, as is described in §147(1) (*b*) or (*c*), is made by a Court it is to be in writing under the hand of a specified officer of the Court; while §147(3) declares that such Court may cause the offender to be arrested and sent in custody before the Police Court having jurisdiction. See §§148(2), 149(5), 380 *et seq. post* and §40 *ante* and *Re Kitnen Chetty* para. 12 *supra.*

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§147 §384 *post* declares that except as provided in *Chapter XXXIV.*, no District Judge or Magistrate shall try an offender for any offence described in §147(1) (*b*) or (*c*) when such offence is committed before himself or is brought under his notice as Judge in the course of a judicial proceeding. *C.f.* §18 *ante*. See Civil Procedure Code §835.

15. §147(4).—Charge.—Although sanction to prosecute may be given in respect of an offence referred to in §147(1), this fact will not preclude the Court from framing a charge in respect of any other offence which the facts disclose to have been committed. §175 *post* deals with the converse case. Whenever a charge is altered by a Court under §172 *post*, and such altered charge deals with an offence which needs sanction, whether under §147 or under any other provision of the law, the case may not proceed until such sanction is obtained.

Duration of sanction when given.—A sanction granted under §147 cannot remain in force for more than six months from the date on which it was given.—See §7 Ordinance No. 21 of 1901. Nothing is stated about sanctions given in the case of other offences. In all cases it is usual, in the case of prosecutions by private persons, for the officer granting the sanction to impose a time limit of a few days or weeks within which the prosecution is to be commenced, failing which the sanction will be recalled. This is done in order to prevent the sanction from being used for improper purposes.

16. **May the Magistrate make an order permitting a charge needing sanction to prosecute to be withdrawn under §195 in a case initiated with the proper sanction ?**—See §195 paras. 2, 7 *post*.

17. **May a Magistrate make an order under §253B *post* in cases which have been instituted with the sanction required by law ?**—See §253B paras. 3, 6 *post*.

18. **Where a District Judge in deciding a civil case, acting under §835 of the Civil Procedure Code, himself initiated proceedings in the Police Court for perjury against some of the parties, held that the Court was doing what the law empowered it to do and that no appeal lay to the Supreme Court.**—*Cader v. Fernando* (1932) 34 *N.L.R.* 193.

CHAPTER XV.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE POLICE COURTS.

Chapter XV. of this Code lays down the ordinary procedure to be followed whenever criminal proceedings are first instituted against any person, irrespective of the fact whether the offence charged is summary or non-summary. As a general rule proceedings must first be instituted in a Police Court. Subject to the rules regarding sanction to prosecute—§147 *ante*—any person has the right to initiate criminal proceedings,* and provided the Police Court has the necessary jurisdiction† it can entertain the complaint and issue process on the

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*See *Erskine v. Muttu* (1914) 17 *N.L.R.* 449; 2 *Crim. App. R.* 6; *Nonis v. Appuhamy*, (1926)4 *T.L.R.* 71; 27 *N.L.R.* 430; *Kandasamy v. Muttamma* (1896) 2 *N.L.R.* 71; *R. v. Joseph* (1923) 5 *C.L.Rec.* 36; 1 *T.L.R.* 238.

†See §§10–11, 13–17, 135–145 *ante*.

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accused. If the offence is triable summarily, the Magistrate will act judicially and try the case under *Chapter XVIII. post;* on the other hand if the offence is one which is not triable summarily, he may, in proper cases, invoke the assistance of §152(3) or §166 *post* and deal with the case summarily, or proceed to hold a non-summary investigation under *Chapter XVI. post,* and either discharge the accused or commit him for trial before a higher Court.

As a rule, therefore, every criminal prosecution has to be initiated under *Chapter XV.*, and the procedure to be observed is to be found in §§148 – 151, 153 – 154. To this general rule there are certain exceptions, *viz.*, (i) under §§385, 440A *post* the Attorney-General has the power to exhibit "informations" to the Supreme Court, and such procedure dispenses with the necessity for magisterial proceedings in the first instance; (ii) a case can be transferred from one Police Court to another.—§422 *post,* 145 *ante,* §§46 – 47 Courts Ordinance, 1889.

For other modes of initiating proceedings in Police Courts under this Code see §§9, 80 – 83, 105, 126A(3), 130 *ante,* 362(4), 380 – 384, 413 *et seq.*, 427, 440, 440A *post.*

As to the right of a "party" to appeal.—See §338 *post* and *Nonis v. Appuhamy* (1926) 4 *T.L.R.* 71.

Where criminal proceedings are instituted as a result of a complaint made by the Assistant Government Agent, he may not himself try the case in his capacity of Additional Police Magistrate.—*Appu v. Rajapakse* (1928) 10 *C.L.Rec.* 14.

Where a person does an act which the law has declared he might do, and it appears that there are sufficient grounds for his so acting, no appeal lies. Thus, when a person or public servant initiates a prosecution according to law, that fact itself gives no right of appeal to the person proceeded against.—*Cader v. Fernando* (1932) 34 *N.L.R. at p.* 195.

Proceedings in Police Court how instituted.

148. (1) Proceedings in a Police Court shall be instituted in one of the following ways :—

(*a*) On a complaint being made to a Magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try ; provided that in the case of an indictable offence such complaint shall be made orally and provided also that in the case of a summary offence such complaint, if in writing, shall be drawn and countersigned by a pleader and signed by the complaint;

(*b*) On a written report to the like effect being made to a Magistrate of such Court by an Inquirer under *Chapter XII.* or by a Peace Officer or a public servant or a Municipal servant or a Local Board servant ; or

(*c*) Upon the knowledge or suspicion of a Magistrate of such Court to the like effect ; provided that when proceedings are instituted under this clause

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the accused or, when there are several persons accused, any one of them, shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Police Magistrate or committed for trial;

(*d*) On any person being brought before a Magistrate of such Court in custody without process, accused of having committed an offence which such Court has jurisdiction either to inquire into or try ; or

(*e*) Upon a warrant under the hand of the Attorney-General requiring a Magistrate of such Court to hold an inquiry in respect of an offence which such Court has jurisdiction to inquire into ; or

(*f*) On a written complaint made by a Court under Section 147.

(2) The written report under head (*b*), the warrant of the Attorney-General under head (*e*), and the written complaint under (*f*) of this section may be forwarded by post or by messenger to the Police Court or delivered by hand to a Magistrate of such Court and shall form part of the proceedings.

(3) Except as herein provided no written complaint shall be entertained by a Police Magistrate.

Procedure to be adopted by Magistrate on receipt of complaint or information.

149. (1) In cases falling under head (*a*) of the last preceding section and when the report under (*b*) discloses an indictable offence the Magistrate shall forthwith examine on oath the complainant or informant, and, if he thinks it advisable, may also examine any other person and may, for that purpose, summon before him the complainant or informant or any other person.

(2) In cases falling under head (*b*) of the last preceding section when the report discloses a summary offence only it shall not be necessary to examine the informant, but the Magistrate may forthwith proceed to issue process in manner hereinafter provided.

(3) In cases falling under head (*c*) the Magistrate shall, before issuing process in manner hereinafter provided, record a brief statement of the facts which constitute his means of knowledge or of the grounds of his suspicion as the case may be.

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(4) In cases falling under head (*d*) the Magistrate shall forthwith examine, on oath, the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

(5) In cases falling under heads (*e*) and (*f*) the Magistrate shall forthwith, on receipt of the warrant or complaint (if the accused be not already in custody before the Court), issue process in manner hereinafter provided against the persons named in such warrant or complaint respectively.

(6) In cases where the offence complained of is one of rape, unnatural offence, or hurt of a serious nature, or hurt, whether serious or not, alleged to have been caused by an instrument for stabbing or cutting, the Magistrate shall cause the person who is alleged to have been the subject of such rape, unnatural offence, or hurt, and the person accused of such rape or unnatural offence to be forthwith examined by a competent medical practitioner, if he has not already been so examined.

Examination to be reduced to writing.

150. (1) Where an examination is held by the Magistrate under the last preceding section the examination shall be reduced into writing and after being read over and, if need be, interpreted to the person examined shall be signed by him and also by the Magistrate and dated.

(2) Such examination may, if the Magistrate thinks fit, be held in private.

(3) Where the offence alleged is an indictable one the examination may be held even although no person by name is accused of having committed the offence.

What to be done after examination.

151. (1) If, in the opinion of the Magistrate, there is, after the examination, held under the provisions of Section 149, no sufficient ground for proceeding against the person accused (if any) or against any other person, he shall not issue a summons or warrant and the accused, if in custody, shall forthwith be discharged, but in such case the Magistrate shall briefly record the reasons for such discharge and shall, in every case, record whether, in his opinion, any offence was in fact committed.

(2) If, in the opinion of the Magistrate, there is in any case mentioned in Section 148, heads (*a*), (*b*) and (*c*), sufficient ground for proceeding against some person who

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(3) The summons or warrant issued under sub-section (2) of this section shall contain a statement of the particulars of the offence charged and in the case of a summons shall require the accused to appear with his witnesses (if any) at a time and place therein specified to answer the charge therein set forth.

Police Court.—See §3 *ante*.

Complaint.—See §3 *ante*.

Magistrate.—See §3 *ante*.

Offence.—See §3 *ante*.

Jurisdiction.—See §§10 – 11, 13 – 17, 135 – 145 *ante*.

Inquire into.—*Chapter XVI. post.*

Try.—See *Chapter XVIII.*, §§152(3), 166 *post*.

Indictable offence.—See §3 *ante*.

Summary offence.—See §3 *ante*.

Writing.—See §3 *ante*.

Pleader.—See §3 *ante*.

Signed.—See §3(2) *ante*.

Inquirer.—See §§3, 120 *ante*.

Peace Officer.—See §3 *ante*.

Public servant.—See §19 Penal Code.

Committed for trial.—See §§158, 165.

Brought in custody without process.—*e.g.* §§32 – 42 *ante*.

Attorney-General.—See §3 *ante*.

Warrant under the hand of the Attorney-General.—See §147(1) (*d*).

Rape.—See §364 Penal Code.

Unnatural offence.—See §§365, 365A Penal Code.

Hurt.—See §§310 *et seq.* Penal Code.

Discharge.—See §§3,156 – 158, 191, 196, 391.

Summons.—See §§44 – 49 ; 62 – 64 *ante*.

Warrant.—See §§50 – 58, 62 – 65 *ante*.

Initiation of proceedings upon "information".—See §§385, 440A *post*.

Evidence to be recorded in the presence of the accused.—See §297 *post*.

1. *C.f.* §§190 – 194, 200 – 205 Indian Criminal Procedure Code. The local law, however, is materially different from the Indian Law.

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2. **Scope of §§148 – 151.**—See Introduction to *Chapter XV.* A person may not be tried by the very person at whose instance he is prosecuted.—*Appu v. Rajapakse* (1928) 30 *N.L.R.* 348.

Proceedings in Police Courts may, as a general rule, be initiated* in one of six ways, and in each case a particular kind of procedure has to be followed by the Magistrate at the time he receives the complaint :—

(*a*) A complaint may be lodged before the Magistrate by any person† to the effect that an offence has been committed within the territorial jurisdiction of his Court, and which such Magistrate is empowered by law to investigate or try. If the complaint refers to a non-summary case, the complaint must be made orally to the Magistrate. If it deals with a summary offence, it may be made either orally or in writing, but, in the latter case, it must be drawn up and countersigned by a pleader, and signed by the complainant.—§148(1) (*a*). The Magistrate, on receiving the complaint, must " forthwith " examine the complainant on oath (or affirmation), and, if he thinks desirable, any other person, and may summon the complainant, if he is not before the Court, or any other person who can give evidence.—§149(1). Thereafter, the Magistrate may, either decline to issue process on the accused—§151(1)—or order the attendance of the accused under §151(2). §151(2) should be read subject to the provisions of §154, which empowers the Magistrate to dispense with the attendance of the accused. Under §153 the Magistrate may, if the complaint is one of culpable homicide, proceed to the scene and hold his investigation at the spot—see paras. 3 and 12 *infra.* If a frivolous or vexatious complaint is lodged under §148(1) (*a*) the complainant may be condemned to pay Crown costs and compensation to the accused.—§253B *post.*

(*b*) Proceedings may be initiated by means of a written report " to the like effect " as provided in sub-section (*a*), if made by an Inquirer into crimes, a Peace Officer, a public servant, Municipal servant, or Local Board servant.—§148(1) (*b*). The officer filing the plaint is the complainant in the case and not the injured party.—*Nona v. Wijeysinghe* (1926) 8 *C.L.Rec.* 88, 29 *N.L.R.* 43. If the offence disclosed by such report is non-summary, the Magistrate must proceed as under the last clause. —§149(1). If the offence disclosed is summarily triable, it is not incumbent on him to examine the informant—§149(2)—and he may at once proceed to issue process on the accused under §151(2), subject to the provisions of §154. As in the last case, the Magistrate, under §153, may proceed to the spot—see paras. 4 and 12 *infra.*

(*c*) Proceedings may also be instituted " upon the knowledge or suspicion " of the Magistrate himself ; but in summary cases it is the right of the accused, or of any one of them, to demand that they shall not be *tried* by the Magistrate on whose knowledge or suspicion the proceedings were commenced, but by some other Magistrate, or that they should be duly committed for trial before a higher Court, after a non-summary investigation before the Magistrate who initiated the proceedings.—§148(1) (*c*). See §§293, 380 – 384 *post.* The Magistrate, before he issues process in cases instituted under sub-section (*c*), is required to record a brief statement of the facts which constitute his means of knowledge or suspicion upon which the case is founded—§149(3). See para. 5 *infra.*

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*See §147 para. 2 *ante; Erskine v. Sollemuttu* (1914) 17 *N.L.R.* 449; 2 *Crim. App. R.* 6 and see §385 *post.*

†See §147 *ante.*

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(*d*) Proceedings may be commenced by the accused being arrested without a warrant and produced before the Court having jurisdiction. —§148 (1) (*d*). The Magistrate must " forthwith " examine on oath (or affirmation) the person who brought the accused before the Court, as well as any other persons who are present and able to speak to the facts of the case—§149(4). Thereafter, the Magistrate decides whether the accused should be discharged from custody under §151 or whether the trial or investigation is to proceed.—See §153 *post* and paras. 6, 12 *infra*. Where the accused is brought before a Magistrate who had already given his mind to the case in another capacity—he should not try the case.—*Appu v. Rajapakse* (1928) 10 *C.L.Rec.* 14.

(*e*) Proceedings may be initiated upon a warrant under the hand of the Attorney-General requiring the Magistrate to hold a non-summary investigation regarding an offence which the Magistrate has jurisdiction to investigate—§148(1) (*e*). If the accused is already in custody, the Magistrate will then proceed to hold the investigation or trial. If he is not before the Court, the Magistrate must " forthwith," on receipt of the warrant, issue process on the accused under §151(2).—See §153 *post* and paras. 7, 12 *infra*.

(*f*) Proceedings may also be instituted on a written complaint made by some other Court under §147(1),(*b*),(*c*),(2),(3) *ante*—§148(1) (*f*). The Magistrate on receiving the complaint will proceed as in the case of a warrant under the hand of the Attorney-General.—§149(5). See para. 8 *infra* and §§293, 380 - 384 *post*.

§148(2) provides that the written report submitted under §148(1) (*b*), the warrant of the Attorney-General under §148(1) (*e*), or a written complaint made by a Court under §148(1)(*f*) may be forwarded to the Magistrate before whom proceedings are initiated either by post, or by messenger, or may be delivered by hand.—See §380 *post*. No kind of written complaint, other than those specified in §148(1), may be entertained by a Police Magistrate.—§148(3).

Where the offence charged against the accused is one of rape, or of an unnatural offence, the Magistrate must cause the accused to be examined by a medical man, and this whether the accused is willing or unwilling to undergo such examination. In all cases of rape, unnatural offences, or serious cases of hurt or hurt caused by sharp instruments, the victims are to be examined by a medical man unless they have already been examined.—§149(6). See para. 9 *infra*.

§150 declares the procedure to be followed by the Magistrate when he proceeds to examine the complainant or any witnesses under §149. The evidence is to be duly recorded, interpreted and read over to the witness and signed by him as well as by the Magistrate.—*Pampatham v. Kandiah*. If the Magistrate so deems fit, such examination may be held in private.—§150(2). See para 11 *infra*. In non-summary cases the examination may be held, even though at such time no person is accused by name as having committed the offence.—§150(3). See para. 11 *infra*.

§151 provides the procedure to be followed by the Magistrate after holding the examination of witnesses required to be held under §149. If the Magistrate thinks that " no sufficient ground " has been made out for proceeding against the accused, he will decline to issue process, and, if the accused is in custody, he will order his discharge, after recording his reasons for the order and his opinion whether any offence has in fact

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been committed or not—§151(1).* Such an order can be reopened by the Attorney-General,—*Fernando v. Fernando.* If on the other hand, when proceedings are instituted under §148 (1)(*a*), (*b*), or (*c*), and there appears to be "sufficient grounds" for proceeding against the accused, who is not then in custody, he will issue process. In doing this he will be guided by the law as laid down in column 4 of *Schedule II. post*† which indicates whether a summons or a warrant ought ordinarily to issue against an accused, but there is nothing to prevent a Magistrate, in the exercise of his discretion, from issuing a summons in a case where a warrant should ordinarily issue, or *vice versa.*—§151(2).—See §62 *ante* and para. 12 *infra.*

Every summons and warrant issued under §151(2) must contain a brief statement of the particulars of the offence alleged against the accused, and in the case of a summons must require him to attend with his witnesses at a certain time and place, in order to meet the charge preferred.—§151(3). See para. 12 *infra* and §§153 - 154 *post.*

3. §148(1) (*a*).—See para. 2(*a*) *supra.*

Complaint.—

See *Kuttlam Chetty v. Ina Muttu* (1899) *Koch* 53.
Samarasinghe v. Appuwo.
Mendis v. Carlinahamy.
Thomas v. Cornelis.
Meegahawatte v. Lazarus.
Herath v. Davith.
Guneris v. James.
} See para. 13 *infra.*

See §3 *ante* for the definition of "complaint," and *c.f.* §148 (1)(*f*).

If the complaint refers to a non-summary offence, it must be made orally, and the Magistrate acting under §149(1) will examine the complainant on oath.—See §153 *post.* If the complaint refers to a summary offence, it may be made either orally or in writing. If made in writing, it must be drawn up and countersigned by a pleader, and also signed by the complainant.

See "complainant" *infra.*

Drawn and countersigned by a pleader.—See *Fernando v. Cornelis Appu* para. 13 *infra*, and *Abeysuriya v. Jayasekera* (1921) 22 *N.L.R. at p.* 381.

Court has jurisdiction either to inquire into or try.—See §§10 - 11, 13 - 17, 135 - 145 *ante. R. v. Sengina* §§135 - 136 para. 7(*a*) *ante.*

Procedure on receipt of the complaint.—See §149(1).

Litten v. Perera.
Sedris v. Judris.
Codrington v. Kandappuhamy.
Dionis v. Charles.
Coore v. Appu.
} See para. 13 *infra.*

And see §153 *post.*

Forthwith.—See *Dureya v. Careem.*—para. 13 *infra* and §§33 para. 3, 42 - 43 para. 5, §71 para. 6 *ante.*

Examine on oath.—Nothing is stated about an examination on "affirmation,"—but see §6 Oaths Ordinance No. 9 of 1895. The witness' statement must be reduced into writing, read over, and interpreted to

*See §253B *post.*
†See §290 para. 3 *post.*

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§148-151 him, and signed both by the Magistrate and by the witness. The deposition so obtained must be dated.—§150(1). See also §§299 - 300, 297, 407 *post*. See para. 11 *infra*.

If necessary, the examination may be held in camera.—See §150(2) and §7 *ante*.

Complainant.—See *Thomas v. Cornelis* para. 13 *infra* and "Complaint" *supra*.

Also examine any other person.—If any other persons are present in Court who are able to give material evidence, it is the duty of the Magistrate to examine them. *C.f.* §149(4). In homicide cases the examination may be made at the scene of the alleged offence.

Procedure after the examination.—See para. 12 *infra*.

General.—

(*a*) **Acquittal of accused in the absence of the complainant.**—See §194 and *Amarasekera v. Gooneratne* para. 13 *infra*.

(*b*) **Discharge of accused by the Magistrate.**—See §§39 *ante*, 191, 196 *post*.

(*c*) **Penalty for initiating a frivolous or vexatious charge.**—See §253B *post*.

Kuttlam Chetty v. Ina Muttu (1899) *Koch* 53.
Meegahawatte v. Lazarus.
Herath v. Davith.
Guneris v. James.
} See para. 13 *infra* and see generally §253B para. 13 *post*.

(*d*) See also §§194, 196 *post*.

4. §148(1) (*b*).—See para. 2(*b*) *supra* and §196 para. 2 *post*.

A written report.—

Kuttlam Chetty v. Ina Muttu— (1899) *Koch* 53.
Samarasinghe v. Appuwo.
Mendis v. Carlinahamy.
Meegahawatte v. Lazarus.
Herath v. Davith.
Guneris v. James.
Thomas v. Cornelis.
} See para. 13 *infra*.

To the like effect.—*i.e.*, to the effect that an offence has been committed which the Court has jurisdiction to try or investigate.

Inquirer.—See §§3, 120 *ante*.

Peace Officer.—See §3 *ante*.

Public servant.—See §19 Penal Code. The following have been held to be public servants:—His Excellency the Governor—*R. v. Arnolis* (1908) 11 *N.L.R.* 265; the Colonial Secretary—(1915) 5 *B.N.C.* 19; Excise Officers—*Attorney General v. Silva* (1914) 17 *N.L.R.* 193, 1 *Crim. App. R.* 81; Fiscals' Surveyors—*Menika v. Ratwatte* (1908) 4 *A.C.R.* 126, *R. v. Eronisa* (1900) 1 *Br.* 14, *Brodhurst v. Sinno* (1896) 4 *N.L.R.* 213, *R. v. Nona* (1906) 8 *N.L.R.* 348, *Bowes v. Tamby* (1905) 8 *N.L.R.* 311; a Local Board Constable—6 *Tam.* 100; Tide Waiters—*Ferdinands v. Silva* (1914) 1 *B.N.C.* 54; Irrigation Inspectors—*R. v. Kapuwela* (1917) 4 *C.W.R.* 351; the superior officer of a public servant—6 *Tam.* 42; the Chairman of a Local Board—*Kindersley v. David* (1908) 11 *N.L.R. at p.* 372, see also 6 *Tam.* 34; a Police Sergeant acting as a clerk in the Police office—(1905) *Lem.* 39; a Government Agent—*Cookson v. Appuhamy* (1911) 15 *N.L.R.* 120; a Chairman of the District Road Committee who is also

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the Government Agent—*Horsburgh v. Nagamany* (1917) 4 *C.W.R.* 270; an Inquirer into crimes—*Wijeygoonetileke v. Joni Appu* (1920) 22 *N.L.R. at p.* 236; Fiscals' officers executing a judicial process—6 *Tam.* 8. A commissioner appointed under the Partition Ordinance—*Rajapakse v. Wansa* (1926) 28 *N.L.R.* 179; the Government Assessor—*R. v. Powar* (1920) 8 *C.W.R.* 269, an arachchi—*R. v. Menika* (1929) 31 *N.L.R.* 301, a peon employed by the Society for the Prevention of Cruelty to Animals is not a public servant—*Police Sergeant v. Rajapakse* (1932) 34 *N.L.R.* 101; a Sanitary inspector is a public servant—*Sangarapulle v. Ratnasekera* (1916) 2 *C.W.R.* 158, but a Sanitary Inspector employed by a local authority like a Local Board is not—*Jamal v. Haniffa* (1933) 35 *N.L.R.* 8; a deputy Registrar of Births and Deaths is a public servant—*Davidson v. Rahiman Lebbe* (1901) 2 *Br.* 281, but a Registrar of Births, Deaths, and Marriages who is not a medical practitioner is not—*Jayasinghe v. Jayatilleke* (1933) 13 *C.L.Rec.* 96. Officers acting under the Quarantine and Prevention of Diseases Ordinance, 1897—§10; Forest officers—Ordinance No. 16 of 1907, §58; Inspectors of wells and pits—Ordinance No. 27 of 1884, §8; Officers acting under the Infectious Diseases of Cattle Ordinance 1909—§16; Municipal officers—§68, Ordinance No. 6 of 1910; Officers under the Housing and Town Improvement Ordinance, 1915—§102; Officers under the Riot Compensation Ordinance, 1915—§39; Officers under the Census Ordinance, 1900—§8; Telegraph officers—Ordinance No. 35 of 1908, §31; Customs officers—§127 Ordinance No. 17 of 1869; members of the Local Defence Force—Ordinance No. 8 of 1910 and see §19 Clause 3 Penal Code; Officers of the Local Government Board—Ordinance No. 11 of 1920, §238, see also Ordinance No. 2 of 1899, §2. Officers appointed by the Medical College Council—Ordinance No. 26 of 1927 §§15, 22(3); every "*Kathi*"—Ordinance No. 27 of 1929 §33; officers and servants of the State Mortgage Bank—Ordinance No. 16 of 1931 §93; curators and watchers of a Botanical Garden—Ordinance No. 31 of 1928 §5; officers under the Tea Control Ordinance, No. 11 of 1933 §3(3); officers of the department of Indian Immigrant Labour—Ordinance No. 1 of 1933 §3—are all public servants. §148-151

Municipal servant or a Local Board servant.—

Municipal servant.—See Ordinance No. 6 of 1910, §68.

Local Board servant.—See *Kindersley v. David*, and 6 *Tam.* 34 *supra.*

Officers of the Local Government Board, Sanitary Board, District Road Committee, etc., are covered by the expression "Public Servant." See *supra.*

Procedure on receiving the report :—

(i) If the offence is non-summary the Magistrate must forthwith examine the informant on oath, and may also examine any other person or issue summons on the informant if he is not before the Court, or any other witnesses.—§149(1). See §153 *post.*

(ii) If the offence is summary there is no legal necessity* for examining the informant at all, and the Magistrate may at once proceed to act under §151.—See *Superintendent of Deaela Estate v. Madalihamy* and *Fernando v. de Silva* para. 13 *infra.*

Forthwith.—See para. 3 *supra.*

Informant.—See *Thomas v. Cornelis* para. 13 *infra* and "Complaint" and "Complainant" para. 3 *supra.*

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*See *Ebert v. Perera* (*Full Court*) §187 *post.*

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Examine on oath.—See para. 3 *supra.*

Also examine any other person.—See para. 3 *supra.*

Case law.——

(1) §149(1).—

Litten v. Perera.
Codrington v. Kandappuhamy.
Dionis v. Charles.
Coore v. Appu.
} See para. 13 *infra.*

(2) §149(2).—

Sedris v. Judris (1899) *Koch* 41.—See para. 13 *infra.*

Procedure after the examination.—See para. 12 *infra.*

General.—

(*a*) A person, on whose information a report under §148(1)(*b*) is made to Court, is entitled under §434 *post* to ask for a copy of the proceedings.—*In the matter of an application for a mandamus*—para. 13 *infra.*

(*b*) The provisions of the Forest Ordinance, 1907 do not over-ride the provisions of §148(1)(*b*).—*Mahawellatenne v. Mohotihamy, Lushington v. Mohamaddu*—para. 13 *infra.*

(*c*) §187 *proviso post.*—*Goonewardene v. Babun, Silva v. Kandu* para. 13 *infra.*

(*d*) The report may be sent to the Court by post, etc.—§148(2).

(*e*) No orders for the payment of Crown costs and compensation can be made in summary cases initiated under §148(1)(*b*).—*Ponnan v. Murugappen* §253B para. 3 *post.* See §253C *post.*

(*f*) Effect of the death of the private complainant.—*Amaratunge v. Perera* (1930) 32 *N.L.R.* 310.

5. **§148(1)(c).**—See para. 2(*c*) *supra* and *R. v. Sittambaram* para. 13 *infra.*

"Upon knowledge or suspicion of a Magistrate" *C.f.* "Credible information," "Reasonable suspicion," "Reason to believe."—§32 *ante.*

See also §§19, 40 – 41, 79, 80, 99 *et seq.*, 126A(3), 130 *ante*, 293, 362(4), 380 – 384, 413 *et seq.*, 427, 440, 440A *post.*

Under §147(1)(*b*),(*c*) *ante* proceeding may only be instituted in respect of offences therein specified either with the sanction of the Attorney-General or "on the complaint of the Court" before which the offence was committed. §384 *post* draws attention to the fact that in such cases no District Judge or Magistrate before whom the offence was committed shall *try* any such offender. *C.f.* §18 *ante.*

§148(1)(*c*) empowers any Magistrate to initiate criminal proceedings against any person before himself, in respect of any offence which such Magistrate knows or suspects the accused to have committed; but it is the right of such accused to demand and, if there are several accused, any one of them may lawfully demand that the Magistrate who initiates proceedings shall not *try* him, but that the case should be sent before another Magistrate for *trial*, or in default that such Magistrate should not *try* the case, but take non-summary proceedings. It follows, therefore, that in such cases if an objection is taken by the accused, the Magistrate initiating proceedings cannot act under §§152(3), 166, or *Chapter XVIII. post.* If the offence is non-summary the *proviso* to §148(1)(*c*) has no application.

The principle underlying the *proviso* to this sub-section and §§18 *ante* and 384 *post* is that a person cannot be a Judge as well as a witness

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in the same cause.* See also §90 Courts Ordinance, 1889 and *R. v. Alahakoon, Bogahalande v. Podisinno, R. v. Brampy, Banda v. Punchirala* para. 13 *infra.*

Suspicion.—See *Forrest v. Leefe* para. 13 *infra.*

To the like effect.—See para. 4 *supra.*

Before the Magistrate issues process in cases initiated under §148(1) (*c*) he must record a "brief statement of the facts which constitute his means of knowledge or of the grounds of his suspicion."—§149(3). Thereafter he may act under §151(2).—See para. 12 *infra.*

General.—See §196 para. 2 *post* and *Eliyatamby v. Sinnatamby, Attorney-General v. Appuwa Veda* para. 13 *infra.*

6. §148(1)(d).—See para. 2(*d*) *supra* and §196 para. 2 *post.*

Being brought in custody.—See §§32 - 39, 100, 102, 115 *et seq.*, 126A, 127, 130, and *c. f.* §147(3) and §148(1)(*f*). See *Superintendent of Deaela Estate v. Mudalihamy* para. 13 *infra.*

Without process.—See §151(2) para. 12 *infra.* It will be observed that §148(1) (*d*) applies to all cases where an accused has been arrested without a warrant and duly produced before the proper Police Court. §148(1)(*f*) deals with a different kind of case.—See para. 8 *infra.*

Procedure after the accused is produced.—See §149(4). The Magistrate must "forthwith" examine, on oath, the person who produces the accused "and any other person who may be present in Court able to speak to the facts of the case."

Forthwith.—See para. 3 *supra.*

Oath.—See para. 3 *supra.*

Any other person.—If witnesses are present it is the duty of the Magistrate to examine them immediately after the examination of the person who produces the accused. §149(4) is not designed solely to enable the Magistrate to decide whether a *prima facie* case has been established or not, but also for the purpose of recording at the earliest opportunity all the evidence available, so as to prevent witnesses being tampered with or the fabrication of false evidence.—*Dureya v. Careem* para. 13 *infra.*

See *Litten v. Perera.*
Dionis v. Charles. } See para. 13 *infra.*
Coore v. Appu.

Procedure after the examination.—See §151(1) para. 12 *infra.* If the Magistrate does not discharge the accused, he will proceed to try him or hold a non-summary investigation as the case may be.—§§187(1). 155 *post.* See §153 *post.*

General.—

(i) *Karupiya v. Kurakal.*—See para. 13 *infra.*

(ii) See §196 *post* and *Eliyatamby v. Sinnatamby, Attorney-General v. Appuwa Veda* para. 13 *infra.*

7. §148(1) (*e*).—See para. 2(*e*) *supra*, and §196 para. 2 *post.*

Warrant under the hand of the Attorney-General.—Such warrant may be forwarded by post, or by a messenger, or delivered by hand.—§148(2).

See *Attorney-General v. Wijeysinghe.*—§147 para. 12 *ante.* *N.B.*—§147 refers to sanctions to prosecute, whereas §148 deals with the mode of instituting proceedings in Police Courts.

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*See *Dias on the Evidence Ordinance pp.* 221–223.

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Procedure after receiving the warrant.—See §149(5).

Forthwith.—See para. 3 *supra.*

Process.—See §151(2) para. 12 *infra.* If the accused is not already in custody, the Magistrate must issue process on him.

8. §148(1)(*f*).—See §835 Civil Procedure Code, *Cader v. Fernando* (1932) 34 *N.L.R. at p.* 195.

See para. 2 (*f*) *supra* and §196 para. 2, §§293, 380 – 384 *post.*

Written complaint made by a Court.—This refers to §§147(1)(*b*),(*c*),(2) and (3) *ante.* Such complaint may be forwarded to the Police Court having jurisdiction as provided by §148(2). See also §148(1)(*d*) para. 6 *supra.*

Complaint.—*C.f.* para. 3 *supra.*

Procedure after receiving the complaint.—The procedure is the same as in cases where proceedings are initiated by a warrant under the hand of the Attorney-General.—§149(5). See para. 7 *supra.*

9. §149(6).—See para. 2 *supra.*

Under the English Law no person, whether a prisoner or not, can be medically examined without his or her consent or against his or her will. A compulsory medical examination lays the person ordering such examination and the officer, who carries it out, open to be charged for assault. —See 9 *Halsbury's Laws of England* para. 1225, *p.* 607; *R. v. Boulton* (1871) 12 *Cox at p.* 91; *Agnew v. Jobson* (1877) 13 *Cox* 625.* In the case of a person of tender years the consent of the parent or guardian should be obtained. The law is similar in India. In *R. v. Kalu* (2 *Sanjiva Row's All-India Digest Criminal p.* 3204) it was held that the law does not sanction the compulsory medical examination of the person of a female without her consent. Power is given to *search* the person, but not to *examine.* If the woman agrees, the examination can lawfully take place. If she refuses, the fact of refusal may be evidence against her.—See also *Sohoni's Criminal Procedure Code pp.* 336 – 337.

§149(6) of this Code,† which is peculiar to Ceylon, creates an exception to the above principle of the English and Indian Law, whereby an accused, in cases of rape or unnatural offence, and the injured persons in such cases and in " hurt " cases are bound to undergo medical examination whether they consent or not.‡ This does not mean that in cases other than those referred to in §149(6), the accused and the complainants cannot be medically examined; but in such cases the English and Indian principle will apply, *i.e.*, the examination must be with consent. If consent is withheld without good cause, a presumption hostile to the accused or the complainant will arise under §114 of the Evidence Ordinance.—See *R. v. Suppiah* (1930) 7 *T.L.R.* 139.

When medical evidence is to be led, the medical officer must be called and his evidence recorded. It is highly irregular, as is sometimes done, for the Police to file a medical report without calling the doctor—*Silva v. Sinno* para. 13 *infra*—or to call the doctor and to cause him to swear or affirm to the correctness of his report filed in the case. The evidence must be fully recorded and the accused afforded an opportunity of cross-examining the witness. In cases where the condition of the accused can be proved without calling the medical officer, such evidence can be given, *e.g.*, in a case of housebreaking that the accused had bleeding scratches on his arms and knees which were visible to everyone.

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*See 1 *Taylor's Medical Jurisprudence p.* 64 *et seq.*

†See Ordinance No. 4 of 1841 §10(3).

‡See *Dias on the Evidence Ordinance p.* 252.

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10. **General.**—

(i) In all cases the *names* of the accused should be entered at the commencement of each day's proceedings, with a memorandum showing whether they are present or absent. The accused should be referred to by name, or by name and number, and not by number alone.—*General Order* 886.

(ii) It is highly irregular to refer a complaint lawfully made under §148 to the Police for report.—*Angohamy v. Police Sergeant, Ealangoda,* para. 13 *infra.* It is the duty of the Magistrate to ascertain judicially, under §149, whether the case is one in which process should issue or not. *C.f. Chapter XII. ante* and §129 *ante.*

(iii) §147 contains the general rules as to the manner in which proceedings in Police Courts are to be initiated, *e.g.*, the Forest Ordinance, 1907, in no way over-rides the provisions contained in §148.—*Mahawellatenne v. Mohotihamy; Lushington v. Mohamadu* para. 13 *infra.*

For examples of other modes by which criminal proceedings may be initiated.—See Introduction to *Chapter XV. ante.*

(iv) As a rule any member of the public may initiate proceedings, subject to the provisions of §147 *ante,* but a Court may, in its discretion, refuse to entertain a complaint where it is shown that the complainant has no interest whatever in the prosecution, and especially in cases where the alleged offence is a breach of a law passed for the benefit or protection of a certain class of persons, of whom the complainant is not a member. —*Erskine v. Muttu* para. 13 *infra.*

(v) There is nothing to prevent a Magistrate from framing charges which the complainant did not initiate, and which were only disclosed during the investigation—*R. v. Sittambaram* para. 13 *infra.*

(vi) It is only after an examination under §148 that a Magistrate can decide whether the case is one in which he can invoke the powers under §152(3) *post.—R. v. Uduman; R. v. de Silva; Abanchihamy v. Peter* para. 13 *infra.*

11. §150.—See *Pampatham v. Kandiah* and see para. 2 *supra.*

An examination.—See §§189, 297, 298, 299 (as amended by Ordinance No. 31 of 1919, §12), 300, 407 *post.*

The examination under §148 may be held in private.—See §7 *ante* and §87 Courts Ordinance, 1889. The reason for the rule provided by §150(2) is that in certain cases, if the initial evidence is to be always recorded in public, it would enable dishonest people to tamper with the remaining evidence which has yet to be called.

In non-summary cases the examination under §148 may be held, although no person by name is accused of having committed the offence, *e.g.*, where the identity of the accused is not known at the time the complaint is made.—*C.f.* §407 *post.*

Where the offence disclosed is one of culpable homicide, the preliminary examination may be held at the scene subject to the provisions of §153 *post.*

12. §151.—

See para. 2 *supra* and §191 para. 2 *post.*

When proceedings have been initiated under §148(1)(*e*) and (*f*), the Magistrate has no option but to issue process on the accused, if he is not already before the Court.—§149(5). When an accused is produced before the Magistrate under §148(1) (*d*) there is no question of issuing process upon him, as he is already before the Court.

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In all cases initiated under §148(1)(*a*),(*b*),(*c*) and (*d*), the first thing the Magistrate has to do after complying with the requirements of §§149, 150 is to decide whether he should or should not issue process on the accused, if he is not already before the Court without process. If the Magistrate comes to the conclusion that no sufficient ground has been established for proceeding against the accused, or any other person, he will not issue process—*Justina v. de Silva* para. 13 *infra*—but will "discharge" the accused if he is in custody. In so doing it is the duty of the Magistrate to record (i) the reasons for his order and (ii) whether, in his opinion, an offence has in fact been committed.—§151(1). See *General Order* 904. A discharge under this section may or may not amount to an acquittal.—See §336 para. 3 *post*. It is open to the Attorney-General to re-open an order of discharge under §151(1).—*Fernando v. Fernando*. See also §§39 *ante*, 191, 196 *post* and §253B *post*.

If on the other hand the Magistrate decides to issue process upon an accused person who is not before the Court (see §149(5)), he must further decide whether a summons or a warrant is to issue in the first instance.—§151(2).

Column 4 in *Schedule II. post** lays down the general rule whether a summons or a warrant should ordinarily issue in the first instance in the case of *all* offences known to our law, but the Magistrate is not bound to follow this general rule. Thus, in cases where a summons should ordinarily issue, he may order the issue of a warrant acting under §62 *ante*. If, on the other hand, the offence is one in which a warrant ought ordinarily to issue, he may, nevertheless, in his discretion order a summons to issue. The Supreme Court has strongly condemned the practice of issuing warrants in the first instance, unless good grounds exist for so doing.—See §62 para. 6 *ante* and the cases cited below.

The summons or warrant issued under §151(2) must contain a statement of the particulars of the offence charged (*C.f.* §§167 - 170 *post*). This is rendered all the more necessary because, under §187 *post*, such statement may form the basis of the charge against the accused when he appears. In addition to the foregoing, the *summons* must require the accused to appear with his witnesses (if any) to answer the charge set out, at a time and place specified therein.—§151(3). §154 *post* authorizes the Magistrate, when issuing a *summons*, to dispense with the personal attendance of the accused, and to enable him to appear by a pleader instead.—*C.f.* §86 *ante*. The Magistrate may at any time revoke this concession.

Where a Magistrate, without good cause, refuses to issue process, a *mandamus* can be obtained to compel him to do so.—§337 *post*.

When may a warrant issue in the first instance?—

Cadersa v. Muttamma.
Sella v. Sinno.
Litten v. Perera.
Perera v. Ran Menika.
Elworthy v. Kandasamy.
} See para. 13 *infra*.

See also §§44, 50. 62 *ante*.

12A. **§149 and §152(3) *post*.**—Before a Magistrate who is also a District Judge exercises his powers under §152(3) *post*, he should comply with the provision of §149. An omission to do this is not a fatal irregularity.—*Abanchihamy v. Peter*, *Kalinguhamy v. Prolis*.

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*See §290 para. 3 *post*.

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13. **Case law.**—*Kuttlam Chetty v. Ina Muttu* (1896) 1 *N.L.R.* 326 (referred to in *Samarasinghe v. Appuwo* and *Koch* 53, and see *Mendis v. Carlinahamy infra*).—*Note.*—This case was decided under the old Code. Where a case is initiated upon a report made by a Police officer, it is not open to the Magistrate, under §253B *post*, to deal with the person who gave information to the Police, if it is found that the charge is frivolous. " Was this present case instituted on a ' complaint '? The appellant did not go to the Police Court to make any allegation, either orally or in writing, to a Police Magistrate . . . He went to the . . . Police station and told his story to the Police Sergeant on duty, charging the accused with an offence within the jurisdiction of the Police Court of Colombo. The Sergeant did not refer him to the Police Court of Colombo, as he might have done, but he adopted the charge made by the appellant and made a formal written report to the Police Court. It is clear from this that the prosecution is not one instituted on a complaint, but that it was a prosecution instituted on a formal written report by a Police Sergeant. That being so, the Magistrate had no jurisdiction to order the appellant to make compensation to the accused . . ." *per* Bonser, C. J. If the information conveyed had been false, the appellant may, of course, have been charged under the Penal Code. See also *Meegahawatte v. Lazarus infra.* §148-151

(1899) *Koch* 53.—*Kuttlam Chetty v. Ina Muttu* followed. This case was decided under this Code.

Samarasinghe v. Appuwo (1914) 2 *Crim. App. R.* 17.—*Held*, that §197 (253B) *post* does not apply to cases where the proceedings have been instituted under §148(1)(*b*).—*Kuttlam Chetty v. Ina Muttu* referred to.

Mendis v. Carlinahamy (1900) 4 *N.L.R.* 341.—Where M gave information to the Police that C had caused hurt to J, and the Police, without vouching for the truth of the information, informed the Magistrate, by means of a departmental form, that M had made such a statement, *held*, that the Magistrate could make an order under §197 (253B) against M if the charge turned out to be frivolous. This case is clearly distinguishable from the case of *Kuttlam Chetty v. Ina Muttu*, because in that case the Police report was made after full investigation by the Police, who took upon themselves the rôle of prosecutors, whereas in this case there was no such investigation, the informant being left at liberty to institute a charge or not as he pleased, and the Police merely communicated the information received to the Magistrate under §22 *ante*. Where a complaint is instituted under such circumstances, it would come under §148(1)(*a*) and not under §148(1)(*b*). The distinction which exists between the two sub-sections was pointed out in these terms : " In the first case (§148(1)(*a*)) the complainant is solely responsible for the case being brought before the Magistrate ; in the latter case (§148(1)(*b*)) the Police, after due inquiry, have taken the responsibility on their own shoulders, and it would be unjust, where the Police, after due investigation, come to the conclusion that it was a proper case to bring before the Court, to fine the informant . . . If it should turn out that his information given to the Police was untrue and he had deceived the Police, he could be punished under the Penal Code . . ." *per* Bonser, C. J. See *Guneris v. James infra.*

Thomas v. Cornelis (1901) 2 *Br.* 16.—" As ' complainant ' must mean the person who makes the ' complaint,' it follows from the definition of ' complainant ' (see §3) that M was then the complainant, and, being so, remained so in law till the end of the proceedings . . . For

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§148-151 my own part I would consider that in §149(1) 'complainant' relates to head (*a*) of §148(1), and 'informant' to any of the officers mentioned in head (*b*), or to the person whom they report to have given them the information . . ." *per* Browne, J.

R. v. Alahakoon (1906) 9 *N.L.R.* 300.—Where a Magistrate institutes proceedings under §148(1)(*c*), he cannot be held to be a party to, or to be personally interested in the proceedings within the meaning of §90 of the Courts Ordinance, 1889. "Even if a Magistrate under such circumstances could be looked upon as a party, my view is that the later §148(1)(*c*) must be taken as modifying the terms of the earlier §90 of the Courts Ordinance . . ." *per* Middleton, J.

Goonewardene v. Babun (1908) 4 *A.C.R.* 141; 4 *A.C.R.* v.—*Held*, that the charge framed under §187(1) *post* should be in writing. "I think that this results not only from the requirements of sub-section 3 (of §187), that it should be read to the accused, but also from the proviso to §187, which in cases coming under §148(1)(*b*) permits a written report to be read to the accused as a 'charge', if the offence is not punishable with more than three months' imprisonment or a fine of Rs. 50. The effect of that proviso clearly is to exclude by implication the framing of a charge in the manner which has been adopted in the present case, where the offence alleged is punishable . . . with a heavier sentence or fine than which it contemplates . . ." *per* Wood Renton, J. See *Silva v. Kandu infra*.

Mahawellatenne v. Mohotihamy (1910) 5 *Bal.* 85.—The report of a Government Agent, under §39 of the Forest Ordinance, 1907, is not a condition precedent to the institution of criminal proceedings for an offence under §22 of that Ordinance. §39 in no way interferes with the ordinary procedure regulating the initiation of criminal proceedings.

Lushington v. Mohamaddu (1913) 16 *N.L.R.* 366.—In a charge under §22 of the Forest Ordinance, 1907, it would be quite in order to commence proceedings under §148(1)(*b*) of this Code. The special procedure prescribed in *Chapter VII.* of the Forest Ordinance was not meant to exclude the operation of §148. *Mahawellatenne v. Mohotihamy* followed.

Silva v. Kandu (1912) 7 *S.C.D.* 19.—See §187 *post*.

Amerasekera v. Gooneratne (1910) 5 *Bal.* 60.—Proceedings initiated under §148(1)(*a*). Absence of complainant on day fixed for trial. See §194 *post*.

Karruppiya v. Kurakal (1907) 3 *Bal.* 187; 2 *A.C.R.* iii.—Civil dispute between parties. A Peace Officer, fearing a riot, seized certain property, which was the subject of the dispute, and produced it before the Magistrate, who ordered it to be handed over to one of the parties. *Held*, that in the absence of a criminal charge, neither §419 nor §148(1) (*d*) justified the order made.

In the matter of an application for a mandamus (1914) 18 *N.L.R.* 70.—A person upon whose information or complaint the Police have made a report under §148(1)(*b*) is a person "affected by the judgment or final order" within the meaning of §434 of this Code, and is entitled to be given a copy of the proceedings.

Meegahawatte v. Lazarus (1914) 18 *N.L.R.* 159; 2 *Crim. App. R.* 18 and see *Herath v. Davith* (1916) 3 *C.W.R.* 85; *Guneris v. James Appu infra*.—Where proceedings are initiated under §148(1)(*b*), the Magistrate cannot, under §54 of the Police Ordinance, sentence the "complainant" for having preferred a false charge. (*Two Judge decision.*)

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Herath v. Davith (1916) 3 *C.W.R.* 85. *Meegahawatte v. Lazarus* followed.

Guneris v. James Appu (1918) 5 *C.W.R.* 189.—"It is argued . . . that the proceedings were instituted on a written report made by the Police under §148(1)(*b*) . . . and that in view of the decision in *Meegahawatte v. Lazarus*, the Magistrate had no jurisdiction to deal with the appellant under §54 of the Police Ordinance. The case cited is not applicable, because the report made by the Police was not a report under §148(1)(*b*). The report there contemplated is a report to the effect that the offence, which is the subject of it, has been committed, and clearly has reference to a case where a Police or other public officer, on being satisfied of the commission of the offence, takes up the complaint of the private party, prefers the charge on his own responsibility, and becomes the prosecutor himself. In such a case the law, for obvious reasons, does not allow the Police Magistrate to punish the prosecutor summarily for bringing a false and vexatious charge . . ." *per* de Sampayo, J. See *Idroos v. Cassim* (1898) 3 *N.L.R.* 262 and *Mendis v. Carlinahamy supra.*

Erskine v. Muttu (1914) 17 *N.L.R.* 449; 2 *Crim. App. R.* 6.—As a general rule any person may initiate proceedings before a Police Court. The Court may, however, in its discretion, refuse to entertain a complaint where it appears that the complainant has no interest whatever in the prosecution, especially in cases where the alleged offence is a breach of a law passed for the benefit or protection of a certain class of persons, of whom the complainant is not a member.—See §147 *ante.*

Angohamy v. Police Sergeant, Balangoda (1915), 1 *C.W.R.* 19.—Charge against a Police Officer—Complainant examined on oath—Case referred by Magistrate to the Superintendent of Police for report—Inquiry held by Superintendent and report made adversely to complainant.—Magistrate thereupon refused process. *Held*, that the procedure was incorrect and that process ought to have issued.

1517 *P.C., Chilaw*, 43800 (*S.C.M. Sept.* 30, 1915).—See §187 *post.*

Attorney-General v. Wijeysinghe (1916) 2 *C.W.R.* 31.—See §147 para. 12 *ante.*

Bogahalanda v. Podisinno (1915) 1 *C.W.R.* 99.—"Under §18 of the Criminal Procedure Code a District Judge cannot, except with the express consent of the accused, try a case which he has committed for trial as a Police Magistrate, and §148(1)(*c*) gives an accused a right to ask for a trial before another Magistrate in the cases there mentioned where there are circumstances which might give a semblance of bias, . . ." *per* Ennis, J. See also §384 *post.*

Superintendent of Deaela Estate v. Mudalihamy (1915) 1 *C.W.R.* 216.—"It is argued that the proceedings were initiated on the written report of the Korala within the meaning of §148(1)(*b*) . . ., and that under §149(1) it was the duty of the Magistrate to examine forthwith the complainant or the informant on oath . . . In my opinion §149(1) does not apply. If the proceedings are to be regarded as having been instituted on the strength of the Korala's report, the case comes under §149(2) since the report disclosed an offence which was triable summarily. It was, therefore, unnecessary for the Police Magistrate to examine the informant at all. It appears to me, however, to be open to argument whether the case might not be regarded as coming under §148(1)(*d*) . . . inasmuch as . . . the accused were produced in custody of a Peace Officer. If that were so, we would have to consider the effect of §149(4),

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§ 148-151 which provides that, where a person is brought before a Magistrate in custody, the Magistrate shall forthwith examine on oath the person who has brought the accused before the Court, and any other person who is present in Court able to speak to the facts of the case. I should not be prepared to hold that the failure of a Magistrate to comply with the requirements of this section in a case like the present . . . and where no kind of prejudice resulted to the accused . . . would be fatal to the proceedings . . ." *per* Wood Renton, C. J.

Forrest v. Leefe (1910) 2 *Curr. L.R.* 164; 13 *N.L.R.* 119.—" I cannot see that the proceedings were wholly irregular, either under §105 or §148(1) of the Criminal Procedure Code. A public nuisance . . . is an offence under the Code, and this would enable the Magistrate to act on his own knowledge or suspicion under §148(1)(*c*), and I see no objection to his obtaining information direct through his own sense of hearing of the fact of its presumptive existence and acting thereon under §105 and making a conditional order . . ." *per* Middleton, J.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 265.—" There is nothing to prevent an inquiry being held into several offences together. If, in the course of an inquiry, fresh alleged offences come to light, which are of such a nature that they may be appropriately embraced within the scope of that inquiry there is no reason why the Magistrate, acting in pursuance of §148(1)(*c*) should not explain the nature of these offences to the accused under §155 . . . and proceed with the inquiry into the original offence and these offences concurrently . . ." *per* Bertram, C. J.

R. v. Sengina (1905) 8 *N.L.R.* 102.—See §§135 - 136 para. 7(*a*) *ante*.

Fernando v. Carolis Appu (1918) 5 *C.W.R.* 293.—" The charge in this case commences with a complaint which is irregular. The offence is a summary offence, and, under §148(1) (*a*), the complaint, being in writing, should have been countersigned by a pleader. The object of that provision, I suppose, is to secure that if the complainant, instead of going direct to the Magistrate and laying his story before him and allowing the Magistrate to frame the complaint, goes and gets it reduced to formal shape, some person of legal knowledge should be responsible for that formal shape . . ." *per* Bertram, C. J. See *Abeysuriya v. Jayasekera* (1921) 22 *N.L.R.* 380.

R. v. Brampy (1915) 5 *B.N.C.* 9.—" §148(1)(*c*) . . . provides for the institution of proceedings upon the knowledge or suspicion of the Magistrate. But it provides, nevertheless, that where such knowledge or suspicion exists, the accused shall be tried, and it gives him the right to require that he should be tried by another Magistrate, or to be committed to another Court . . ." *per* Wood Renton, C. J.

Banda v. Punchirala (1923) 1 *T.L.R.* 197.—A Magistrate, in convicting an accused, called upon the complainant under §81 *ante* to show cause why he should not be bound over to keep the peace. It was urged in appeal that under §148(1)(*c*) it was not in order for the Magistrate who convicted the accused to try the security to keep the peace proceedings. *Held*, that §148 did not apply to a case like this.

Litten v. Perera (1908) 11 *N.L.R. at p.* 94.—" On the second page of this multifarious document is a print of what is intended for a compendious summary of the evidence to be given by the superintendent of the estate, presumably intended to supply the place of the examination of the complainant which §149 of the Criminal Procedure Code requires the Magistrate to make as a first step in taking cognizance of a case . . ." *per* Wendt, J.

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Sedris v. Judris (1895) 3 *N.L.R.* 121.—(*This case was decided under the old Code.*) A private complaint was preferred which disclosed the commission by the accused of a summary as well as of a non-summary offence. *Held*, "It was the duty of the Magistrate, on receiving the complaint, to examine the complainant . . . The statement made by the complainant on such examination is to be reduced to writing, and, after being read over to the complainant, is to be signed by him and the Magistrate. If the Magistrate, after examining the complainant, is of opinion that there are no sufficient grounds for proceeding further with the case, he may refuse to issue process, or, if the accused is in custody, he may discharge him. In my opinion this preliminary evidence is almost the most important proceeding in the whole of the inquiry . . ." *per* Bonser, C. J.

(1899) *Koch* 41.—*Held.* "As this was a summary offence, the Magistrate was competent to issue summons without examining the complainant.—§149(2) . . ." *per* Withers, J.

Silva v. Sinno (1909) 2 *S.C.D.* 64.—§149(6) does not authorize the Magistrate acting upon a medical report, which is produced, without calling the doctor whose opinion it embodies. The irregularity, in this case, was held not to have prejudiced the accused.

R. v. Uduman (1900) 4 *N.L.R.* 1; 1 *Br.* 129.—It is only after hearing evidence under §149 that the Magistrate can invoke the powers of §152(3). This reasoning was followed in *Punchirala v. Don Cornelis* (1904) 8 *N.L.R.* 58.

Dureya v. Careem (1908) 3 *A.C.R.* viii.—Accused charged with theft—production before Magistrate in custody. *Held*, that it was the duty of the Magistrate "forthwith" to examine on oath or affirmation the person producing the accused before him, and any other person who was present and able to speak to the facts of the case under §149(4).

Abanchihamy v. Peter (1918) 5 *C.W.R.* 277 (*Two Judges*) overruling *Heyzer v. Silva* (1915) 1 *C.W.R.* 136 and *Mohamadu v. Aponsu* (1915) 1 *C.W.R.* 170.—*Held*, that it is an irregularity for a Magistrate to assume powers under §152(3) without hearing evidence under §149, but that the irregularity was not fatal to a conviction. See *Kalinguhamy v. Prolis* (1922) 24 *N.L.R.* 17.

R. v. de Silva (1916) 3 *C.W.R.* 63.—Summary trial under §152(3). Objection taken in appeal for the first time that before assuming such jurisdiction the Magistrate had not taken evidence under §149. *Held*, that it must be presumed that everything was correctly done before the Magistrate issued process.

Codrington v. Kandappuhamy (1915) 1 *C.W.R.* 236.—The failure to observe the provisions of §149(1) is not a fatal defect which vitiates a conviction.

Dionis v. Charles (1915) 4 *B.N.C. at p.* 55.—"The intention of the law, which rests upon sound considerations of policy, clearly is that where such reports are formulated as the foundation of criminal proceedings, the Police Magistrate shall exercise his own discretion in the matter, and shall decide what the formal charge shall be after the examination directed by §149(4).

Coore v. Appu (1920) 22 *N.L.R. at p.* 212.—The *dictum* in *Dionis v. Charles* was cited with approval by Bertram, C. J.

R. v. Dissanayaka (1913) 2 *Cr. App. R. at p.* 46.—"A Peace Officer is bound to report (§22 *ante*) the commission of any offence of

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which he has received information, and a Magistrate, on receipt of such report, is bound, if the offence is an indictable one, to examine the informant on oath (§149 (2)) . . ." *per* Ennis, J.

Cadersa v. Muttamma (1902) 6 *N.L.R.* 120; 3 *Br.* 93.—It is a fatal irregularity to issue a warrant for the apprehension of a labourer, upon a charge of quitting service without notice, if the complaint reduced into writing by the Magistrate, is not signed by the complainant as required by §150. §425 was held not to cure the defect. *See Sundaram v. Vedappen* (1916) 3 *C.W.R.* 238.

Justina v. de Silva (1887) 8 *S.C.C.* 120 (*This case was decided under the old Code*).—Before refusing to issue process, the Magistrate ought to hold an examination of the complainant or other person.

Eliatamby v. Sinnatamby (1905) 2 *Bal. at p.* 22.—The discharge of an accused referred to in §191 *post* is one under §196 *post* or under §151.

Attorney-General v. Appuwa Veda (1907) 10 *N.L.R.* 199; 2 *A.C.R.* i. —*Eliatamby v. Sinnatamby* approved.

4 *Leader* 9.—*Held*, that §151(3) only applies to non-summary offences.

Sella v. Sinno (1879) 2 *S.C.C.* 167.
Litten v. Perera (1908) 11 *N.L.R.* 92.
Perera v. Ran Menika (1909) 3 *S.C.D.* 52.
Elworthy v. Kandasamy (1915) 1 *C.W.R.* 93.
} See §62 para. 6 *ante*.

Fernando v. de Silva (1920) 8 *C.W.R.* 202.—Where a summary charge was initiated on a Police report, and the Magistrate did not follow the procedure in §149(2), *held*, that §425 cured the irregularity.

Appuhamy v. Sidappen (1923) 24 *N.L.R.* 394—Although a Korala is not a public servant directly concerned in the institution of criminal proceedings, he has power to present a complaint in Court.

Pampatham v. Kandiah (1928) 30 *N.L.R.* 140.—The statement of a complainant which was recorded in the absence of an accused for the purpose of issuing process, and which was not recorded in the manner provided by §150(1) cannot be treated as evidence in the case.

Fernando v. Fernando (1930) 8 *T.L.R.* 47.—It is open to the Attorney-General under §391 to re-open a discharge under §151(1).

Procedure to be adopted when case proceeds.

152. (1) Where the offence appears to be one not triable summarily by a Police Court, the Magistrate shall follow the procedure laid down in *Chapter XVI.*

(2) Where the offence appears to be one triable summarily by a Police Court the Magistrate shall follow the procedure laid down in *Chapter XVIII.*

(3) Where the offence appears to be one triable by a District Court and not summarily by a Police Court and the Magistrate, being also a District Judge having jurisdiction to try the offence, is of opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in *Chapter XVIII.* and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose.

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Offence.—See §3 *ante.*
Triable summarily.—See §3 *ante.*
Indictable offence.—See §3 *ante.*
Police Court.—See §3 *ante.*
District Court.—See §3 *ante.*
Sentence.—See §§14,16, 17 *ante.*

1. §152 finds no counterpart in the Indian Criminal Procedure Code. §152(3) is founded upon §1 of Ordinance No. 8 of 1896, which has been repealed by this Code.—See *Silva v. Silva* (1904) 7 *N.L.R. at p.* 184. This section ran as follows :—" In all cases falling under heads 2 and 5 of section 152 of the 'Criminal Procedure Code, 1883,' where the offence is one which the Police Court has no power to try summarily, but which is *triable by the District Court,* and in all cases falling under heads 1, 3 and 4 of section 152 of the said Code, where it shall appear after the examination required by section 156 of the said Code, that the offence is one which the Police Court has no power to try summarily, but is *triable by the District Court,* it shall not be obligatory on the Police Magistrate, *where he is also a District Judge of the district,* to proceed in manner provided by *Chapter XVI.* of the said Code, and to commit such cases for trial ; *but it shall be lawful for him, in his capacity of District Judge,* without any such commitment, to hear, try, and determine all such cases, and in the trial thereof to observe the procedure prescribed by *Chapter XIX.* of the said Code, so far as it is applicable, anything in the said Code, or any other Ordinance to the contrary notwithstanding."—See *Fernando v. Fernando* and (1899) *Koch* 10 para. 6 *infra* and §166 para. 1 *post.*

2. **Scope of §152.**—After criminal proceedings have been regularly initiated under §§147 – 148 and the necessary preliminaries have been concluded, as a general rule the Magistrate must do one of two things :—

(i) If the offence is not summarily triable by a Magistrate under column 8 of *Schedule II. post,* he will proceed to investigate the case following the procedure indicated in *Chapter XVI. post.*—§152(1) ;

(ii) If, on the other hand, the offence is one which is summarily triable by a Police Court under column 8 of *Schedule II.* or declared to be triable summarily by the law creating the offence, the Magistrate will proceed to try the case following the procedure indicated in *Chapter XVIII. post.*—§152(2). If, at the end of a summary trial, the Magistrate thinks that he cannot adequately punish the offender, he will act under §192 *post.* On the other hand, if, in the course of a summary trial, it is disclosed that the proceedings should be non-summary, §193(2) *post* provides the normal procedure.

Besides the non-summary and summary jurisdictions of Police Courts to investigate or try offences, the law vests them with a third kind of jurisdiction which may be described as the 'mixed' jurisdiction of Police Courts, because it partakes of the nature of both the summary as well as of the non-summary jurisdiction. §152(3) provides one example of this mixed jurisdiction of Police Courts, while §166 *post* provides the other.

§152(3) declares in effect that where an offence "appears" to be one triable exclusively by a District Court, and not summarily by a Police Court as well, and if the Magistrate before whom the proceedings are initiated is himself also a District Judge, who could have lawfully tried the offender as District Judge, had the case been duly committed for trial ; and he is of opinion that the offence "may properly be tried summarily," he may proceed to do so, following the procedure laid

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§152 down by *Chapter XVIII. post*, and if he convicts the accused thereafter he may award a sentence which a District Judge trying such offence could have imposed.—See §325 *post.*

The provisions of §1 of Ordinance No. 8 of 1896 should be contrasted with those of §152(3).—See para. 1 *supra.* The numerous cases decided under §152(3) have further interpreted and explained its scope and effect.—See paras. 5 and 6 *infra.* Before invoking the aid of §152(3) the Magistrate should comply with the provisions of §149 *ante*, but an omission to do so is not a fatal irregularity.—*Abanchihamy v. Peter*; *Kalinguhamy v. Prolis.*

§166 *post*, on the other hand, enables a Magistrate under certain specified circumstances to try summarily an offence triable by a District Court, provided the accused consents to such summary trial. §152(3) does not require that the consent of the offender should be obtained before action can be taken by the Magistrate thereunder. In either case, however, it is the Magistrate who must elect to proceed under either section; the parties have no right to demand that action should be taken under §152(3) or under §166 *post.*

See §166 para. 2 *post.*

3. **The offence.**—*i.e.*, the offence referred to in §§148 *et seq.*

4. **Shall.**—§152(1) and (2) bring into operation *Chapters XVI.* and *XVIII*, and by the use of the word " shall " the Legislature clearly indicates that there must be no deviation from the rules laid down in either chapter. *C.f.* " May try " in §152(3).

4A. A Magistrate acting under §152(3) will have power to award the accused compensation under §253B *post*, provided proceedings were initiated under §148(1) (*a*). Moreover under §§253D and E the accused may also be ordered to compensate the prosecution.

5. §152(3).—

(*a*) **§152(3) cannot apply in the case of offences summarily triable by the Police Court, irrespective of whether the District Court has concurrent jurisdiction to try the offence along with the Police Court, *e.g.*, §316 of the Penal Code:—**

Madar Lebbe v. Kiri Banda (*Full Court*).
Andris v. Appuhamy.
R. v. Jayasinghe.
Pieris v. Wijeytunge.
Andris v. Nicholas.
Hamy v. Hamy.
R. v. Rodrigo.
Usubu v. Nona.
R. v. Silva.
4 *Tam.* 17.
} See para. 6 *infra.*

(*b*) **§152(3) may be utilised where the offender is charged with committing several offences, some of which are summary and some of which are not:—**

Madar Lebbe v. Kiri Banda (*Full Court*).—See para. 6 *infra.*

(*c*) **§152(3) may be utilised even where the original summary offence charged turns out to be a non-summary offence during the course of the trial, *e.g.*, an offence under §315 of the Penal Code becoming one under §317:—**

Gressy v. Direckze.—See para. 6 *infra.*

Cader v. Fernando.—See para. 6 *infra.*

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(*d*) **At that stage in the proceedings may the provisions of §152(3) be invoked ?—** **§152**

R. v. Uduman.
Jainadeen v. Geomonis.
Abdul v. Balappu.
Punchirala v. Cornelis.
Gooneratne v. Perera.
Abanchihamy v. Peter.
Kalinguhamy v. Prolis.
} See para. 6 *infra.*

(*e*) **The Magistrate must make a record of the fact that he is acting under §152 (3), that he is a District Judge and that, in his opinion, the case is one which may " properly " be dealt with summarily :—**

(1899) *Koch* 18.
Danhia v. Donhamy.
Silva v. Silva.
Naide v. Ratranhamy.
R. v. Rodrigo.
(1915) 1 *C.W.R.* 6.
Punchirala v. Cornelis.
L. & A. 18.
Pasupathy v. Levvai.
(1915) 1 *C.W.R.* 16.
} See para. 6 *infra.*

(*f*) **May properly be tried :—**

(1899) *Koch* 8.
1 *Tam.* 39.
R. v. Jayasinghe.
Hodgson v. George.
} See para. 6 *infra.*

(*g*) (i) **Proper use of §152(3) :—**

See *Punchirala v. Cornelis.*
Gooneratne v. Perera.
Silva v. Silva.
Gressy v. Direckze.
Cader v. Fernando.
Malhonda v. Ukku Banda.
} See para. 6 *infra.*

(ii) **Improper use of §152(3) :—**

Perera v. Silva
R. v. Silva.
(1899) *Koch* 8.*—Rioting.
(1899) *Koch* 54.*—Housebreaking.
*R. v. Uduman.**—Housebreaking.
*Danhia v. Donhamy.**—Housebreaking.
*Ramasamy v. Sumochi.**—Housebreaking.
Silva v. Appuhamy.—Attempted murder.
Fernando v. Ana Bai.
Chetty v. Pitchi.—Another District Judge available.
Pasupathy v. Levvai.—Another District Judge available.
Hodgson v. George.—Another District Judge available.
Paramoo v. Cuppay.—Summary trial of "habitual criminal."—See §193 para. 2 *post.*
Rajah v. Gopalan.
R. v. Silva 5 *N.L.R.* 17.
} See para. 6 *infra.*

See also Introduction to *Chapter XVI.* para.4(*c*).

*See *Appu v. Babun* para. 6 *infra.*

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§152 (*h*) §425 *post* **may cure an irregular use of §152(3) and the Supreme Court may review the Magistrate's reasons for acting under the section :—**

Madar Lebbe v. Kiri Banda.
Silva v. Silva.
Andris v. Nicholas.
Usubu v. Nona.
Abanchihamy v. Peter.
Appu v. Babun.
Kalinguhamy v. Prolis.
} See para. 6 *infra.*

(*i*) **Under §152(3) the Magistrate acts as 'Magistrate' and not as 'District Judge' :—**

Madar Lebbe v. Kiri Banda.
R. v. Jayasinghe.
Hamy v. Hamy.
Usubu v. Nona.
} See para. 6 *infra.*

(*j*) **A Magistrate may not try a summary offence under §152(3) in order to enable him to award the accused a District Court sentence :—**

Madar Lebbe v. Kiri Banda.
Andris v. Appuhamy.
R. v. Silva.
} See para. 6 *infra.*

(*k*) **The accused must object at the earliest opportunity, otherwise the Supreme Court may not interfere, unless he has been prejudiced :—**

R. v. Silva 3 *C.W.R.* 63.
Levvai v. Affoor.
Cader v. Fernando.
} See para. 6 *infra.*

(*l*) **Appears to be triable by a District Court :—**

Nadar v. James.—See para. 6 *infra* and §166 para. 4 *post.*

(*m*) **Following the procedure laid down in *Chapter XVIII.* :—**

Malhonda v. Ukku Banda.—See para. 6 *infra.*

(*n*) **§152(3) depends upon the nature of the offence, and not upon the convenience of parties.**—4 *Tam.* 17 para. 6 *infra.*

(*o*) **§1 of Ordinance No. 8 of 1896 :—**

Fernando v. Fernando.—See para. 6 *infra.*

(1899) *Koch* 10.—See para. 6 *infra.*

5A. **Release of offenders on probation.**—See *Chapter XXVI. post.*

6. **Case law.**—*Fernando v. Fernando* (1897) 2 *N.L.R.* 340.—This case was decided under the provisions of Ordinance No. 8 of 1896, which empowered Magistrates, who were also District Judges, to try District Court offences summarily.—See *Koch* 10 *infra.*

Madar Lebbe v. Kiri Banda (1915) 18 *N.L.R.* 376; 1 *C.W.R.* 146 (*Full Court*).—A Police Magistrate, who is also a District Judge, when exercising the punitive powers conferred upon him by §152(3) in respect of non-summary offences, acts as a Police Magistrate, and not as a District Judge. If the offence is one summarily triable by him, the Police Magistrate has power to try the offender without any reference to §152(3), and if he arrogates to himself higher punitive powers by purporting to act under that section, the infliction of any punishment beyond the Police Court limit does not by itself vitiate a conviction, but which may be cured as regards the sentence by the interference of the

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Supreme Court in revision. §152(3) can lawfully be applied to a case where the offender is charged with having committed several offences, some of which are summary, and some of which are not, provided he inflicts no higher punishment in respect of the lower offences than he has ordinary jurisdiction to impose.—*per* Wood Renton, C. J., Ennis & de Sampayo, J.J. *C.f. Appu v. Noordeen* (1916) 19 *N.L.R.* 223; 2 *C.W.R.* 260. See also *R. v. Jayasinghe* (1915) 1 *C.W.R.* 76; *Usubu v. Nona* (1915) 1 *C.W.R.* 93. §152

(1899) *Koch* 18.—A Magistrate purported to acquit an accused in a non-summary offence. There was nothing to show whether he purported to act under §152(3) or §166. *Held*, that the "acquittal" only amounted to a discharge. *Held further*, that it is the duty of Magistrates, when acting under §152(3), to make a record of that fact.

(1899) *Koch* 8, 1 *Tam.* 15.—"It seems to me that District Judges are abandoning to Police Magistrates their proper criminal jurisdiction. This, I venture to think, is against the spirit of our criminal law. Summary procedure is well adapted for the trial of comparatively trivial offences . . ." *per* Lawrie, C.J. (On the same page of this report the learned Judge gave expression to similar views in a case where a Magistrate summarily dealt with a charge of rioting.)

(1899) *Koch* 10.—"Ordinance No. 8 of 1896 dealt with the trial of cases by a District Judge summarily without a committal for trial. That Ordinance was repealed by the . . . Criminal Procedure Code, and §152 deals with the trial of cases, not only by a District Court, but by a Police Court. Instead of giving power to the District Courts to try without commitment, the law now gives power to Police Magistrates who are also District Judges, not only to try summarily cases hitherto triable by a District Court, but to impose District Court sentences, not as District Judges, but as Police Magistrates . . ." *per* Lawrie, C.J.

1 *Tam.* 39.—Under §152(3) the question to be decided by the Magistrate in every case is not whether the offender can be tried by a District Court.—*Schedule II.* decides that, but whether the offence is one which may properly be tried summarily.

(1899) *Koch* 54.—*Held*, that it was improper for a Magistrate to try a charge of housebreaking by night (§443 of the Penal Code) under §152(3).

R. v. Uduman (1900) 4 *N.L.R.* 1; 1 *Br.* 129.—*Held*, that a Magistrate, who is also a District Judge, should exercise his discretion as to whether the accused should be tried summarily under §152(3), immediately after hearing the evidence of the complainant or his witnesses as enjoined in §149 *ante*. It is irregular for him to record all the evidence as an investigating Magistrate, and then try the offender summarily under §152(3). *Held further*, that offences under §444 of the Penal Code ought never to be tried summarily. This decision was followed in 688 – 693 *D.C.Crim.*, *Kalutara*, 34781 (*S.C.M. July* 6, 1915); *Ramasamy v. Sinnochi* (1916) 2 *C.W.R.* 2; *Jainadeen v. Geomonis* (1919) 21 *N.L.R. at p.* 96.

Jainadeen v. Geomonis (1919) 21 *N.L.R.* 95.—It is irregular for a Magistrate to arrogate to himself jurisdiction under §152(3) after dealing with the case non-summarily, and after the record had been submitted to the Attorney-General for "instructions."—See §192 para. 2 *post.*

Danhia v. Donhamy (1901) 2 *Br.* 230.—When a Magistrate purports to act under §152(3), the record should itself show that the Magistrate

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§152 is also a District Judge, that, in his opinion, the case is one which may properly be tried summarily, and his reasons for such opinion. *Held further*, that offences under §443 of the Penal Code ought never to be tried under §152(3).—See *Appu v. Babun* (1919) 6 *C.W.R.* 319.

Appu v. Babun (1919) 6 *C.W.R.* 319.—Although a Magistrate. who is also a District Judge, ought not, as a general rule, to try offences of housebreaking by night under §152(3), yet such a trial does not by itself vitiate a conviction . . ." *per* Ennis, C. J.

Fernando v. Ana Bai (1918) 5 *C.W.R.* 184.—" Speaking generally, it appears to be desirable that, if possible, when a Magistrate is holding non-summary proceedings in which . . . he discharges the rôle of a prosecutor, he should not be called upon to try, in connection with the same facts, another charge in a summary manner. I do not lay this down as a general rule, but I think that, if possible, this combination of functions should be avoided . . ." *per* Bertram, C. J.

Abdul v. Balappu (1915) 1 *C.W.R.* 7; 4 *B.N.C.* 81.—" I entirely agree with the principle enunciated by Sir John Bonser in *R. v. Uduman* (*supra*) as interpreted and applied by Sir Charles Layard in *Punchirala v. Cornelis* (*infra*) that the power conferred by §152(3) cannot be exercised after the Police Magistrate has heard the whole case for the prosecution . . ." *per* Wood Renton, C. J.

Punchirala v. Cornelis (1914) 8 *N.L.R.* 58.—" It appears to me that it was not competent for the Magistrate, after taking in full the evidence of the . . . complainant, as committing Magistrate to then turn round and say ' I will treat the evidence as if I had recorded it in my capacity as District Judge.' It might be different if he had recalled the complainant after he had made up his mind to try the case as District Judge . . ." *per* Layard C. J. *Held further*, that it is the duty of a Magistrate, when acting under §152(3), to state his reasons for forming the opinion that the case is one which may properly be tried summarily. This case was followed in *Gooneratne v. Perera* (1917) 4 *C.W.R.* 89, and see *Abanchihamy v. Peter* (1918) 5 *C.W.R.* 277.

Gooneratne v. Perera (1917) 4 *C.W.R.* 89.—The Magistrate should not invoke the aid of §152(3) after practically the whole case for the prosecution has been placed before him, and, even in proper cases, he should recall all the witnesses who have been already examined and have them examined afresh.

Abanchihamy v. Peter (1918) 24 *N.L.R.* 15; 5 *C.W.R.* 277 (*Two Judges*).—It is irregular for a Magistrate to invoke the aid of §152(3) without hearing any evidence as required by §149 *ante*, but such irregularity is curable by §425 *post*. *Heyzer v. Silva* (1915) 1 *C.W.R.* 136; *Mohamado v. Aponsu* (1915) 1 *C.W.R.* 170, overruled, and see *R. v. de Silva* (1916) 3 *C.W.R.* 63.

Silva v. Silva (1904) 7 *N.L.R.* 182; 1 *Bal.* 25 (*Full Court*).—The question whether a given case ought to have been tried summarily under §152(3) may be reviewed by the Supreme Court. It is the duty of a Magistrate acting under §152(3) to state his reasons for his opinion that the offence is one which is properly triable summarily. Any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact, or evidence, and double theories as to the circumstances, or any difficult questions as to intention or identity, or in cases where the punishment ought to exceed two years is one that ought not to be tried summarily under §152(3).

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Chetty v. Pitchie (1900) 4 *N.L.R.* 339, 1 *Br.* 335.—It is irregular for a Magistrate to assume powers under §152(3) when there is another District Judge available in the station to try the case. This case was approved in *Levvai v. Affoor* (1908) 3 *A.C.R.* x. §152

Levvai v. Affoor (1908) 3 *A.C.R.* x.—Where the Magistrate assumed jurisdiction under §152(3) without objection by the accused, *held*, that it was too late to take the objection in appeal.

Silva v. Appuhamy (1900) 4 *N.L.R.* 47.—Where the evidence discloses that the offence is one of attempted murder, it is irregular for the Magistrate to arrogate to himself jurisdiction under §152(3) and try the offender summarily.

Andris v. Appuhamy (1900) 1 *Br.* 42.—Where a Magistrate dealing with a charge under §315 of the Penal Code (an offence summarily triable by a Magistrate) invoked the assistance of §152(3) on the ground that the offence was serious and could not adequately be punished by him, and thereafter convicted the accused and awarded him a District Court sentence, *held*, that the case was not one in which the provisions of §152(3) could be utilised, as it was summarily triable, and that the sentence was bad.—See §192 *post*.

R. v. Jayasinghe (1915) 18 *N.L.R.* 374; 1 *C.W.R.* 76.—A Magistrate, when acting under §152(3), acts throughout as a Magistrate and not as a District Judge. He may invoke the aid of §152(3) if the offence is non-summarily triable, if he is a District Judge, and if the offence is one which may properly be tried summarily.—See *Madar Lebbe v. Kiri Banda supra*.

R. v. Silva (1901) 5 *N.L.R.* 17—Where a Magistrate, after receiving a complaint and recording the evidence of the complainant, requested another judicial officer, who was both a District Judge as well as a Magistrate, to hear the case, *held*, that the latter could not lawfully act under §152(3) upon the mere examination of the complainant recorded by the former Magistrate, and without stating that the case was one which might properly be tried summarily.

Gressy v. Direckze (1901) 6 *N.L.R.* 33.—Where a trial originated as one for an offence under §315 of the Penal Code, but after recording the evidence the Magistrate found that the case was one of grievous hurt under §317, and informed the accused that he intended trying the case summarily under §152(3), and recalled the witnesses and permitted him to cross-examine them afresh, *held*, that the procedure was not illegal. See the judgment of Wendt, J.

Cader v. Fernando (1902) 6 *N.L.R.* 95.—In this case the charge against the accused was one under §315 of the Penal Code, and the Magistrate examined some of the witnesses and postponed the trial. Subsequently the wound inflicted on the complainant turned out to be grievous, and the Magistrate informed the accused that he would try the charge of grievous hurt under §152(3). The witnesses were recalled and tendered for cross-examination, and the case was adjourned for want of time. When the trial was resumed the accused objected to the summary trial, but the Magistrate proceeded with the case. *Held*, that as the amendment of the charge had not been made too late, nor the accused in any way prejudiced, the objection could not stand.

4 *Tam.* 17.—The application of §152(3) depends on the nature of the offence and not on the convenience of parties. *Held further*, that while the section enables a Magistrate to try a District Court case summarily, it does not give a District Judge power to try a case without a committal.

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§152 *Pieris v. Wijeytunge* (1907) 4 *Bal.* 85; 1 *A.C.R.* (i)—Where an offence is triable both by a District Court as well as by a Police Court, §152 (3) can have no application.

Andris v. Nicholas (1911) 14 *N.L.R.* 207.—A Magistrate, who was also a District Judge, tried, under §152(3), an offence which was triable summarily by a Magistrate, and imposed a Police Court sentence. *Held*, that in the circumstances the irregularity was curable by §425.

Naide v. Ratranhamy (1905) *Lem.* 95.—In acting under §152(3) the Magistrate should record the fact that he is a District Judge and his reasons for holding that the case is one which is properly triable summarily.

L. & A. 18.—*Held*, that a record by the Magistrate in a hurt case to the effect that " the injury is not a very serious one " as his grounds for trying the case summarily under §152(3) is not a good ground for the assumption of these powers where the medical evidence discloses a serious injury.

Pasupathy v. Levvai (1908) 2 *S.C.D.* 34.—Where the Magistrate recorded as his reason for trying a non-summary case under §152(3), that it presented no complicated points of law or fact, and that the offence was not sufficiently serious to justify the taking of non-summary proceedings, *held*, that the reason was good enough, if it was the fact that there were no complicated questions of law or fact, but that this could not be ascertained until after the evidence had been led. *Held further*, that the powers under §152(3) ought not to be invoked if there is another District Judge available at the place.

Hodgson v. George (1909) 12 *N.L.R.* 273 ; 1 *Curr.L.R.* 178.—" There is nothing in §152(3) . . . which requires a Magistrate, who thinks that a case may properly be tried summarily . . . to decline to try it himself if another District Judge is available . . ." *per* Wood Renton, J.—*Chetty v. Pitchi*, and *Pieris v. Wijeytunge supra* referred to.

Hamy v. Hamy (1909) 4 *S.C.D.* 15.—A Magistrate who acts under §152(3) acts as Magistrate and not as District Judge. Where an offence is triable summarily both by the Police Court and the District Court, §152(3) can have no application. Conviction quashed and case sent back for non-summary proceedings.

Nadar v. James (1915) 4 *B.N.C.* 60.—" I was referred to the construction put by Pereira, J., on §152(3) . . . in 332 - 336 *P.C., Galle* 8,547 (*S.C.M.May* 19, 1915), and counsel contended that the words "within the jurisdiction of a District Court " in §166(1) should be similarly construed as meaning " within its exclusive jurisdiction." The language of §152(3) . . . is, however, very different from that of §166 and, as at present advised, I do not think that the construction which counsel . . . put upon the latter enactment is a sound one . . ." *per* Wood Renton, C. J.

R. v. Rodrigo (1915) 4 *B.N.C.* 62.—Where the record left it doubtful whether the offence charged was summarily triable by a Magistrate or not, the Supreme Court set aside the conviction and remitted the case to be proceeded with in due course of law.

(1915) 1 *C.W.R.* 6.—The Magistrate, before acting under §152 (3), should record that he is a District Judge, and his reasons for adopting this mode of trial.

(1915) 1 *C.W.R.* 16.—" The . . . Magistrate has tried the accused in the exercise of his powers under §152(3) . . . The reason that he assigns for doing this, *viz.*, the importance of dealing with cases of this

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description promptly, is not by itself a good one, but the exercise of the power can be justified upon another ground, *viz.*, that, in spite of the number of the accused, the case is essentially a simple one . . ." *per* Wood Renton, C.J. §152

Usubu v. Nona (1915) 1 *C.W.R.* 93.—Charges under §§437 and 386 of the Penal Code, trial and conviction under §152(3). *Held*, that the offence under §386 being triable both by a Police Court as well as by a District Court, it was irregular to deal with it under §152(3),—but see *Madar Lebbe v. Kiribanda* (*supra*); that in any event a wrong application of §152(3) was curable by §425, especially where the sentence imposed is within the jurisdiction of the Police Court. *Held*, also that a Magistrate in acting under §152(3) acts as Magistrate and not as District Judge.

Ramasamy v. Sinnochi (1916) 2 *C.W.R.* 2.—Charges under §§443, 444 of the Penal Code should not be tried summarily by a Magistrate, even with the consent of the accused under §166 *post*.

Paramoo v. Cuppay (1916) 2 *C.W.R.* 230.—It is irregular for a Magistrate to assume powers and deal with an offender, when it is brought to his notice that such person is an 'habitual criminal' The same point has been decided in *Appu v. Noordeen* (1916) 19 *N.L.R.* 224; 2 *C.W.R.* 260. *c.f.* (1917) 4 *C.W.R.* 123.

R. v. De Silva (1916) 3 *C.W.R.* 63.—Where no objection has been taken in the Court below against the assumption of powers under §152(3) by the Magistrate, and where it appeared that the accused were represented by counsel throughout the trial, and that no point was made of the alleged irregularity in the petition of appeal, *held*, that it was too late to take the point at the argument.

R. v. Silva (1915) 5 *B.N.C. at p.* 55.—"The only other point that I feel called upon to mention is the constant exercise by the Police Magistrates summarily of the powers of criminal jurisdiction belonging to District Courts in cases that they have themselves the power to try summarily as Police Magistrates. This Court has laid it down again and again, and the language of §152 . . . is so clear as to stand in little need of interpretation that that cannot be done. If the Courts, at the time when charges are framed, would take the trouble to refer to the Schedule appended . . . to the Criminal Procedure Code, mistakes of this character would be readily avoided . . ." *per* Wood Renton, C.J.

Perera v. Silva (1919) 7 *C.W.R.* 85.—Complaint was made against X, Y and Z jointly charging them with committing a certain offence. The Magistrate took non-summary proceedings against X and Y, who appeared, and were duly committed for trial. Subsequently Z was produced, and the Magistrate proceeded to try him summarily under §152(3). At this trial the witnesses were not recalled, but their former depositions were read out to the accused. *Held*, that the proceedings against Z were bad. Conviction quashed, and case sent back.

Malhonda v. Ukku Banda (1920) 2 *C.L.Rec.* 150.—A Magistrate in proceeding under §152(3) should carefully conform to the procedure laid down for summary trials. Moreover, the powers under §152 (3) should not be used in such a manner as to deprive an accused of an opportunity of being able to retain and instruct his legal advisers.

Kalinguhamy v. Prolis (1922) 24 *N.L.R.* 17. Before a Magistrate, who is also a District Judge, exercises his powers under §152 (3) he should comply with the provisions of §149 *ante*. An omission to do so is not fatal to a conviction and may be cured under §425 *post*.

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§152 *Rajah v. Gopalan* (1930) 8 *T.L.R.* 71.—Charge under §§443, 369. Police Magistrate also being a District Judge invoked the powers conferred on him by §152(3). Accused pleaded guilty and was remanded for identification under §6(1) of Ordinance No. 2 of 1926. It was then found that accused was a reconvicted criminal. The Police Magistrate then, without any further proceedings, sentenced the accused to one year's rigorous imprisonment and to four years' preventive detention. *Held* (considering *Madar Lebbe v. Kiri Banda* (1915) 18 *N.L.R.* 376), that it was a question whether a Police Magistrate acting under §152(3), was only acting as Police Magistrate with the addition of the punitive powers of a District Judge. Conviction quashed and case sent back for non-summary proceedings, but reserving to the accused the right to raise the plea of *autre fois convict*.

In case of homicide Magistrate to hold inquiry on spot.

153. If, in a proceeding instituted under Section 148, the case appear to be one of culpable homicide the Magistrate shall, unless for reasons to be recorded by him, he thinks it inexpedient, go to the spot where such offence appears to have been committed and, if the accused be present before him, shall proceed to hold such part of the inquiry directed by the next following chapter as may be necessary, and, if the accused be not present, shall hold the examination provided by Section 149(1) of such persons as may seem to him to be able to give material evidence.

Culpable homicide.—See §§293 – 297, 300 – 301 Penal Code.

Magistrate.—See §3 *ante*.

Offence.—See §3 *ante*.

Inquiry.—See *Chapter XVI. post*.

Evidence.—See §3 Evidence Ordinance.

Inquiry at the spot.—See §§238, 422(1)(*c*) *post*.

1. §153 does not appear to have been based upon any section of the Indian Code.

2. **Scope of §153.**—This section should be regarded as being a part of §149 *ante*. If the proceedings initiated under this chapter disclose an offence of culpable homicide, the Magistrate, as a general rule, " shall go " to the scene of the offence. If the accused is present, the Magistrate " shall proceed to hold " such part of the non-summary investigation directed by *Chapter XVI.* " as may be necessary," but, if the accused is not present, he " shall hold the examination provided by §149(1) of such persons as may seem to him to be able to give material evidence."

Under the provisions of Ordinance No. 12 of 1890, a Magistrate may lawfully hold his Court, *i. e.*, in summary trials as well as in non-summary investigations " at any convenient spot within the limits of his division"—see *Wickremaratne v. Bastian* (1918) 5 *C.W.R.* 119; *Rasiah v. Sittambarapillai* (1920) 8 *C.W.R. at pp.* 117 – 118. Ordinance No. 12 of 1890 as well as §153 are based on considerations of convenience and utility. By holding the investigation at the scene of the alleged offence, the witnesses are enabled to give an accurate description of what they

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saw, while the Magistrate is able to follow the evidence more clearly than it would have been possible had the investigation taken place away from the scene of the offence. Moreover, by visiting the spot the Magistrate can personally address the persons assembled before him, and call upon anyone who can give material evidence to come forward. It is submitted that in all investigations held under §153 the Magistrate should, in this way, call upon the persons present, as it frequently happens that persons who themselves are unwilling for various reasons to come forward voluntarily as witnesses, may thereby be induced to give evidence, because everybody present is aware of the fact that they are in a position to give material evidence, and that if they did not come forward voluntarily, some other person would do so and state that such persons are able to give evidence.

3. **Culpable homicide.**—This expression would include the offences of murder and culpable homicide not amounting to murder. §153 is silent as to the offences of attempting to commit culpable homicide—§§300, 301—of causing death by a rash or negligent act—§298—or of the abetment of suicide. It is submitted that the provisions of Ordinance No. 12 of 1890 are wide enough to enable a Magistrate in all criminal cases to proceed to the scene and hold the investigations at the spot.

4. **Go to the spot.**—It has been held in India that, as a rule, a Judge ought not to inspect the scene of an offence, and that if it is for some reason or another thought desirable that this should be done in any given case, he would be wise to postpone his visit until all the evidence on either side has been led, and even then not allow anyone on either side to say anything to him which might prejudice his mind one way or the other.—See 19 *Alla.* 302; 21 *Cal.* 920 and 19 *Mad.* 263. It is to be observed that all these cases refer to judicial *trials*, where the Judge, *i.e.*, a Judge of law and of facts, or a Judge and jury or assessors, tries the case and decides it one way or another. Under our law §153 and Ordinance No. 12 of 1890 enable a Magistrate to hold his Court at any place within his division.—See also §§238, 422(1)(*c*) *post.*

In 21 *Cal.* 920 it was laid down that where a local inquiry by a Judge takes the form of an investigation into an occurrence at the spot, instead of in the Judge's court, such evidence should not be recorded unless it is protected by all the safeguards by which evidence upon which a Judge can act is protected by law.

5. **If the accused be present . . . shall proceed to hold such part of the inquiry directed by the next following chapter as may be necessary . . .**—See §§155, 156 *post.*

6. **If the accused be not present shall hold the examination provided by §149(1) of such persons as may seem to him to be able to give material evidence.**—If the accused is absent, and it is proved that he has absconded and that there exists no immediate prospect of arresting him, §407 *post* enables the Magistrate to conclude the investigation and commit the accused for trial, even in his absence.

The meaning of §153 is that even though the accused is not present, and even though it is not proved that he has absconded, and, it is submitted, even in cases where the identity of the accused is unknown, the Magistrate can proceed to hold the investigation. When the accused subsequently appears before the Court the Magistrate must recall the witnesses, read over their evidence, and give the accused an opportunity of cross-examining them.—§156 *post.*

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§153 If a witness, who has been examined under §153 in the absence of the accused, dies before the accused appears, and there is no proof that at the time the deposition was recorded the Magistrate was acting under §407 *post*, it would appear that the deposition would be inadmissible against the accused at his trial, unless, perhaps, its admission could be justified under §32 of the Evidence Ordinance. Magistrates recording evidence in the absence of the accused would be well advised to keep this point in mind, and to take an early opportunity of leading some formal proof, if it be a fact, that the accused has absconded and that there is no reasonable prospect of his immediate arrest.

In summons case personal attendance of accused may be dispensed with.

154. Whenever a Magistrate issues a summons he may, in his discretion, dispense with the personal attendance of the accused and permit him to appear by a pleader; provided always that the Magistrate may, in his discretion, at any stage of the proceedings direct the personal attendance of the accused and enforce his attendance in manner hereinbefore provided.

Magistrate.—See §3 *ante*.

Summons.—See §§44 – 49, 62 – 65, 151 *ante*.

Pleader.—See §3 and *c.f.* §86 *ante*.

1. §154 is based upon §205 of the Indian Code.

2. **Scope of §154.**—This section should be considered as being supplementary to §151 *ante*.

§297 *post* enacts that "except as otherwise expressly provided" all evidence taken at inquiries or trials under this Code, "shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader." §§149 – 150 *ante* entitle a Magistrate to examine witnesses in the absence of an accused; §407 *post* entitles him to do so when it is proved that the accused has absconded and that there is no prospect of his immediate arrest; while §153 entitles him to examine witnesses in cases of culpable homicide in the absence of the accused.

§154 declares that where a Magistrate issues a summons on an accused under §151 *ante*, he may, in his discretion, make an order dispensing with the personal attendance of the accused and authorize him, if the accused desires to avail himself of the concession, to appear by a pleader. It is, however, competent for the Magistrate at any stage of the proceedings to withdraw his order and direct the personal attendance of the accused, or enforce his personal attendance by summons or warrant.

§154 ought only to be used in cases which are trivial in their nature, *e.g.*, where the alleged offence is of a technical nature, as for driving a vehicle after dark without a light, or where it is punishable with a fine only—see *dicta* in *R. v. Silva* para. 4 *infra*. It has been held in India that this section can be utilised in the case of *purdanashin* ladies, even in cases where a warrant ought normally to issue in the first instance.—*Basumoti v. Budram* 21 *Cal.* 588; *R. v. Bibi* 6 *Alla.* 59 para. 4 *infra*.

The ordinary rule is that a pleader cannot bind his client by tendering a plea of guilty on the client's behalf.—*Hodgson v. George* (1909) 12 *N.L.R.* 273; *Saram v. Marikar* (1900) 4 *N.L.R.* 154; *R. v. Meerasa*

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(1913) 1 *Crim. App. R.* 6. To this rule §154 creates an exception. It has been decided in *R. v. Silva* (1914) 1 *Crim. App. R.* 73 that §154 authorizes a pleader to tender a valid plea of guilty on behalf of his client, and this decision has been approved of in *Fonseka v. Appuhamy* (1918) 5 *C.W.R.* 223—see para. 4 *infra*. The case of *R. v. Velupillai* (1923) 25 *N.L.R.* 65 decides that as a general rule a pleader may not plead not guilty on behalf of an absent client. See also *Leema v. Van Rooyen* (1927) 8 *C.L.Rec.* 171; *Ferdinands v. Mudalihamy* (1932) 12 *C.L.Rec.* xviii. §154

§86 *ante* similarly authorizes a Magistrate to dispense with the personal attendance of the respondent in proceedings under *Chapter VII.* for keeping the peace or to be of good behaviour.

See §188 para. 3 *post* as to admissions of guilt made by an accused through his pleader.

3. **Enforce his attendance in manner hereinbefore provided.**—See §151 *ante*.

3A. **Judgment in cases where the personal attendance of the accused is dispensed with.**—See §304 para. 6 *post*.

4. **Case law.**—*R. v. Silva* (1914) 1 *Crim. App. R. at p.* 74.—"§154 . . . gives power to a Magistrate in issuing summons to dispense with the personal attendance of the accused and to permit him to appear by a pleader, provided, of course, that the Magistrate may at any stage of the proceedings direct the personal attendance of the accused. If this section does not mean that a plea may be tendered on behalf of his client by a pleader, who appears in accordance with it, it is clear that the section can be of no practical advantage to anyone. *I think that the section may be deemed to be an authority to the Magistrate, even when there is no such direction in the summons as that mentioned above, to allow a pleader to appear on the return day of the summons and tender a plea on behalf of the accused.* Of course, no Magistrate will adopt that proceeding in the case of a serious offence for which the accused is liable to a substantial term of imprisonment. But I cannot help thinking that the terms of the section are wide enough to give a Magistrate the jurisdiction that I have mentioned. I may, however, state that the terms of §205 of the Indian Criminal Procedure Code are identical with those of §154 of our Code, and Princep in his commentary sounds this uncertain note—'Before such a person can be convicted and fined, it will probably be necessary to obtain his attendance in order to obtain a proper plea on the offence charged.' I need not, however, decide finally the question here involved . . ." *per* Pereira, J.

Fonseka v. Appuhamy (1918) 5 *C.W.R. at p.* 223.—"My own view is that, in all cases except perhaps the special case referred to by Pereira, J., (*i.e., R. v. Silva supra*), even though an advocate states to a Court 'My client instructs me to plead guilty,' at least as a matter of precaution, the Court should formally address the accused and take his plea from his own lips. Unless this is done the very valuable precautions which this Code prescribes in directing that the accused's plea should be taken down as far as possible in his own words are liable to be nullified . . ." *per* Bertram, C. J.

Das v. Chandra 27 *Cal.* 985.—Where an accused had been summoned but failed to appear, but put in an appearance through his pleader who asked that the accused's personal attendance be dispensed with, *held*, that the Magistrate was wrong in instituting proceedings under §172 of the Penal Code, for contempt of Court.

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§155 *Basumoti v. Budram* 21 *Cal.* 588.—In a warrant case, the accused being a *purdanashin* lady, the Magistrate can dispense with her personal attendance under this section, if he issues a summons in the first instance upon her.

R. v. Bibi 6 *Alla.* 59.—Where certain *purdanashin* ladies were charged with abetting the offence of bigamy under §362B of the Penal Code, and they applied to be exempted from personal attendance under this §154, *held,* that the Magistrate should allow them to be represented by a pleader until such time as he had before him clear, direct and reliable *prima facie* proof that the accused had a real charge to answer. He should then take steps to secure their attendance as appeared to him proper and necessary.

R. v. Lallubhai 5 *Bom. H.C.R.* 64.—If the personal attendance of an accused is dispensed with under §154 and it is deemed advisable to take security to ensure his personal attendance at some future date, such bond should be taken from the accused and not from his pleader.

CHAPTER XVI.

OF THE INQUIRY INTO CASES WHICH APPEAR NOT TO BE TRIABLE SUMMARILY BY POLICE COURT, BUT TRIABLE BY A HIGHER COURT.

1. **What offences are "non-summarily" triable** ?—see §§10 – 11 *ante.*

2. **Who may conduct the prosecution in a non-summary inquiry** ?—

No person, other than the Attorney-General, the Solicitor-General, Crown Counsel, or a pleader generally or specially authorized by the Attorney-General may do so, and, in the absence of any such persons, it is the duty of the Magistrate to conduct the prosecution. The Magistrate, however, has the right to avail himself of the assistance of any pleader or public officer in the conduct of the investigation.—§392 *post.* The scope of non-summary investigations is further illustrated by the cases of *Fernando v. Appu* (1918) 5 *C.W.R.* 293; *Saram v. Weera* (1895) 1 *N.L.R.* 95 para. 4 *infra.*

3. **The stages of a non-summary investigation.**—

(*a*) The proceedings are to be initiated before a Police Court having territorial jurisdiction in the manner indicated in §148, subject to the provisions of §147 *ante,* and other sections which require that sanction to prosecute should be obtained. The witnesses are examined in the manner provided by §149,* and process issued upon the accused as provided by §151.

(*b*) If the offence is one non-summarily triable, the Magistrate is bound to take proceedings under *Chapter XVI.*—§152(1)—but under certain circumstances he is entitled to try non-summary offences summarily.—§§152(3), 166.

There is nothing to prevent the Magistrate from taking non-summary proceedings even in the case of summary offences.—*R. v. Thomis* para. 4 *infra.* As to the procedure to be followed where the plaint charges the accused with committing offences which are both non-summarily

*See 1084 *P. C. Nuwara Eliya* 5233 (S.C.M. December 15, 1921) §156 para. 9 *post.*

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as well as summarily triable—see *Siyadoris v. Gunawardene* (1906) *L. & A.* 44, and the cases cited under §152(3) para. 6, in particular, *Jainadeen v. Geomonis* (1919) 21 *N.L.R.* 95—see para. 4 *infra*. As to the procedure where a non-summary offence is disclosed in the course of a summary trial– see §193(2) *post*.

(*c*) If the accused is proved to be absconding, evidence may be recorded in his absence under §407 *post*. If, at the subsequent trial of the accused, any witness so examined is dead or cannot be found, the deposition of his evidence will be admissible against the accused although it was recorded in his absence, and although the accused had no chance of cross-examining the witness. *C.f.* §33 Evidence Ordinance.

(*d*) Procedure on the appearance of the accused before the Court—§155(1).

(i) The Magistrate states to the accused the nature of the offence charged against him, with such particulars as are necessary to explain the same.—§155(1). *C.f.* §§167–170 *post*.

(ii) The Magistrate thereafter addresses the accused in terms of §155(1), and records the answer of the accused in the manner provided by §302 *post*.—§155(2).

(iii) Thereafter, §156(1) enacts that the Magistrate is to read out to the accused all the evidence recorded under §150 *ante*, and it is submitted he should also read out all the evidence, if any, recorded under §407 *post*. The accused is entitled to have such evidence duly interpreted to him.—§300 *post*.

(iv) The witnesses already examined are then recalled and tendered for cross-examination.—§156(5).

(v) Any further evidence which has still to be taken is then adduced, "whether called by the prosecutor or by the Magistrate."—§156(1), and see §§156(4)(6), 429, 430. All witnesses so called may be cross-examined by the accused.—§156(5).

(*e*) Procedure after the case for the prosecution has been closed:

(i) If the evidence does not, in the opinion of the Magistrate, disclose a *prima facie* case of guilt, the Magistrate "*shall*" discharge the accused.—§156(2), 157(1)(*a*). Such a discharge by the Magistrate does not bar a further prosecution in respect of the same offence—§157(2)—nor does it bind the Attorney-General, who has the power to direct the Magistrate to reopen the proceedings in a non-summary case, in which he has discharged the accused—§391 *post*—but the Magistrate may not reopen the case himself without the orders of the Attorney-General. A Magistrate need not wait until the close of the case for the prosecution to discharge the accused; he may do so at any earlier stage.—157(3). A Magistrate, in discharging an accused in a non-summary case, has no power to make an order under §253B *post*.—(1899) *Koch* 43—but he may make an order under §253C *post*. See para. 4 *infra*.

(ii) If the evidence discloses a *prima facie* case against the accused (*a*) "the Magistrate *shall examine* the accused as provided by §295" and record his answers as required by §302 *post*.—§156(3). See *R. v. Sittambaram* §155 para. 8 *post*. (*b*) He shall also take the evidence called for the defence, if any.—§156(3), see §282 *post*. (*c*) Thereafter the case is submitted to the Attorney-General for instructions.—§157(1)(*b*). (*d*) The Magistrate either remands the accused into custody —§157(1), 289(2)—or admits him to bail.—§157(1), §§394 *et seq*, 410 *et seq*, 436 *post*.

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§155 (*f*) The Attorney-General, when the record is received by him, deals with the case in the same manner as the Grand Jury in England dealt with the cases which were submitted to them. It is the duty of the Attorney-General to satisfy himself whether there is a *prima facie* case made out against the accused which is sufficient to justify a committal before a higher Court, and, if so, to decide what charges the indictment should contain.—*R. v. Sittambaram* §155 para. 8 *post.* The Attorney-General is not bound by the charges contained in the plaint upon which the magisterial proceedings were held, and he may lawfully indict for any other offences which are disclosed by the evidence.—*R. v. Sittambaram* §155 para. 8 *post.*

If further evidence is necessary, the Attorney-General may instruct the Magistrate to have such evidence led, and, when the case is completed, he will direct the committal of the accused to the Court named by him in the indictment or direct the discharge of the accused—see generally §§388 – 390 *post.*

(*g*) Procedure after the record has been returned by the Attorney-General.—

(i) If the discharge of the accused is ordered by the Attorney-General "he shall forthwith be discharged."—§158(1)(*a*). *C.f.* §388 *post.*

(ii) If the committal of the accused is ordered, the Magistrate shall commit the accused "to the Court specified in that behalf by the Attorney-General."—§158(1)(*b*). (*a*) The indictment should be duly read and explained to the accused, and a copy thereof given him.—§158(2). If the accused is committed upon charges other than those upon which the non-summary proceedings were held, the accused should formally be recharged and his statement recorded afresh, and all the witnesses named on the indictment formally tendered for cross-examination prior to committal.—See *R. v. Sittambaram* §155 para. 8 *post.* *C.f.* §145 *ante.* (*b*) The Magistrate then calls upon the accused to give the names of the witnesses he desires to have summoned at the trial.—§159(1). At any stage before the trial the accused may give the Magistrate a further list of his witnesses, and it is the duty of the Magistrate to have such witnesses duly summoned, subject to the provisions of §159(3). (*c*) Where the accused is committed to the Supreme Court, it shall be the duty of the Magistrate to ask the accused whether he elects to be tried by an English-speaking jury or otherwise.—§160. See §222 *post.* (*d*) The Magistrate then binds over all witnesses summoned for the prosecution and the defence, and who are to give evidence before the higher Court.—§162. (*e*) The Magistrate should certify the record.—§163. (*f*) It is only the accused who is entitled to receive a copy of the proceedings in a non-summary case, prior to the conclusion of the trial in the higher Court.—§164. The practice of giving "complainants" such copies is illegal and not warranted by law.—*C.f.* §434 *post.* (*g*) The Magistrate has to forward the record to the Court of commitment, together with the productions—§165(1)—and notify this fact to the Judge of such Court.—§165(2). Unless the accused is on bail, he is remanded to the custody of the Fiscal "until and during the trial."—§165(1). (*h*) If fresh evidence is discovered after committal and before the trial, such evidence may be recorded subject to the special provisions contained in §161, and the names of the witnesses so examined can be added to the indictment.—§161(4).

(iii) If the Attorney-General directs that further evidence be taken "the Magistrate shall obey such directions, and then return the record to the Attorney-General."—§158(1)(*c*).

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If the Supreme Court during the hearing of an appeal directs a District Judge or Police Magistrate to record fresh evidence, such evidence is to be recorded under *Chapter XVI.*—§348(4) *post.* §155

(*h*) Miscellaneous provisions applicable to non-summary investigations.—

(i) Making an accomplice "King's Evidence."—§§283 – 286 *post.*

(ii) Right of the accused to be defended by a pleader—§287 *post*—and to have the evidence led in his presence.—§297 *post.*

(iii) Where the accused is unable to make his defence—(*a*) If deaf, dumb, etc.—§288 *post*, (*b*) If insane.—§367 *et seq. post.*

(iv) Power of Magistrate to adjourn the investigation.—§289 *post.*

(v) Compounding offences.—§290 *post.*

(vi) Non-summary trials in the case of offences by reconvicted criminals—§291, *post* Ordinance No. 2 of 1926, and §68 Penal Code.

(vii) Change of Magistrate during the investigation.—§292 *post.*

(viii) Power to order the detention of witnesses.—§293 *post.*

(ix) Investigations may lawfully be held on Sundays and on Public Holidays.—§294 *post.*

(x) Special provisions regarding the recording of evidence.—§§298–302, 406 – 409 *post.*

(xi) Commissions to examine witnesses.—§§401 – 405 *post.*

(xii) Orders as to property which is the subject of an offence.—§§413 – 414 *post.*

(xiii) The transfer of investigations.—§422 *post.*

(xiv) Persons subject to military law to be handed over to the military authorities.—§435 *post.*

(xv) Power of investigating Magistrate to punish false witnesses for contempt of Court.—§440 *post.* See *Ambalam v. Mailu* para. 4 *infra.*

(xvi) Special procedure in cases of sedition.—§440A *post.*

(xvii) Non-summary investigation of offences referred to in §147(1)(*b*) and (*c*) by Magistrates before whom such offences were committed.—§380 *post.*

(xviii) Payment of witnesses in non-summary inquiries, compensation, etc.—§253A *et seq. post.*

(xix) Power to issue process.—§282.

4. **Case law.**—(*a*) There is nothing illegal in dealing non-summarily with a summary offence—*R. v. Thomis* (1900) 1 *Br.* 19—but the Supreme Court may reduce the sentence imposed by the District Court so as to bring it within the limits of a Police Court sentence.—See *R. v. Don Davith* (1900) 1 *Br.* 400; *R. v. Mathes* (1889) 8 *S.C.C.* 199. *C.f. Fernando v. de Silva* (1920) 8 *C.W.R.* 202.

(*b*) A Magistrate holding a non-summary investigation is not trying the accused. All he has to do is to ascertain whether a *prima facie* case has been established as would justify a committal before a higher Court.—*Saram v. Weera* (1895) 1 *N.L.R.* 95; *c.f. Nagamma v. Themis Sinno* (1911) 1 *C.A.C.* 56 referred to in *Arnis v. Charles* (1914) 18 *N.L.R. at p.* 288.

(*c*) May a Magistrate commence a non-summary investigation and thereafter try the accused summarily ?

(i) See *Fernando v. de Silva* (1920) 8 *C.W.R.* 202 and the cases cited under §152 para. 6 *ante* and in particular *Jainadeen v. Geomonis* (1919) 21 *N.L.R.* 95. See §§172 – 175 para. 2 and the cases of *Arnis v. Charles, Cader v. Fernando* there cited.

(ii) *Siyadoris v. Gunawardene* (1895) 2 *N.L.R.* 65 following *Saram v. Weera* (*supra*). *Held*, that where a Magistrate commences a non-

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§155 summary investigation into offences which are both summary as well as non-summary, and thereafter finds that the non-summary offences have not been established so as to justify committal, he ought to discharge the accused as regards such non-summary offences before proceeding summarily with the summary offences. *N.B.—This case was decided under the old Code.* Under existing circumstances in such a case the fairest course would be for the Magistrate either to continue to deal with the remaining charges *non-summarily* and to commit the accused for trial, or discharge the accused in the non-summary proceedings and cause the case to be tried anew summarily before another Magistrate. See also (1906) *L. & A.* 44; *Charles v. Charles* (1896) 2 *N.L.R.* 137; *R. v. Fernando* (1920) 8 *C.W.R.* 312.—Where an habitual criminal was jointly charged along with a non-habitual—the Magistrate is bound, under the repealed Ordinance No. 32 of 1914, to take non-summary proceedings against the habitual criminal, but it does not follow that non-summary proceedings should also be taken against the non-habitual offender.

(iii) It is the duty of the Magistrate to guide and direct the proceedings in a non-summary case.—*Fernando v. Appu* (1918) 5 *C.W.R.* 293; *c.f.* §392(2) *post.*

(iv) There is nothing irregular in investigating several offences at one and the same time, but this should be done so as not to embarass the accused.—*R. v. Sittambaram* (1918) 20 *N.L.R.* 257; 5 *C.W.R.* 287 (*Full Court*).

(v) A Magistrate holding a non-summary investigation has no power to make an order under §253B *post*—(1899) *Koch* 43 and see §253B para. 3 *post.* He would nevertheless be entitled to make an order under §253C *post.*

(vi) A Magistrate holding a non-summary investigation may make an order under §440 *post.*—*Ambalam v. Mailu* (1900) 4 *N.L.R.* 49.

(vii) An accused cannot give evidence in the course of a non-summary investigation—(1899) *Koch* 52—but he may make a statement under §155 *post*, or be questioned under §295 *post.* If the accused makes any voluntary statement after an inquiry has commenced, such statement will be recorded under §295.

(*d*) 1084 *P.C. Nuwara Eliya* 5233 (S.C.M., December 15, 1921).—A Magistrate should not, as a rule, call a Police officer into the box before calling other witnesses, and elicit from him beforehand what the witnesses are expected to say.—See §§156 - 157 para. 9 *post.*

(*e*) *Qu.*—Summary case set aside in appeal and sent back for non-summary proceedings. Can the Police Magistrate dispense with recalling each witness, reading over his previous evidence and tendering each witness for cross-examination?

It was held in *Silva v. Heyzer* (1924) 26 *N.L.R.* 189 that when a case is sent back for a rehearing before another Magistrate, the Magistrate has no right to take into consideration any evidence given in the first proceeding except with the express consent of the accused or his pleader.

5. **The following are general instructions issued to Magistrates holding non-summary inquiries:—**

Non-Summary Cases (Circular No. 4 from The Colonial Secretary's Office Dated 17-1-25)

By the Criminal Procedure Code Police Magistrates have, *inter alia*, jurisdiction to inquire into cases not triable summarily, to summon

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and examine witnesses, to apprehend criminals, to issue search warrants, and to inquire into cases of sudden or mysterious death. §155

2. The Code further provides (*Chapter III.*, Section 21) that all persons aware of the commission of certain crimes shall forthwith give information to the Magistrate, or to the Police or Headman, and the Police are required by *Chapter XII.* to hold an investigation into all crimes reported to them, and to make a report of their investigation to the Magistrate (Section 131).

3. Further by Section 392(2), in the absence of the Law Officer of the Crown, or any one representing him, the Magistrate in any inquiry which he holds is himself the prosecutor.

4. The Code thus invests Magistrates with a general supervision in cases of crime, and the public, the headman, and the Police are bound to assist the Magistrate, and have a corresponding right to look to him for guidance.

5. The attention of Magistrates is directed to the facilities afforded by the Code (Section 148(1)(*c*)) for the commencement of inquiries into alleged crimes, &c. It is in effect enacted that the Magistrate shall proceed to inquire, not only upon a complaint being made, in which case the Magistrate should examine complainant in order to ascertain whether there is sufficient ground for proceeding, but upon any information received by the Magistrate which he considers credible, and which leads him to infer that a crime has been committed.

6. Magistrates have, therefore, ample powers to take cognizance of alleged crimes. Any credible information will warrant the commencement of Police Court proceedings and, *a fortiori*, justify the Magistrate in taking such preliminary action as may be necessary to such proceedings.

7. The Police reports, referred to in paragraph 2 above, are not made to the Magistrate with a view to relieve him of his responsibilities, but to enable him to discharge them. The object of these reports is to furnish the Magistrate with information, and not to communicate to the Magistrate the opinions of the Police. The Police are now forbidden to express their opinions on matters investigated by them.

8. The fact that in any case reported to the Magistrate no formal complaint is lodged, either by the Police, or Headman, or by a complainant, does not entitle the Magistrate to put the report aside and take no further action. It is his duty in the case of every crime reported to him, if after a reasonable interval no proceedings are instituted, *himself to hold a personal inquiry*, wherever he has reason to suppose that the matter has not been fully investigated, or that the true facts are not presented by the report, or that on any other ground in the interests of justice a personal investigation is desirable.

9. In every investigation into an alleged crime, the Magistrate should hold the threads of the inquiry in his hand from first to last, directing the Police and Headmen, and at any stage of the inquiry issuing warrants against parties accused and summons to persons supposed capable of giving evidence. It should be remembered that the *onus probandi* rests with the prosecution. The Magistrate should ascertain and record the whole of the evidence tending to establish the charge, and should test that evidence, at the same time affording every facility to the accused to disprove it and clear himself. The object of the inquiry being to elicit the truth, which both parties often seek to evade, the Magistrate should personally direct the inquiry, whether the com-

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§155 plainant is represented by a pleader or not, and should rely upon himself to make the inquiry both searching and complete. In this connection the provisions of Section 153 should not be overlooked. This section requires a Magistrate in homicide cases to conduct the non-summary inquiry at the scene of the offence.

Magistrate to address accused and record his statement.

155. (1) When the accused appears or is brought before the Police Court, the Magistrate shall state to him the nature of the offence of which he is accused, giving such particulars as are necessary to explain the same, and shall address him as follows:

"I am prepared to hear any statement which you wish to make. Anything you say will be written down and will be read at your trial. You may give the names of any persons whom you wish to be summoned to give evidence and state what each can prove."

(2) Any statement made by the accused shall be recorded in manner provided by Section 302.

Police Court.—See §3 *ante*.

Magistrate.—See §3 *ante*.

Offence.—See §3 *ante*.

Nature and particulars of the offence.—*C.f.* §§167 - 169 *post*.

Procedure to be observed in recording statements of accused persons.—See §302 *post*.

Interrogation of the accused.—See §§156(3), 295 *post*.

Statements of accused to be read at trial.—See §§209, 233 *post*.

1. *C.f.* §171 Criminal Procedure Code, 1883.

2. **Scope of §155.**—See Introduction to *Chapter XVI.* para. 3 (*d*) (i)–(ii) *ante*, and §§156(3), 295 and 302 *post*.

When the accused appears or is brought before the Police Court, if the case is non-summary the first thing that has to be done is for the Magistrate to indicate to the accused the nature of the offence of which he is charged, and at the same time give him such particulars as are necessary to explain the same. When this has been done, the Magistrate proceeds to address the accused in the manner provided in §155(1). This address informs the accused of his right to make a statement in answer to the accusation made against him, and that he is at liberty, if so advised, to disclose the names of his witnesses he wishes to have summoned to give evidence at the inquiry, and the nature of the evidence such witnesses can give. The address also conveys the caution that anything the accused may state will be taken down in writing and read at his subsequent trial. It follows that if the accused does not understand English, everything stated by the Magistrate, under §155(1), must be interpreted to him. It is for the accused and not for his proctor or counsel to make the statement under §155. The accused may read a written statement, or say that on legal advice he declines to say anything more than plead "Not guilty," but the legal advisers of the accused have no status to make the statement for him. Magistrates should be on their guard on this point.

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If the accused makes a statement in response to the Magistrate's invitation, it must be duly recorded in the manner provided by §302 *post*. That is to say, the statement must be recorded in the language in which it is made; but, if for some reason it is impracticable for the Magistrate to record it in the language in which it is made, it may be recorded in English, provided the reason for the departure from the general rule is made to appear on the record itself. There should also appear a certificate to the effect that the statement was shown to or read over to the accused, or, if recorded in a language not understood by the accused, that it was duly interpreted to him. In either case the accused is at liberty to add to or explain anything that he has already stated. The accused shall thereafter be asked to sign his statement, and, if he refuses to do so, the Magistrate must make an entry to that effect on the record. It is then the duty of the Magistrate to countersign the statement, and to add a certificate to the effect that such statement was taken in his presence and hearing, and that it contains accurately the whole of the statement of the accused. The onus of proving that the provisions of §302 were duly observed is upon the prosecution.—*R. v. Babundina* (1907) 10 *N.L.R.* 298—see para. 8 *infra*. As to the practice of counsel advising their clients to reserve their defence in the Police Court, see the observations of Stephen, J., in *R. v. Maybrick* cited under §§243 – 245.

If the accused, when invited to make a statement, does not make a statement, or remains mute, the Magistrate has to consider (i) whether he stands mute of malice, or (ii) mute by visitation of God.

An accused stands mute of malice when he contumaciously refuses to make a statement. From the terms of §155 it is clear that, if an accused in such circumstances does not make a statement, the investigation will proceed. An accused may stand mute by visitation of God either (*a*) because he is unable to make a statement owing to insanity, or (*b*) because owing to deafness or dumbness or like cause he is unable to make a statement.

If the Court suspects that the accused is insane, the Magistrate will act under §367 *post*. See also §§369, 370, 371 *post*. If the accused, although not insane, cannot be made to understand the proceedings, the Magistrate will proceed with the investigation, and, if the case ends in a committal to a higher Court, he will forward the record to the Supreme Court for orders.—§288 *post*.

It is open to the accused, as the investigation proceeds, to offer any further statements he may desire to make.—See §302 *post*. All such statements must be recorded in the manner provided by §302. All statements made by an accused during the inquiry must be read at the trial.—See §§209, 233 *post*.

Our law also provides for the interrogation of an accused by the Magistrate. §156(3) clearly indicates that when, at the end of the case for the prosecution in any non-summary investigation, there appears to be a *prima facie* case established against the accused, the Magistrate "**shall**" examine the accused as provided by §295, recording such examination in the manner provided by §302. Over and above this, §295 further provides that, in order to enable the accused "to explain any circumstances appearing in the evidence against him, the Police Magistrate holding an inquiry '**may**' question the accused generally after the witnesses for the prosecution have been examined, and **may** *at any stage of the inquiry for the purposes aforesaid* put to him such questions as he may think necessary." This inquisitorial method of

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§155 interrogating an accused has been criticised by legal writers,* but it has been held by the Supreme Court that the interrogation of the accused by the Magistrate "is not an ordeal through which the accused must pass, but a privilege to which he is entitled."—*R. v. Sittambaram* (1918) 20 *N.L.R.* 257; 5 *C.W.R.* 287 (*Full Court*). See para. 8 *infra.*

In a non-summary investigation an accused may make a statement, but he cannot give evidence on oath or affirmation from the witness-box. —(1899) *Koch* 52 para. 8 *infra.* An admission of guilt contained in a statement made under §155 affords legal evidence against the person who makes it, and a conviction in the higher Court based solely on such an admission is lawful.—*R. v. Sidda* para. 8 *infra.* Such a statement may also be utilised in order to corroborate an accomplice witness, but it cannot be used as evidence against a co-accused.—See §30 Evidence Ordinance. If a *witness* in giving *evidence* makes an incriminating statement, his deposition may be used against him at his subsequent trial.—*R. v. Rahiman* para. 8 *infra.* If, before the non-summary proceedings have commenced, a Magistrate irregularly records the statement of an accused under §134 *ante*, such statement, even if it amounts to a confession, cannot be utilised against him either in the subsequent non-summary inquiry, or at his trial. If, however, the accused, in making his statutory statement under §155, refers to such irregularly recorded statement, and incorporates it as part of his statutory statement under §155, this cures the irregularity and makes it admissible against himself.—*R. v. Mudianse* para. 8 *infra.*

If the Attorney-General commits an accused for trial on charges other than those in respect of which the accused was invited to answer under §155, it is the duty of the Magistrate, prior to committal, to explain to him the nature and particulars of the new charges framed in the indictment, and to invite the accused to make any further statements he may desire to make. It is also the duty of the Magistrate in such cases to afford the accused an opportunity of further cross-examining any of the witnesses named on the back of the indictment.—See *R. v. Sittambaram* para. 8 *infra* and *General Order* 888. This case also explains difference between the plea of an accused in a summary case when charged, and the statement made by an accused in a non- summary case under §155.

3. **Appears or is brought.**—*i.e.*, irrespective of whether the accused voluntarily surrenders to Court, or is brought before the court on process, or under arrest without a warrant. It has been held in *R. v. Sittambaram* para. 8 *infra* that the words "when the accused is brought before the Court" seem to imply, as nearly as possible, "at the commencement of the inquiry."

4. **Giving such particulars as are necessary to explain the same.**—In non-summary investigations no formal charge is framed as in the case of summary trials.—See §187 *post.* All that the Magistrate is required to do is to state the nature of the offences of which the prisoner is accused, and to give him such particulars as are necessary to explain the same. *C.f.* §§167 *et seq. post.*

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*See the Trial of *Eugene Aram* by E. R. Watson, *Notable British Trials Series* p.138.—"Were an Aram to be tried today in Ceylon he would be constrained not only to make a statement in reply to the charge to the Magistrate, but would have to submit to an interrogation by him on the facts as deposed against him. . . "

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5. **The statement of the accused.—**

(*a*) The difference between the plea of the accused in a summary trial when he is called upon to plead to the charge, and the statement of an accused in a non-summary proceeding, is explained in *R. v. Sittambaram* para. 8 *infra.*

(*b*) If more accusations than one are made against the accused, he should be so informed, and an opportunity afforded him of making answers in respect of each accusation.—*Fernando v. Appu* para. 8 *infra.* But a multiplicity of charges so as to embarrass the accused should not be allowed.—*R. v. Sittambaram* (1918) 20 *N.L.R.* 257; 5 *C.W.R.* 287.

(*c*) If the Attorney-General directs the committal of the accused on charges in respect of which he was not given an opportunity of making a statement, it is the duty of the Magistrate, before committal, to give the accused such an opportunity.—*R. v. Sittambaram* para. 8 *infra.*

(*d*) In a non-summary investigation an accused may make a statement, but he cannot give evidence.—(1899) *Koch* 52 para. 8 *infra.*

(*e*) Statements contained in the accused's statutory statement furnish legal evidence against himself at his trial.—*R. v. Sidda* para. 8 *infra.*

(*f*) The *deposition* of a *witness* in which an incriminating statement appears may be utilised against him in any subsequent trial, if such statement amounts to evidence of guilt. Such a deposition is not a statement recorded under §155.—*R. v. Rahiman* para. 8 *infra.*

(*g*) Where a Magistrate irregularly examined a person under §134 *ante*, but such person when subsequently addressed under §155 incorporated the statement so irregularly recorded into his statutory statement, it was held that this fact cured the irregularity.—*R. v. Mudianse* para. 8 *infra.*

(*h*) The burden of proof is upon the prosecution to show that the provisions of §302 have been strictly complied with in the recording of the statements of accused persons in non-summary investigations.—*R. v. Babundina* para. 8 *infra.*

(*i*) The use to which such statement can be put to at the trial.—See *R. v. Naylor.* The failure of the accused to disclose his defence in this statement cannot be used adversely to him.

6. **You may give the names of any persons whom you wish to be summoned to give evidence and state what each can prove.** —*C.f.* §§159, 282 *post.* §155 (1) is meant to give an accused an early opportunity of disclosing the names of the witnesses he desires to have summoned at the inquiry. §159(1) is designed to give the accused a similar opportunity with regard to the trial.

7. **Procedure to be followed where the accused makes no statement, or stands mute.**—See para. 2 *supra.*

8. **Case law.—**

Fernando v. Appu (1918) 5 *C.W.R.* 293.—See §§148 - 151 para. 13 *ante. Held further,* " Persons bringing a charge of this kind are entitled to receive the assistance of the Magistrate in the marshalling of the facts, and, even where they are represented by a pleader, it is still the duty of the Magistrate to guide and direct the proceedings, so that, when, if necessary, the case comes to be submitted for the direction of the Attorney-General, the facts may appear in due form . . . It is also most desirable that, as the case proceeds, or before there is

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§155 any actual committal, when it is decided what charges are to be framed, that the accused should be given an opportunity of making his formal statement in regard to each charge. No one can tell, until the case is in the hands of the Attorney-General, what will be the ultimate charges framed. It may very well be that, if the accused had a definite charge before him, he might be able to make a statement which would affect the mind of either the Magistrate, or the Attorney-General, and . . . the accused ought to be given that opportunity . . ." *per* Bertram, C.J. See *R. v. Sittambaram infra.*

R. v. Sittambaram (1918) 20 *N.L.R.* 257; 5 *C.W.R.* 287 (*Full Court*). —The accused was charged non-summarily before the Magistrate on a specific charge. The indictment presented to the District Court charged the accused with committing a similar offence, but based upon different facts from that upon which the charge in the Police Court was based. *Held* by the Full Court that the indictment was in order, but that, before committal, the accused ought to have been recharged in terms of the indictment, and his statement duly recorded. "The third objection is of a more substantial nature . . . The charge on which the inquiry proceeded was not the original complaint of the complainant, but the charge embodied in the warrant under the Fugitive Offenders Act. It was the offence thus specified which was explained to the accused in pursuance of §155 of the Criminal Procedure Code. The offences on which the accused was finally indicted, however, did not comprise this offence, but were the other three offences referred to in the original complaint. It was contended . . . that it was not competent to the Crown to indict the appellant on these charges, and that the only offence on which he could be indicted was the offence the nature of which was explained to him at the commencement of the inquiry under §155. This contention raises very important questions which go to the root of the procedure applicable to preliminary inquiries under the Criminal Procedure Code. It often happens, in charges of criminal breach of trust or other forms of fraud, that the inquiry instituted into a specific charge, naturally and properly travels beyond the actual facts charged . . . In order to determine whether it was competent to prefer these charges, let us examine the course of procedure in these preliminary inquiries. The stages in these inquiries are as follows :—

(*a*) "*When the accused is brought before the Court*"—words which seem to imply, as nearly as possible, at the commencement of the inquiry—"*it is the duty of the Court to explain the nature of the offence of which he is accused.*"—§155. In the case of summary inquiries the Magistrate must frame a charge.—§187. In non-summary inquiries, however, no charge is actually framed until the indictment.

(*b*) Upon the nature of the offence being explained to him, the accused is invited to make a statement. In the case of a summary trial he is not invited to make a statement, but is called upon to plead.

(*c*) Before the conclusion of the inquiry, if the Magistrate thinks that there is a *prima facie* case of guilt, it is his duty to interrogate the accused under §295 so as to enable the accused to explain any circumstances that may have appeared in the evidence against him.

(*d*) There is no express provision with regard to non-summary inquiries corresponding to §172, under which, at an actual trial, the Court may alter the charge or add any additional charge to that under investigation.

(*e*) Upon the conclusion of the inquiry, if the Magistrate finds "*that there are sufficient grounds for committing the accused for trial*"

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the record is forwarded to the Attorney-General, and the Attorney-General, if he thinks fit, directs the committal of the accused upon an indictment in which the formal charge is for the first time framed. §155

It will be observed that it is nowhere said that, in framing the indictment, the Attorney-General is restricted to the offence, the nature of which was explained to the prisoner at the commencement of the inquiry . . . The Code contemplates that it shall be open to the Attorney-General to frame the charges in the indictment accordingly (*i.e.*, as provided under §§178 – 181). But it does not appear when he can effectively do this if he is restricted in his indictment to the actual offence explained to the accused at the commencement of the inquiry. It is said that the accused may suffer prejudice if he is indicted with an offence not explained to him at the inquiry, and with respect to which he is afforded no opportunity of making a statement provided for in §155, but he is equally liable to be prejudiced if the Court adds a charge at his trial under §172, and it is to be borne in mind that in any case the evidence tendered against him at his trial has been previously given at the inquiry in the form of depositions, of which he is cognizant . . . While I am sensible . . . of the inconvenience which might result from the laying down of such a restrictive rule as that contended for, I am also sensible that inconvenience might, in some cases, result to the accused . . . I would, however, draw attention to the fact that the Code is sufficiently elastic to afford the accused all possible facilities that may be necessary for his protection, and that it is the duty of Magistrates, and those who instruct them, to see that those facilities are in fact afforded . . ." *per* Bertram, C.J. *Held further* by Bertram, C.J., (*a*) That there is nothing to prevent an inquiry being held into several offences together.—See §§148 – 151 para. 13 *ante*. (*b*) If, in the course of an investigation, another alleged offence comes to light, and which is of such a nature that it cannot appropriately be investigated as part of the same investigation, but should be dealt with separately, the Magistrate may proceed to do so, or the Attorney-General may direct that this should be done. (*c*) If the Attorney-General thinks such a course appropriate, he may instruct the Magistrate before committal to explain the nature of other charges which it is intended to commit the accused upon, and afford him an opportunity of making a statement under §155, and of cross-examining any of the witnesses already called. (*d*) The Magistrate may, in appropriate cases, interrogate the accused under §295.—See §156(3). This interrogation is not an ordeal through which the accused must pass, but a privilege to which he is entitled. *See the judgment of Shaw, J.*

R. v. Rahiman (1905) 9 *N.L.R. at p.* 73.—Nature of §155 explained. Where, in a non-summary investigation, M, a *witness*, gave evidence incriminating himself, and thereupon the Magistrate made him an accused, *held*, that the deposition of M, made when he was a witness, was admissible against himself at his trial, and that it was not a statement recorded under §155 of this Code. *C.f. R. v. Mudianse* (1918) 21 *N.L.R.* 48 *infra*.

(1899) *Koch* 52.—An accused cannot give evidence as a witness in a non-summary inquiry.

R. v. Babundina (1907) 10 *N.L.R.* 298.—The statement of the accused made in the course of a non-summary investigation must be recorded in the language in which it is made, unless it is impracticable to do so. The burden is on the Crown to show that it was impracticable for the Magistrate to record the statement in the language in which it was made.—See §424 *post*.

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§155 *R. v. Sidda* (1918) 20 *N.L.R.* 190; 5 *C.W.R.* 73.—Where an accused, in making a statement in a non-summary case in which he was charged, stated "I am guilty, I beg for pardon," *held*, that at the subsequent trial in the District Court he was rightly convicted on his statement made in the Police Court, although the accused retracted the statement when pleading to the indictment, and in spite of the fact that the District Judge held that in the absence of such statement there was not sufficient evidence to justify a conviction.—See *R. v. Sinnatamby* (1901) 3 *Br.* 36.

R. v. Mudianse (1918) 21 *N.L.R.* 48.—Where an *accused* made a confession to a Magistrate prior to the non-summary investigation, and the Magistrate, in breach of the terms of §134, recorded such confession on oath, *held*, that such confession was irregularly recorded and was invalid. In this case, however, the accused, when making his statutory statement under §155, stated "Yesterday I made a full statement to the Magistrate, that is the statement which I wish to make now." *Held*, that the accused having incorporated his previous statement into his statutory declaration, such confession became part of his statement under §155, and was, therefore, admissible against him in the circumstances of the case.—See *R. v. Rahiman supra.*

R. v. Naylor (1932) *Ct. of Crim. Appeal*; 12 *C.L.Rec.* 81.—An accused in reply to the charge in a non-summary inquiry says "I don't wish to say anything except that I am innocent." The fact that the trial Judge, in summing up, drew an inference adverse to the accused is misdirection and vitiates the conviction.

Evidence previously taken to be read to accused and evidence for prosecution taken.

156. (1) The Magistrate shall then read over to the accused the evidence (if any) recorded under Section 150 and take in manner hereinafter provided all such further evidence as may be given in support of the prosecution, whether called by the prosecutor or the Magistrate.

(2) If such evidence does not establish a *prima facie* case of guilt the Magistrate **shall** discharge the accused.

(3) If such evidence establishes a *prima facie* case of guilt the Magistrate shall examine the accused as provided by Section 295, recording such examination in manner provided by Section 302, and shall then take all such evidence as may be produced on behalf of the accused.

(4) The Magistrate, may at any stage of the proceedings, summon and examine any person whose evidence he considers essential to the inquiry and re-call and re-examine any person already examined.

(5) The accused shall be permitted to cross-examine any person whose evidence has been recorded under Section 150 and all witnesses called for the prosecution or called or re-called by the Magistrate.

(6) If the Magistrate calls for other evidence than that produced for the prosecution he shall briefly record what is the nature of the evidence called for.

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Conclusion of inquiry.

157. (1) When the inquiry has been concluded the Magistrate shall (*a*) if he finds that there are not sufficient grounds for committing the accused for trial, discharge him, or (*b*) if he finds that there are sufficient grounds for committing the accused for trial, forward the record to the Attorney-General, remanding the accused to custody or admitting him to bail as he thinks proper. §157

(2) A discharge under this section does not bar a further prosecution for the same offence.

(3) Nothing in this section shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case if, for reasons (to be recorded by him), he considers the complaint to be groundless.

Magistrate.—See §3 *ante*.

Prosecutor.—*C.f.* §392 *post*.

Discharge.—See §§158(1)(*a*) *post*.

Interrogation of the accused.—See §295 *post*.

Summon.—See *Chapter V. ante*.

Inquiry.—See §3 *ante*.

Committing the accused.—See §§158, 160 - 165 *post*.

Attorney-General.—See §3 *ante*.

Remanding accused to custody.—*C.f.* §289 *post*.

Admitting accused to bail.—See §163, *Chapter XXXVI*; *Chapter XXXIX*. and §436 *post*.

Read over to the accused.—*C.f.* §189(1) *post*.

Forwarding record in summary case to Attorney-General.—See §192.

1. *C.f.* §209 Indian Criminal Procedure Code.

2. **Scope of §§156 - 157.**—See Introduction to *Chapter XVI.* para. 3, (*d*)(iii) - (v), E *ante*, §387, 391 *post*.

After the accused has made his statutory statement under §155, or if he stands mute of malice, or refuses to make a statement, the Magistrate "then" proceeds to read over to him all the evidence recorded under §150 *ante*.—§156(1). It is submitted that if the accused has been absconding, and any evidence has been recorded under §407 *post*, such evidence also should be read over to the accused. If the accused is a person who does not understand English, he is entitled, not only to have the evidence read over to him, but also to have it interpreted in a language intelligible to him.—§300 *post*. The accused shall, moreover, "be permitted" to cross-examine any person whose evidence has been recorded under §150—§156(5)—and, it is further submitted, also all witnesses examined under §407 *post*, if they are alive and capable of being called.—See §297 para. 7 *post*. From the words "shall be permitted" in §156(5), it would appear that the accused may waive his right to cross-examine such witnesses, but the record should show clearly that the provisions of §156(5) have been complied with, and that the accused was in fact "permitted" to cross-examine the witnesses, had he thought fit to do so. It is open to doubt whether the accused's pleader may, on behalf of the accused, waive his right to have the witnesses re-called

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§157 for cross-examination. In a case where a pleader, on behalf of the accused, waives the right to cross-examine, the Magistrate might well interrogate the accused under §295 *post* as to whether that is his wish.

The normal practice is for the Magistrate to re-call every witness, who had been examined up to the time of the appearance of the accused; to enter on the record the fact that the witness' previous evidence has been read; and thereafter to record the cross-examination of the witness by the accused, if any. The deposition is then certified as having been read over by the witness or interpreted to the witness, and admitted to be correct, and signed by the deponent, and countersigned by the interpreter and the Magistrate. The same procedure should be adopted when a summary case is set aside in appeal and sent back for non-summary proceedings. In this connection the importance of *General Order* 886 should be observed. Non-compliance with the terms of this *General Order* makes it impossible to ascertain subsequently whether a particular accused was present in Court or not when a certain witness was re-called. —See also §189 para. 2 *post*.

After the witnesses who have already given evidence have been re-called, the Magistrate proceeds to record the rest of the evidence for the prosecution, whether called at the instance of " the prosecutor or the Magistrate ".—§156(1),(4). If the Magistrate calls for evidence other than that produced for the prosecution, he is to make a brief record of the nature of the evidence so called.—§156(6).—See also §§429 - 430 *post*. It is competent for the Magistrate at any stage to re-call and re-examine any witness who has already been examined.—§156(4). The accused has the right to cross-examine all witnesses called or re-called on the part of the prosecution.—§156(5).

When the evidence for the prosecution has been duly recorded, and the prosecution closed, the Magistrate has to decide whether or not a *prima facie* case of guilt has been established against the accused. The question to which the Magistrate has to address himself is whether, on the whole of the evidence led for the prosecution, the case is one which justifies committal to a higher Court.—*General Order* 887(i). If he comes to the conclusion that a *prima facie* case of guilt has not been made out against the accused, it is his bounden duty to discharge the accused.—§§156(2), 157(1)(*a*). See *General Order* 887(ii) and *Dias v. Peries*. It is irregular for a Magistrate to avoid this responsibility by forwarding the case to the Attorney-General and at the same time recommending that the Attorney-General should direct the discharge of the accused. It is a condition precedent to the forwarding of a case to the Attorney-General that the Magistrate has come to the conclusion that a *prima facie* case of guilt has been established against the accused, so as to justify his committal to a higher Court.—See §157(1)(*b*). The law has vested Magistrates with the duty of deciding, in the first instance, whether the case is to stop at the conclusion of the case for the prosecution or earlier, or whether it is to proceed further; and Magistrates should never hesitate to exercise the power the law confers upon them of discharging accused in cases where they consider that a discharge is called for. The law encourages the exercise of these powers by Magistrates and provides ample machinery for correcting any erroneous exercise of this power. An order of discharge in a non-summary case is not final, and does not bar a subsequent prosecution in respect of the same offence.—§157(2), and see 1 *Tam.* 59, *Mathes v. Samsedeen* para. 9 *infra*. A discharge under §157 is not an appealable order.—*Kannangara*

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v. Kannangara; Fernando v. Fernando; Appiah v. Pitchi. In any event it is always open to the Attorney-General to direct the re-opening of any case in which he considers that an accused has been wrongly discharged.—§391 *post.* See *Dias v. Peries* as to discharges under §156 and under §157. The Attorney-General cannot re-open a discharge under §156.—*Dias v. Peries;* but see *Fernando v. Fernando.* A Magistrate has no need to wait until the close of the case for the prosecution before ordering the discharge of the accused, he can do so at any previous stage of the proceedings.—§157(3). A judicious use of the power of discharging accused persons would lead to the saving of a great deal of public time and expense, inasmuch as it would tend to curtail the number of cases which otherwise have to be committed for trial. It is correct that §158(1)(*a*) empowers the Attorney-General to direct that an accused should be discharged, but this is a power which naturally can only be exercised in a very limited number of cases. The Attorney-General has not seen the witnesses giving evidence, neither can he form an adequate opinion as to their credibility from a perusal of a record. The fact that the record has been submitted to him by the Magistrate implies that, so far as the Magistrate is concerned, he recommends the committal of the accused or that at least the Magistrate does not consider it to be a case for the discharge of the accused. If the recorded evidence appears not to be contradictory, and sufficient, if believed, to support a conviction, the Attorney-General, as a rule, has no option but to direct the committal of the accused.—See also §§283 – 286 para. 2 *post.* §157

If, on the other hand, at the conclusion of the case for the prosecution, the Magistrate forms the opinion that there is a *prima facie* case of guilt made out against the accused (i) he "**shall**" then proceed "to examine the accused as provided by §295, recording such examination in manner provided by §302."—§156(3). See *R. v. Sittambaram* §155 para. 8 *ante* and §295 para. 2 *post.* (ii) Thereafter, he should record any evidence that is tendered on behalf of the defence.—§156(3). It is to be observed that an accused cannot give evidence himself in the course of a non-summary investigation.—(1899) *Koch* 52 §155 para. 8 *ante.* (iii) The Magistrate will then proceed to fill up the "Confidential Schedule" relating to the case, and in so doing he should indicate the specific offences for which the accused should, in his opinion, be committed for trial. He should also indicate the salient features of the case, and the opinion he himself has formed as to the credibility of the witnesses, and the merits of the case generally. He should also state whether the accused is on bail or on remand.—See *General Order* 887(*ii*) – (*v*). The Magistrate will fix a returnable date for the case and forward the record to the Attorney-General, at the same time admitting the accused to bail or remanding him into custody.—§157(1)(*b*), §387 *post.* See §289 *post.*

If the Police inquiry under *Chapter XII.* has been adequately held and if the Magistrate as prosecutor has kept the threads of the inquiry in his hands during the non-summary inquiry, when he forwards the record to the Attorney-General there should be no necessity for any further action in the case beyond the forwarding of the indictment with an order from the Attorney-General for the commitment of the accused —see §387 para. §2, 3 *post* where the writer has ventured to criticise the existing procedure of elaborate instructions with the record passing to and from the Attorney-General several times before the final commitment of the accused.

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§157 It is to be observed that an order of discharge or of committal is not a " judgment " or " final order " within the meaning of §338.—See *explanation* to §338. Hence, no appeal can lie from such an order.—See *Mendis v. Appuhamy* para. 9 *infra*.

2A. **Orders of discharge under §156(2) and §157.**—See *Dias v. Peries* para. 9 *infra*.

3. **Then.**—*i.e.*, after the accused has made a statement in response to the Magistrate's address under §155 *ante*, or where no statement has been made either because the accused stands mute, or refuses to make a statement.

4. **Read over.**—If the accused does not understand English, not only should the evidence be read over to him, but it should also be duly interpreted to him.—§300 *post*. Where an accused is represented by a pleader, will it suffice if the evidence is only read over and not interpreted ?

5. **Evidence recorded under §150.**—156(1),(5).

This refers to the evidence recorded when the case was instituted. It is submitted that, if evidence under §407 *post* has also been recorded, owing to the fact that the accused was absconding, such evidence too ought to be read over to the accused when he appears.

6. **Take in manner hereinafter provided.**—See §§156(4),(6), 158(1)(*c*), 161, 297 – 300, 401 – 403, 406 – 407 *post*.

The accused is entitled to cross-examine every witness who has been called in his absence, if such witness is alive and capable of being called, as well as every witness who is called or re-called in his presence in Court.—§156(5).

7. **Whether called by the prosecutor or the Magistrate.**—§156(1). See §392 *post*.

8. **Procedure after the conclusion of the case for the prosecution.**—See para. 2 *supra*.

(i) If the Magistrate forms the opinion that no *prima facie* case of guilt has been established against the accused, he " shall discharge " him.—§§156(2), 157(1)(*a*). The Magistrate, however, may discharge the accused at an earlier stage in the proceedings.—§157(3). A discharge in a non-summary investigation does not bar a subsequent prosecution in respect of the same offence—§157(2), *Mathes v. Samsedeen* para. 9 *infra*—but the Magistrate himself cannot re-open the very proceedings in which he made the order discharging the accused, unless directed to do so by the Attorney-General.—§391 *post*. *C.f. R. v. Harmanis* para. 9 *infra*.

(ii) If the Magistrate forms the opinion that a *prima facie* case of guilt has been established against the accused (*a*) he **"shall"** proceed to examine the accused under §295 and record his answers as provided by §302 *post*.—§156(3), *R. v. Sittambaram* §155 paras. 2 and 8 *ante*. (*b*) Thereafter, the Magistrate shall record any evidence tendered on behalf of the defence.—§§156, 282 *post*. The accused, however, cannot give evidence in the course of a non-summary investigation.—(1899) *Koch* 52 §155 para. 8 *ante*. (*c*) Thereafter, the Magistrate will forward the record to the Attorney-General, after admitting the accused to bail, or remanding him into custody.—§157(1)(*b*) and see para. 2 *supra*, §§298 – 301 para. 8 *post*, and also §387 *post*. It is open to the Magistrate at any stage of the inquiry to interrogate the accused.—§295 (1). If the accused, besides making a statement under §155 *ante*, makes any further voluntary statements during the inquiry, the Magistrate will record them under §295(1).

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9. **Case law.—** §157

Mendis v. Appuhamy (1893) 2 *S.C.R.* 149.—No appeal lies against an order of discharge pronounced in a non-summary proceeding.—See §338 *explanation post. Held further*, that it is the duty of a Magistrate to ascertain whether there are grounds for putting the accused to the ignominy and expense of standing a trial, and that a Magistrate would fail in his duty if he committed a case where he considered the prosecution utterly unreliable and that there was no possibility of a conviction.

Mathes v. Samsedeen (1893) 2 *C.L.R.* 161.—A Magistrate cannot pronounce an order of acquittal in a non-summary case. Even were he to do so, such an order would only amount to a discharge.

R. v. Harmanis (1903) 8 *N.L.R.* 138.—Where a Magistrate discharged an accused in a non-summary case, and another Magistrate upon a fresh inquiry committed the accused for trial, *held*, that it was not open to the District Judge to go behind the commitment.

(1899) *Koch* 43.—A Magistrate in discharging an accused in a non-summary case has no power to make an order under 253B *post*. Apparently he could make an order under §437 *post*. *C.f.* (1899) *Koch* 3.

(1899) 1 *Tam.* 59.—If a prosecution is discontinued by the discharge of the accused, it can be renewed, the discharge not putting an end to the prosecution.

1084 *P.C. Nuwara Eliya* 5233 (S.C.M. December 15, 1921).—Bertram, C.J., held that it is incorrect for the Magistrate to call a Police officer into the witness-box at the outset of the proceedings and obtain from such witness beforehand everything that the other witnesses are expected to say, before calling any witnesses. Although this ruling was pronounced in a case triable summarily, the same reasoning would hold good in the case of non-summary investigations. If Magistrates would follow this authority it would tend to make the work of those whose duty it is to peruse the proceedings prior to committal, as well as those of the trial Judge himself, much easier than under the existing practice. A circular to this effect has been issued to Magistrates.

Kannangara v. Kannangara (1928) 30 *N.L.R.* 149; 6 *T.L.R.* 78.—See §158 para. 10 and §338 *post*. A discharge under §157 is not a judgment or final order within the meaning of §338. See *Fernando v. Fernando* (1932) 34 *N.L.R.* 160.

Dias v. Peries (1930) 31 *N.L.R.* 487, 7 *T.L.R.* 131.—Non-summary inquiry. Accused discharged by Police Magistrate before case for prosecution closed. Case re-opened by Attorney-General under §391. An appeal and an application in revision was made to the Supreme Court against this order. " The short point I have to decide is whether the accused was discharged under §156 or 157 of the Criminal Procedure Code. It will be seen that under §156(1) after the Magistrate has read over all the evidence previously recorded to the accused on his first appearance, the Magistrate is to record ' all such further evidence as may be given in support of the prosecution, whether called by the prosecution or the Magistrate.' It is only after this has been done, when ' such evidence does not establish a *prima facie* case of guilt ' that the Magistrate is authorized to discharge an accused. Clearly this is not what happened in the case, for the Magistrate did not hear all the evidence which the prosecutor was prepared to tender, but cut the inquiry short as he thought that it was of no use to pursue the inquiry further. The order of discharge was, therefore, not made under §156. Was it made under §157 ? §157(1) provides

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§157 for the order to be made when the whole inquiry has been concluded, *i.e.*, the Magistrate may himself discharge the accused or forward the record to the Attorney-General for committal . . . And there by sub-section (3) of §157 nothing is to prevent a Magistrate from discharging the accused 'at any previous stage of the case, if, for reasons to be recorded by him, he considers the complaint to be groundless.' In my opinion the discharge in this case was made by the Magistrate under §157(3), and therefore the Solicitor-General had power under §§391 and 393 to reopen the inquiry," *per* Akbar, J.

Fernando v. Fernando (1930) 8 *T.L.R.* 47.—The right of the Attorney-General to reopen a non-summary case where an accused has been discharged by the Police Magistrate is not confined to the case under §157. Under §391 the Attorney-General may reopen such a case when the discharge has been made at any other stage, *e.g.*, under §151(1) or §156(2).

Fernando v. Fernando (1932) 34 *N.L.R.* 160.—A discharge under §157 is not appealable.

Appiah v. Pitche (1934) 13 *C.L.Rec.* lxxii.—No appeal lies from an order of discharge in a non-summary case under §157.

What to be done on receipt of record from Attorney-General.

158. (1) As soon as the record has been received back from the Attorney-General then (*a*) if the Attorney-General directs that the accused be discharged, he shall be forthwith discharged; (*b*) if the Attorney-General directs that the accused be committed for trial, the Magistrate shall commit the accused for trial to the Court specified in that behalf by the Attorney-General; but (*c*) if the Attorney-General directs that further evidence be taken, the Magistrate shall obey such directions and then return the record to the Attorney-General.

(2) Where a committal is directed by the Attorney-General the indictment, as settled and approved by the Attorney-General, shall be read and explained to the accused and a copy thereof served on him.

Attorney-General.—See §3 *ante*.
Discharge of accused.—See §§156(2), 157(1)(*a*), (2), (3); 388 *post*.
Committal of accused.—See §§158(2); 159 - 160; 162 - 165 *post*.
Arraignment of accused.—See §§203(1), 218(1) *post*.
Court.—See §3 *ante*.
Magistrate.—See §3 *ante*.
Indictment.—See §§186, 387, 391, *Form* 9 *Schedule III. post*.
Copy.—*C.f.* §§161, 164; 434; *post*.
Reading the indictment to the accused.—See §167(6) *post*.
Forwarding record in summary case to Attorney-General.—See §192 *post*.

1. *C.f.* §176 of the Code of 1883.

2. **Scope of §158.**—*Chapter XVI.* of the Code is silent as to what steps the Attorney-General should take when he receives a record sub-

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mitted to him under §157(1)(*b*) *ante*; but see §387 *et seq.* From the provisions of §158, however, it is clear that his duties are threefold, *viz.*, (i) to consider whether the accused ought to be discharged, (ii) whether the case is ripe for committal, and, if it is, to forward an indictment and a direction as to the Court to which the committal should be made—See §387 *post* and §§47, 93 Courts Ordinance, 1889—and (iii) if the case is not ready for committal owing to the lack of necessary evidence, to direct the Magistrate to record such evidence, if it is available.—See *Wickremasuriya v. Appusinno* para. 10 *infra.* §158 should also be read in the light of the provisions of §§387 - 391 and 393 *post.*

The question of deciding whether an accused ought to be committed to the Supreme Court or to the District Court is vested solely in the discretion of the Attorney-General.—*Kannangara v. Kannangara.* An exception to this rule occurs, where, in appeal or in revision, the Supreme Court remits a case to the Police Court and directs that non-summary proceedings should be taken and the accused committed to a specified District Court or to the Supreme Court.—See §§177, 347(*a*), 357 *post.* Subject to this qualification the discretion vested in the Attorney-General is absolute. It is manifest, however, that the Attorney-General cannot override the law. For example there are certain offences which are exclusively triable by the Supreme Court, such as murder, rape and the like. It is obvious that the Attorney-General has no power to commit such a case for trial before a District Court. Where, however, the offence is triable, both by the Supreme Court and by a District Court, *e.g.*, grievous hurt caused by a cutting instrument (§317 Penal Code), it is for the Attorney-General to decide whether the case is to go before the Supreme Court or before the District Court. Moreover, there are many cases which, although at first sight appear to be exclusively triable by the Supreme Court, yet, upon a careful scrutiny of the evidence, disclose nothing more serious than a District Court offence, *e.g.*, where a person is charged with murder, but the circumstances show that the accused only dealt the deceased a light blow under provocation, and death was due to the rupture of an enlarged spleen; or where the charge is one of attempted rape and the evidence discloses nothing more serious than the use of criminal force with intent to outrage modesty. In all such cases the Attorney-General may exercise his discretion and commit the accused for the lesser offence. It is not open to a District Judge to question the validity of an indictment duly presented to his Court and supported by a valid committal—see *R. v. Perera, R. v. Boosa, R. v. Kolandavail, R. v. Appuwa Veda, R. v. Kolanda* para. 10 *infra*, and see §§172 - 176 para. 5A; §177 para. 5 *post*—his duty is to try the accused for the offence specified in the indictment, and the Supreme Court is the only Court which can question the propriety of the Attorney-General's act—*R. v. Kolandavail* para. 10 *infra*—but the Supreme Court will not interfere unless there has been a manifest abuse of his powers on the part of the Attorney-General.—*R. v. Sinno, R. v. Fernando* para. 10 *infra.* In drafting the indictment the Attorney-General is not bound to confine himself to the charges framed by the Magistrate, but may add other charges which are disclosed in the evidence.—*R. v. Sittambaram* para. 10 *infra* and see §203 para. 3 *post*, and *General Order* 888 (*i*). When the Attorney-General directs the committal of the accused, the Magistrate will read and explain the indictment to the prisoner (*c.f.* §167(6)) and serve him with a copy of it.—§158(2). He will thereafter proceed to commit him for trial as indicated by §§159 - 160, 162 - 165 *post.* See §165 paras. 2, 5 *post.*

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§158 If the accused, though not insane, cannot be made to understand the proceedings and his commitment is ordered, the Magistrate will act as provided by §288 *post*.

If the Attorney-General directs the discharge of the accused, the Magistrate "shall forthwith" obey the direction.—§158(1)(*a*). As to the principles guiding the discharge of an accused by the Attorney-General.—See §157 paras. 2 and 8 *ante*. *C.f.* §§202, 217, 388 *post* and see *Kannangara v. Kannangara* para. 10 *infra*.

If the Attorney-General directs the recording of further evidence the Magistrate is required to carry out the direction and thereafter to return the record to the Attorney-General.—§158(1)(*c*), and §389 *post*. The Attorney-General will then further consider whether the accused should be committed or not.

The Attorney-General may also direct the Magistrate to try the accused summarily—*Simmons v. Hebna*; but it would seem that such trial should take place before a new Magistrate.

3. **Forthwith.**—See §33 para. 3 *ante*.

4. **Discharge on the orders of the Attorney-General.**—Such a discharge does not amount to an acquittal, and it would be open to the Attorney-General to re-open the case under §391.—*C.f. R. v. Harmanis* (1899) 1 *Tam.* 59 para. 10 *infra*. No appeal lies against an order of discharge.—(1899) *Koch* 64 para. 10 *infra*, and see the *explanation* to §338 *post*. The Supreme Court cannot revise the discharge of an accused in a non-summary case.—*Kannangara v. Kannangara* para. 10 *infra*.

5. **Court specified in that behalf.**—See §387 *post* and §§47 93, Courts Ordinance, 1889.

6. **Directs that further evidence be taken.**—See §389 *post*.

7. **Indictment.**—See *Form* 11, *Schedule III.*, and §§186 para. 2, 387, 391 *post*.

Proceedings which may be held without the Attorney-General's Indictment.—(1) Proceedings on the Attorney-General's Information—§385 *post*. (2) On transfer by the Supreme Court.—See §§12 and 203 para. 2 *post*.

8. **Copy served on him.**—*C.f.* §§161(3), 164, 306(5), 434 *post*. See §§203(2), 218(2) *post*. *Qu.*—Should such copy be stamped under item 22A of the Stamp Ordinance, 1909?

9. **General order 888 (*ii*).**—Particulars which should be endorsed on the warrant of commitment.

9A. **Applicability of §158 to summary proceedings.**—See §192 para. 2 *post*.

10. **Case law.**—

R. v. Perera (1897) 3 *N.L.R.* 43.—"The District Judge discharged the accused because there was (he says) an attempt to murder. Perhaps there was, but that was not the charge the Judge was asked to try. He was bound to try the accused on the charge of hurt set forth in the indictment . . ." *per* Lawrie, C.J. See *R. v. Kolanda infra*.

R. v. Boosa (1908) 11 *N.L.R.* 355 (following *R. v. Kolandavail* and *R. v. Veda infra*).—"A District Court, before which an accused person is brought for trial upon a warrant of commitment regular on its face, and to which an indictment is presented by the Attorney-General, is not competent to inquire whether the proceedings which culminated in the committal were regularly instituted or regularly conducted. It is its duty to try the accused . . ." *per* Wendt, J.

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§158

R. v. Kolandavail (1891) 1 *S.C.R.* 198 (followed in *R. v. Boosa supra*).—" This Court has already decided that when a prisoner is before the Court and an indictment is duly exhibited against him, it is too late to take exception to the commitment. District Courts have no power to review the circumstances under which a commitment was made; they are required to try such offenders within their jurisdiction as may be committed for trial before them on the *fiat* of the Attorney-General. The remedy for an irregular commitment would be by application to this Court"—*per* Layard, C. J.

R. v. Veda (1907) 10 *N.L.R.* 199; 2 *A.C.R.* 1 (followed in *R. v. Boosa supra*).—" The ruling . . . in *R. v. Kolandavail*, and that in *R. v. Harmanis* (1903) 8 *N.L.R.* 139, seem to me to support the view contended for . . ., that the District Judge, in the presence of an indictment good on the face of it and supported by a commitment by the Attorney-General, has no jurisdiction to inquire into the validity of the commitment . . ." *per* Middleton, J.

R. v. Harmanis (1903) 8 *N.L.R.* 139.—A Magistrate acting under §157 discharged an accused. Thereafter, a fresh non-summary investigation was held and the accused regularly committed for trial. *Held*, that the committal was valid, and that the discharge did not operate as a bar to the trial of the accused. (See *R. v. Boosa* (1908) 11 *N.L.R. at p.*356 where it was held that the headnote to the case of *R. v. Harmanis* was misleading.)

R. v. Sinno (1919) 21 *N.L.R.* 142; 6 *C.W.R.* 10.—" . . . It is within the discretion of the Attorney-General to direct to what Court a case shall be committed, and what offence he shall be indicted for, and it appears to me that it should only be in some extreme case that the Court of Appeal should interfere with the discretion so given to him and direct a trial in a different Court . . ." *per* Shaw, J.

R. v. Fernando (1905) 8 *N.L.R.* 354.—Under §387 the Attorney-General has large powers of commitment, and the Supreme Court will not interfere with his discretion unless it has been manifestly abused—*per* Layard, C. J., & Wendt, J.

Simmons v. Hebna (1899) *Koch* 26.—*Held*, that §158 seemed to provide only for the Attorney-General directing (i) the discharge of the accused, (ii) the commitment for trial to a Court specified by him, and (iii) the taking of further evidence. The greater power to direct a commitment includes the lesser, *viz.*, to direct a summary trial in the Police Court.

(1899) *Koch* 64.—Is a discharge in a non-summary case an appealable order? (This case was apparently decided under the old Code. See §338 *explanation post.*)

(1899) 1 *Tam.* 59.—After a discharge in a non-summary case, the proceedings are renewable.

R. v. Kolanda (1901) 5 *N.L.R.* 236; 2 *Br.* 142, 315.—"In my opinion under the Courts Ordinance and the Criminal Procedure Code, District Judges must rely on the Attorney-General. On him is laid the burden of deciding on what charges and in what Court an accused shall be tried. If he errs, it is an error which the District Judge is powerless to correct. District Courts (would) do well to try patiently and carefully all the cases brought before them, on indictments duly signed and presented. In this case I do not know whether the accused should have been on his trial before a jury for murder or culpable homicide not amounting to murder. I presume that the Attorney-General did right

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§158 in deciding that a charge of grievous hurt was all that could be laid against him . . ." *per* Lawrie, C. J. See the judgment of Moncreiff, J., *at p.* 239. "If a man guilty of murder were indicted in the District Court for grievous hurt, it seems to me that it would be the duty of the Judge to try the charge of grievous hurt, and if he found the facts amounted to grievous hurt to give his verdict accordingly . . ." *per* Bonser, C. J. See *R. v. Perera supra.*

Wikramasuriya v. Appusinno (1895) 1 *N.L.R.* 299 (decided under the old Code).—"The duties and powers of the Attorney-General on receipt of . . . proceedings . . . appear to be three . . . If he is satisfied that everything is in order, to specify the Court which is to try the case . . . if . . . he is of opinion that no further proceedings should be taken . . . he may make an order . . . directing the accused to be discharged . . . If he is of opinion that there is a criminal offence disclosed, but that the evidence is defective, he may order the Police Magistrate to take further evidence . . ." *per* Bonser, C. J., & Withers, J.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 265; 5 *C.W.R.* 287.—In committing an accused for trial, the Attorney-General is not bound by the charges framed in the Police Court, but may indict him for any other charges disclosed in the evidence. Procedure in such cases indicated. See *General Order* 888 (*i*).

Kannangara v. Kannangara (1928) 6 *T.L.R.* 78; 30 *N.L.R.* 149; See *Fernando v. Fernando* (1932) 34 *N.L.R.* 160.—Where, in a non-summary case, the Police Magistrate discharged an accused on the orders of the Attorney-General, the Supreme Court has no power to revise such order. (*N.B.*—This is quite clear. If the Supreme Court interfered and re-opened the order of discharge the Attorney-General could still refuse to commit or a *nolle prosequi* might be entered.)

Defendant's witnesses.

159. (1) The Magistrate shall also, at the same time, require the accused to state orally there and then the names of the persons (if any) whom he wishes to be summoned to give evidence at his trial, distinguishing between those whom he proposes to call to speak to facts and those who are merely to speak to character.

(2) The accused may at any time before his trial give to the Magistrate a further list of persons whom he wishes to give evidence on his behalf at such trial provided that such list be accompanied by a concise statement of the facts to be proved by such witnesses.

(3) The Magistrate shall summon such of the witnesses named by the accused under sub-sections (1) and (2) as have not been already examined to appear before him and shall bind them over to give evidence at the trial; provided always that no such witness shall be summoned unless the Magistrate has first satisfied himself that there are reasonable grounds for believing that the evidence of such witness is material, and provided also that if he is not so satisfied

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he may refuse to summon the witness (recording his reasons for such refusal) or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness. §159

Magistrate.—See §3 *ante*.

Witnesses to speak to accused's character.—See §§53 - 55 Evidence Ordinance, 1895.

Binding over accused's witnesses.—See §§161, 162, 397.

Summoned.—See *Chapter V. ante*.

Reasonable grounds for believing.—*C.f.* "Reason to believe" §62 *ante*.

Require such sum to be deposited.—See §282(3).

1. *C.f.* §§172 - 174, 177 - 181 Criminal Procedure Code No. 3 of 1883 and see §§211, 216 Indian Criminal Procedure Code.

2. **Scope of §159.**—See Introduction to *Chapter XVI.* para. 3 (*g*) (ii)(*b*).

After the indictment which has been drafted by the Attorney-General has been read and explained to the accused, and a copy of the same has been served upon him as directed by §158(2), the Magistrate shall "at the same time" require the accused to state *orally* "there and then" the names of his witnesses (if any) distinguishing between witnesses to facts, and witnesses to prove the accused's good character.—§159(1). It will be observed that when the accused first appeared before the Court, and was invited to make a statement in reference to the charge, he was told that he was at liberty to disclose the names of any persons "whom he wished to be summoned and to give evidence" at the investigation.—§155(1). On the commitment of the accused, he is afforded a further opportunity of having his witnesses, who have not been hitherto examined, summoned and bound over to give evidence at the trial. As under §155(1) it is entirely within the discretion of the accused whether he should accept or decline the invitation held out to him; so under §159(1) he cannot be compelled to divulge the names of his witnesses.

At any time before the trial, the accused may submit to the committing Magistrate a further list of witnesses whom he desires to have summoned and bound over to give evidence at his trial. In this case the procedure is more formal. The accused cannot give the names of his additional witnesses orally, but must submit *a list*, together with "*a concise statement of the facts to be proved by each witness.*" The object of this provision is obvious. The accused is certain to give the names of all his material witnesses at the earlier stages, either under §155(1), or under §159(1), and belated applications might perhaps be intended to cause annoyance to the persons to be summoned, or in other ways to impede the course of justice. Hence, the accused is required when making an application under §159(2) to give a statement of the facts which the witnesses can prove. *C.f.* §161(1) and 282 *post*.

§159(3) lays down the procedure to be followed in the summoning of persons, whether the application is made under §159(1) or §159(2).

§159(3) has no application in the case of defence witnesses, who have "already been examined." This means that if under §155(1) an accused has expressed a desire to have certain persons summoned and examined in the course of the investigation itself, and such persons

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§159 have been examined, then §159(3) has no application. The Attorney-General will either include their names on the indictment as witnesses for the prosecution, or refuse to do so. In the latter event, if the accused still desires to call them for the defence at his trial, he will apply to the Magistrate to order that the bonds which such persons have already entered into should be kept alive, so as to make it incumbent upon them to appear at the trial. No action need be taken under §159(3) in the case of such persons. This sub-section only applies to the summoning and binding over of persons who have not hitherto appeared before the Court.

As a general rule it is the duty of the Magistrate to issue process to secure the attendance of all persons required by the accused, whether under §159(1) or §159(2), and when they have appeared, it is his duty to have them bound over to give evidence at the trial. There are certain qualifications to this rule. No person is to be summoned unless the Magistrate " has first satisfied himself that there are reasonable grounds for believing that the evidence of such witness is material."—*C.f.* §162(1) *post*. If he is not so satisfied, he can refuse to issue process, or impose the condition that, before process is issued, the accused should deposit a sum of money which, in the opinion of the Magistrate, is sufficient to defray the expense of obtaining the attendance of the witness.—§282 *post*. The Supreme Court may, of course, review any exercise of the powers conferred by §159(3).

It will be seen that the provisions of §282(2) *post* and those of §159(3) overlap to a considerable extent. It would appear that §159(3) is only a particular example of the general rule contained in §282(2) which applies both to the prosecution as well as to the defence. See *Sampanther v. Hinniappu* (1916) 2 *C.W.R.* 109. *C.f.* §62(2) *ante*. When witnesses for the defence are summoned after the committal of the accused, but before the trial, it is open to the Magistrate to summon them, and examine them.—§161(1). It is not necessary that the accused should be present when this is done—§161(2)—but a copy of the depositions " shall be forthwith delivered to him."—§161(3).

It is moreover open to the accused to move the Court of trial itself for the issue of process upon witnesses for the defence, or to call any competent witness not previously named by him—if such witness is in attendance.—§236 *post*.

3. **At the same time.**—*i.e.*, at the same time when the indictment is read over and explained to the accused.—§158(2) *ante*.

4. **§159 does not in express terms empower the Magistrate to *examine* the defence witnesses whose names have been given under this section.** All that §159(3) requires is that the Magistrate should be satisfied before process is issued upon any witness that his evidence is material. §159(3) nowhere empowers him to summon the witness *and examine* him as to what he is capable of proving. Such a power is conferred by §161(1) in express terms, and it would appear that the power of examining the defence witnesses, which has not been conferred by §159, is conferred by §161(1).—See §161 para. 2 *post*, and *R. v. Appuhamy* (1923) 2 *T.L.R.* 68; 5 *C.L.Rec.* 119.

Under the Indian Criminal Procedure Code whenever the accused gives the Magistrate a list of witnesses for the defence, whether orally or in writing (§211), he " may, in his discretion, summon and examine any witness named in any list given in to him under §211."—§212. §159 of our Code appears to have been based upon §§211 and 216 of the Indian

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Code, and it is noteworthy that §212 of the Indian enactment has no counterpart in our law. §161(1) is based upon §219(1) of the Indian Code. It will be observed that the provisions of the Indian Code on this point are consistent in enabling the Magistrate, not only to summon, but also to examine the defence witnesses at whatever stage the names of the witnesses have been tendered to the Magistrate. Our law at first sight appears to be inconsistent, inasmuch as in §159 no reference is made to the power of the Magistrate to examine the witnesses for the defence whose names have been given under that section, whereas such power is expressly conferred under §161. It would appear that the intention of the Legislature in adding to §161(1) the words "including any witnesses *named under* §159 who have not already been examined" was to confer power upon Magistrates to summon as well as to examine (in proper cases) all witnesses for the defence, whether they are summoned under §159, or under §161.—See §161 para. 2 *post*. §160

5. **Provided always . . .**—See §159(3).

Denonath v. Rajcoomar 3 *Cal.* 573.—"I understand this section (§216 Indian Code) to mean that if, among the persons named by the accused as witnesses for the defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to enquire generally into what the defence of the accused person is to be, and to consider whether, on learning of the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority . . ." *per* Jackson, J.

Deela v. Dyal 6 *Cal.* 714.—"The Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in §216 . . ., and that if he did refuse on those grounds he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate."

Rajah of Kantit 8 *Alla.* 668.—The powers conferred on Magistrates enabling them to refuse to summon the defence witnesses should not be lightly exercised. Where a Magistrate refused to summon a witness solely on the ground that the witness was a rajah, the Sessions Judge ordered a summons to issue.

6. **At his trial an accused is not debarred from calling any witness not previously named by him if such witness is in attendance.**—See §§232 – 237 para. 2(4), §§208 – 212 para. 2(4). See *R. v. Hinniappu, Palihawadene v. Silva, R. v. Denoris Appu* §§232 – 237 para. 6 *post*.

7. **The evidence of such witness is material.**—*C.f.* §§162(1), 289(5) *post*.

Accused to elect panel.

160. On committing the accused for trial before the Supreme Court, the Magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial and shall record such election if made.

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§160 The accused so electing shall be bound by and may be tried according to his election, subject, however, in all cases to the provisions of section 224.

Committing the accused for trial.—See §§158(1)(*b*),(2),159, 162 – 165.

Supreme Court.—See §3 *ante.*

Magistrate.—See §3 *ante.*

Panels of jurors.—See §§257—262 *post.*

Tried.—See *Chapter XX. post.*

1. *C.f.* §176(1) Criminal Procedure Code No. 3 of 1883.

2. **Scope of §160.**—See Introduction to *Chapter XVI.* para. 3 (*g*) (ii)(*c*), and §165 para. 2 *post.*

In cases where the accused is committed for trial before the Supreme Court, it is the duty of the committing Magistrate to enquire from him, at the time of committal, whether he desires to be tried by an "English-speaking," "Sinhalese-speaking," or "Tamil-speaking" jury. —See §§257, 261 *post.* When the accused has made his election,* the Magistrate should make a minute of the same on the record. The entry usually reads "The accused elects to be tried by an English-speaking jury" (or as the case may be). When the accused has made his election, he *is bound* by it, and *may* thereafter be tried according to his election, "subject, however, in all cases to the provisions of §224."

When once an accused has made his election, is it thereafter open either to him or to the prosecution to apply for the trial to take place before a different jury? In the case of *R. v. Stephen* (1923) (Third Western Circuit Criminal Sessions, August 2, 1923) a controversy arose out of the fact that the prosecution moved for a special jury to try the prisoner, who, under §160, had elected to be tried by a Sinhalese-speaking jury. (*a*) It will be observed that the words used in §160 are "The accused so electing *shall* be bound and *may* be tried according to his election." §160 does not state that the accused "shall be tried" according to his election. Turning to §224(1), to which §160 is subject, it is found stated that at every trial before the Supreme Court "the jury shall be taken from the panel elected by the accused, *unless the Court otherwise directs.*" Hence, it is quite clear that for some good reason, a discretion is vested in the Judge of Sessions to direct the trial of the accused before a different kind of panel from that which the accused himself desired to be tried. The power is given to the Judge alone, but application might be made to him either by the defence or by the prosecution. What usually happens is this. An accused elects to be tried by a Sinhalese-speaking jury in the Police Court. When arraigned before the Court on the opening day of the Sessions, he may, either in person or through his counsel, apply to the presiding Judge that he may be allowed to be tried by an English-speaking jury. It is then for the Judge to decide what order he should make. It may be stated that it is very seldom that the prosecution ever moves the Court under §224. (*b*) Both the defence as well as the prosecution have the power to override the accused's election of the jury, by applying, under §222 *post* for a trial before a special jury.—§257(4) *post.* Such an application may be made to *any* Judge of the Supreme Court, and unless

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* *Qu.*—What happens if the accused does not make any election? The Magistrate should report the matter to the Supreme Court without delay.

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it is made by the Attorney-General, Solicitor-General, or Crown Counsel, shall be supported by an affidavit.—§222(2). If the Judge "considers such application just and reasonable," he will, as a rule, allow it. §161

Examination of supplementary witnesses.

161. (1) The Magistrate may, after commitment and before the commencement of the trial, summon and examine supplementary witnesses, including any witnesses named under Section 159, who have not been already examined, and bind them over to appear and give evidence at the trial.

(2) It shall not be necessary for the accused to be present at such examination, but notice of such examination shall be given to the accused.

(3) A copy of all evidence taken in the absence of the accused shall be forthwith delivered to him.

[§ 3, 37 of 1908]

(4) The Attorney-General may add the names of any witnesses examined under this section to the list of witnesses in the indictment, and if any document or things are produced may add them to the list of productions. A copy of the lists as amended shall be served on the accused.

Magistrate.—See §3 *ante*.

Commitment.—See §§158(1)(*b*), 159 - 160, 162 - 165.

Trial.—See *Chapters XIX., XX. post.*

Summon.—See *Chapter V. ante.*

Binding over witnesses to appear at trial.—See §§159, 161 - 162 397.

Attorney-General.—See §3 *ante*.

Indictment.—See §§158(2), 186, 387, 391, *Form* 9, *Schedule III. post.*

Copy to be given to accused.—See §§158(2), 164, 434.

1. *C.f.* §219 Indian Criminal Procedure Code and §178 of the Criminal Procedure Code, No. 3 of 1883.

2. **Scope of §161.**—See Introduction to *Chapter XVI.* para. 3(*g*) (ii)(*h*).

This section has been designed for the purpose of enabling evidence to be recorded, whether for the prosecution or for the defence, which is discovered after the committal of the accused, but before the trial begins.

(*a*) **Fresh evidence for the prosecution.**—

When the Attorney-General presents his indictment to the Police Court and directs the committal of the accused for trial before a higher Court under §158 *ante*, the indictment must contain the specific charges upon which the accused is to be committed, as well as a list of the witnesses who are to be called for the prosecution, and a list of all the productions or exhibits which the prosecution desires to produce at the trial.—See §186(2) *post.* As a rule the prosecution is tied down to

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§161 the witnesses and productions named in the indictment, and witnesses and productions not contained in the list may not, as a rule, be called or produced before the higher Court. Therefore, if, after the committal of the accused, but before the trial, fresh evidence comes to light, §161 enables the authorities to have such evidence duly led in the Police Court, and thereafter to have the indictment itself amended, if necessary, by the addition of the names of such new witnesses and productions.

When fresh evidence is discovered for the prosecution, the Magistrate may act on his own initiative under §161, but the normal course is for him to inform the Attorney-General, who thereupon formally instructs him to record the evidence in the manner provided for by §161. The Magistrate will call for the record from the Court of commitment, and will, as a rule, notice the accused to appear, if he is on bail, or order his production, if he is on remand, and then proceed to record the evidence, the accused being afforded every opportunity of cross-examining the witnesses. It is, however, not essential that the accused should be present when this evidence is being recorded, provided he has been duly informed of what is to be done.—§161(2). If such evidence is recorded in the absence of the accused, a copy of all the evidence so recorded "shall be forthwith delivered to him."—§161(3). Thereafter, the Magistrate will forward the record to the Attorney-General who, after considering the new evidence, may amend the indictment already presented by the addition of the names of such fresh witnesses or productions.—§161(4). A copy of the amended list of witnesses and productions must be served on the accused. The Magistrate will also bind over the new witnesses to appear and give evidence at the trial.—§161(1).

If, as a result of the fresh evidence led, the Attorney-General desires to amend the charges already framed in the indictment, he will cause a *fresh indictment* to be drafted against the accused, and will direct the Magistrate to *commit the accused afresh* on that indictment in the ordinary way, and prosecuting counsel will proceed to trial on the latter indictment when the case comes on for trial. §161 does not authorize the Attorney-General to amend *charges* contained in the indictment before trial, he may only amend the lists of witnesses and productions.

If fresh evidence is discovered *after the trial has commenced*, §§172 – 176 *post* enable the indictment to be amended, either by the addition of the names of new witnesses or of productions, or by the addition of fresh charges.

(*b*) **Fresh evidence for the defence.—**

Under §159(2) the accused is empowered "at any time before his trial" to give the Magistrate a list of persons whom he desires to have summoned to give evidence for the defence, provided the list is accompanied by "a concise statement of the facts to be proved by such witnesses." §159(2) does not authorize the Magistrate to summon *and examine* such witnesses—§159 para. 4 *ante*—but this power is conferred upon the Magistrate by §161(1). It would appear, although the terms of §161 are wide enough to enable the Magistrate to examine all witnesses summoned for the defence under §159(2), that this power ought not ordinarily to be exercised except in cases where the accused himself desires to have such witnesses examined. The accused would not be present at such examination and it is illegal to forfeit his bail for non-attendance.—*R. v. Appuhamy* (1923) 2 *T.L.R.* 69; 5 *C.L.Rec.* 117.

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Whenever the Magistrate proceeds to examine witnesses for the defence under §161, the provisions of §161(2), (3) should be followed. If the witnesses examined for the defence appear to support the case for the prosecution, it is open to the Attorney-General under §161(4) to add their names to the indictment as witnesses for the prosecution.—See §165 para. 2(*k*) *post*.

3. **Forthwith.**—See §33 para. 3 *ante*.

4. **Supplementary witnesses who have not already been examined.**—*i.e.*, "Supplementary witnesses for the prosecution who have not already been examined prior to the committal of the accused; and supplementary witnesses for the defence who have not already been examined in the course of the investigation and before committal under §156(3), and whose names have been given to the Magistrate together with a concise statement, as provided by §159(2)." Although not provided for in §161 it would appear to be lawful for the Magistrate to recall and re-examine any witness named on the back of the indictment or named by the accused after committal, but before trial, provided such re-examination takes place in the presence of the accused.

5. **Under Ordinance No. 2 of 1926 provision is made by §5(4) for the Police Magistrate, after committal and before trial, to forward to the Attorney-General all proceedings recorded by him relative to the previous convictions of the accused.**

Material witnesses to be bound to appear.

162. (1) When the Magistrate commits the accused for trial he shall require every material witness for the prosecution or defence, who has appeared before him and given evidence and has not already been bound over under the next following sub-section to appear before a higher Court, to execute a bond with or without sureties for his appearance to give evidence at the trial; and for the like purpose it shall be lawful for any Magistrate, who examines any witness on commission under the provisions hereinafter contained, to require such witness so examined to execute a bond with or without sureties as such Magistrate may determine.

(2) The Magistrate may, at any stage of the inquiry, require any witness to execute such bond as in the last sub-section mentioned for appearance at any future stage of the proceedings, either in that Court or in the higher Court, in case the accused be committed for trial. It shall not be necessary to specify such higher Court in the bond, but the obligor shall be bound, on receiving reasonable notice, to attend at the trial in whatever Court the accused may be tried.

(3) If a witness refuses or neglects to execute such bond the Magistrate may commit him to prison until such bond is duly executed or until the trial, when he shall be sent in custody to the Court of trial.

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§162 (4) The Magistrate shall endorse on the warrant of committal the names of all persons who have been bound over to give evidence at the trial or who, having refused to be bound over, have been committed to prison.

(5) Every person who executes such bond shall give to the Magistrate an address at which all notices respecting the further proceedings in the case may be left for him, and any notice left at such address for him shall (until the contrary be proved) be deemed to have been received by him.

Magistrate.—See §3 *ante*.

Committal of accused.—See §§158(1)(*b*), 159 - 160, 163 - 165.

Trial.—See *Chapters XIX., XX. post.*

Material witness.—*C.f.* §159(3) *ante*.

Binding over witnesses.—See §159(3), 161, 397.

Examination of witnesses on commission.—See §§401 - 405 *post*.

Inquiry.—See §3 *ante*.

Warrant of committal.—See §§158, 165. See §§309, 312(1) **Warrant of commitment.**

Summoning witnesses.—See §282 *post*.

1. *C.f.* §§181 - 183 Criminal Procedure Code No. 3 of 1883.

2. **Scope of §162.**—See Introduction to *Chapter XVI.* para. 3(*g*)(ii)(d) *ante*, and §165 para. 2 and §282 para. 2 *post*.

Every witness in a non-summary case should be required, immediately after he has given evidence, to sign a bond for his appearance in the same or a higher Court.—*General Order* 888A. This *General Order* is based on §162(2) of the Code, which lays down the general rule with regard to the binding over of witnesses who are examined in the course of a non-summary inquiry. The rule would include both prosecution as well as defence witnesses who are examined in the course of the investigation.

The old rule was for the witness to enter into a bond in which he bound himself to forfeit a certain sum of money if he failed to attend Court after receiving notice. Under the present system the witness binds himself to appear before the Police Court at any future stage of the proceedings, or in the higher Court in case the accused is committed for trial.—§162(2). See *R. v. Ukkuwa* (1916) 2 *C.W.R.* 203 para. 5 *infra*.

If at the time the accused is committed for trial there still remain material witnesses, whether for the prosecution or the defence, who have duly appeared before the Court and given evidence, and who have not yet been bound over, the Magistrate will order them to execute a bond for their due appearance.—§162(1).

Whenever a Magistrate examines witnesses on commission, it is his duty to bind them over to appear in the usual manner.—§162(1).

With regard to the procedure to be followed in the examination and binding over of witnesses *after the committal of the accused*.—See §§159(2), 161 *ante*.

Any witness who refuses or neglects to execute a bond may be remanded to prison until he enters into a bond, or until the trial takes place, when he is to be sent in custody to the Court of trial.—§162(3).

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This sub-section is similar to §217(2) of the Indian Code. May a witness be remanded to prison for some reason other than that of failing to furnish security, *e.g.*, for the protection of the witness himself, or to prevent his evidence being tampered with ? See the remarks of Bertram, C.J., in the *Delwita Murder Case* para. 6 *infra*.

It is the duty of the Magistrate to endorse upon the warrant of committal the names of all persons who have been bound over to give evidence, or who have been remanded into custody for failure to give security.—§162(4).

Every witness who has entered into a bond must give the Magistrate an address at which all notices respecting the further proceedings in the case may be left for him. If it is shown that any such notice has been duly left at such address, it will be presumed that the witness has received it, and the onus will be on him to prove that it was not so.—§162(5). See §436 *post*, and *General Order* 888B.

3. **Material witness.**—*C.f.* §159(3) *ante*, and §289(5) *post*.

4. **Who has appeared before him and given evidence and has not already been bound over . . . to appear before a higher Court.**—These words refer (i) to all witnesses called for the prosecution during the investigation, and (ii) to all witnesses for the defence who were examined in the course of the investigation, under §156(3) *ante*, and in either case who have not been bound over in terms of §162(2) and *General Order* 888A.

5. **It shall not be necessary to specify such higher Court in the bond . . . tried.**—See §162(2).

R. v. Ukkuwa (1916) 2 *C.W.R.* 203.—A witness was bound over to attend the District Court. The trial was fixed for February 7th, but was repeatedly postponed and finally fixed for March 18th at 8·30 a.m. The witness was not present in Court at the time, and the Judge ordered him to show cause why the amount of his bond should not be forfeited. No cause being shown, the Judge ordered that a sum of Rs. 10·00 should be forfeited. *Held*, that it was obligatory upon the witness to attend on the days for which the trial had been adjourned, and that his not being present at the time in question amounted to a breach of the conditions of his bond.

See the cases cited under §411 *post*.

6. **Remanding witnesses into custody on failure to furnish security.**—See §162(3). See also §217(2) Indian Criminal Procedure Code.

May a witness be remanded into custody for some reason other than that of failing to furnish security ?—See para. 2 *supra*.

Delwita Murder Case No. 9, *P.C. Kurunegala Case No.* 6094 (*Midland Circuit Sessions, May 25th*, 1920) *per* Bertram, C. J.—"The other matter is the imprisonment of T.F. as a witness. This was done as a result of his failure to give security for his appearance. A considerable sum was demanded and he could not furnish it, and so he was detained in prison until the trial. There undoubtedly are cases in which there is a danger of witnesses being tampered with, and it is most desirable that in such cases a witness should be surrounded with all precautions. The *Delwita Murder Case* was such a case. Moreover, the crime with which T.F. was connected as a witness was one of murder by a band of hired assassins, and the police authorities may have been apprehensive of the personal safety of the witness. At the same time, I do not think that the section of the Criminal Procedure Code under which the detention

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§164 was ordered was enacted for the purpose of preventing witnesses being tampered with. It is to be used in cases where there is some danger of the witness absconding, or where it is apprehended that there may be some danger of his not turning up and the trial delayed. For that reason it is obligatory on the Magistrate to bind over all witnesses, but the amount, I think, is to be regulated by these two objects. I think it would be better if the Legislature faced the question, and where there is a danger of witnesses being tampered with special provision should be made. I trust this matter will receive attention. I am not prepared at this moment to suggest an alternative. It may be that persons in the position of Justices of the Peace, or persons appointed as supervisors of first offenders . . . may be charged with the responsibility of guarding witnesses who are in this position. It is, of course, very important that witnesses should be protected. There are naturally dangers to be guarded against. With regard to the detention of the witness in the Delwita Case, I must say it had been done with great scrupulousness and conscientiousness, and if it is always possible to rely on such a high standard, my remarks will have little application, but it is desirable that, in the interests of the liberty of the subject, detention of witnesses should be very carefully exercised, and I trust the matter will receive consideration."

See §§283 – 286 para. 6 *post*.

7. **The Magistrate shall endorse on the warrant of committal** —§162(4).

See §165 *post*.

Magistrate to certify record.

163. The Magistrate shall, if the accused is committed for trial, record whether the accused is on bail or in custody and certify under his hand the record of the inquiry.

Magistrate.—See §3 *ante*.

Committal of accused for trial.—See §§158(1)(*b*), 159 – 160, 162(1), 164 – 165.

1. *C.f.* §183 Criminal Procedure Code No. 3 of 1883.

2. **Scope of §163**—See Introduction to *Chapter XVI.* para. 3(*g*)(ii)(*e*) and §165 para. 2 *post*.

When the Magistrate commits an accused for trial it is his duty to make a minute on the record as to whether the accused is on bail, or in custody.—See §165 para. 2(*f*) *post*. It is also his duty to certify "under his hand" that the record which he submits to the higher Court under §165(1) is a true record of the evidence and proceedings recorded and held before him.

3. **Presumption attaching to the record.**—See §80 Evidence Ordinance 1895.

4. **Whether the accused is on bail or in custody.**—*C.f.* §157(1)(*b*) *ante* and see §§165(1), 289 *post*, and *Chapters XXXVI., XXXIX. post*.

Accused may have copy of evidence.

164. When the accused has been committed for trial he shall, if he demands it at a reasonable time before the trial, be furnished by the officer in charge of the record

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with a copy of the record or of any part thereof on payment of six cents for a hundred words. §165

Committal of accused for trial.—See §§158(1)(*b*), 159 - 160, 162(1), 163, 165.

1. *C.f.* §184 Criminal Procedure Code No. 3 of 1883.

2. **Scope of §164**—See Introduction to *Chapter XVI.* para. 3(*g*)(ii)(*f*) *ante.* After his committal, *but not before*, the accused has the right to demand that the officer in charge of the record should furnish him with a copy of it or any part of it on payment at a certain specified rate. If the application is made "*at a reasonable time before the trial*" the copy must be given.

It will be observed that §158(2) directed that on his committal the accused was to be given a copy of the indictment as settled and approved by the Attorney-General. Under §161(3) a copy of all depositions recorded after committal and in the absence of the accused were to be delivered to him, while §161(4) directed that if the list of witnesses or of the productions on the indictment was altered under §161, a copy of the lists so amended were to be served on the accused. See also §§306(5), 434 *post.*

The "*complainant*" in a non-summary case has no right whatever under §164 to apply for or to be furnished with a copy of the proceedings in a non-summary case. A "complainant" may obtain a copy of the record in *any kind of proceedings* under §434 *post*, and it is clear that §434 does not enable him to obtain a copy in a non-summary case which has been committed and is pending trial. *C.f. Application for a mandamus* (1914) 18 *N.L.R.* 70.

Record to be forwarded to court of trial and productions to Fiscal.

165. (1) When the Magistrate commits the accused for trial he shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to the custody of the Fiscal of the province until and during the trial, and shall forthwith transmit the record of the inquiry, together with all documents produced in evidence, to the Court of trial. All productions other than documentary evidence shall be forwarded to the Fiscal to be produced by him at the trial.

(2) The Magistrate shall forthwith, after committing the accused for trial, notify such committal in the case of committals to the Supreme Court to the Registrar, and in the case of committals to a District Court to the Judge of such Court.

Magistrate.—See §3 *ante.*

Committal of accused for trial.—See §§158(1)(*b*), 159 - 160, 162(1), 163 - 165.

Bail.—See *Chapters XXXVI., XXXIX. post.*

Warrant of committal.—See §§158, 162(4). See §§309 - 312(1).—**Warrant of commitment.**

This Code.—See §1 *ante.*

Fiscal.—See Ordinance No. 4 of 1867.

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§165

Court of trial.—See *Chapters XXIX., XXX. post.*
Supreme Court.—See §3 *ante.*
Registrar.—See §3 *ante.*
District Court.—See §3 *ante.*
District Judge.—See §3 *ante.*
Inquiry.—See §3 *ante.*

1. *C.f.* §§185 - 186 Criminal Procedure Code No. 3 of 1883.
C.f. §218 Indian Code.

2. **Scope of §165**—See Introduction to *Chapter XVI.* para. 3(*g*) (ii)(*g*).

Procedure to be observed in committing an accused for trial :—

(*a*) If the Attorney-General directs the committal of the accused, the Magistrate shall commit the accused for trial to the Court specified in that behalf by the Attorney-General.—§158(1)(*b*). See para. 5 *infra.*

(*b*) The indictment, as settled and approved by the Attorney-General, is read and explained to the accused and a copy thereof served on him.—§158(2). See para. 5 *infra.*

(*c*) The accused is asked to state *orally* the names of witnesses he desires to have summoned for the defence.—§159(1),(3).

(*d*) All material witnesses who have not already been bound over are now bound over to appear at the trial.—§162(1),(2).

(*e*) In committals to the Supreme Court the accused are asked to elect the jury they desire to be tried by.—§160.

(*f*) The Magistrate has to certify the proceedings and also record whether the accused is on bail or on remand.—§163.

(*g*) The committal of the accused is effected by means of a warrant of committal to the custody of the Fiscal, if the accused is not enlarged on bail.—§165(1).

The warrant of committal should contain the following particulars :—

(i) The names of all witnesses who have been bound over to attend at the trial, or who are in custody in default of giving security.—§162(4).

(ii) In committals to the Supreme Court, *General Order* 888 requires that the Magistrate should endorse certain further particulars on the warrant of committal which are specified.

The warrant of committal should be sent to the Fiscal within three days of the date of committal.—*General Order* 889(1).

(*h*) The record of the investigation, which has been perfected in the manner indicated in §163 *ante*, must " forthwith " be transmitted to the Court of trial "together with all documents produced in evidence." Under §§5(1) and 6(2) of Ordinance No. 2 of 1926 the Magistrate is empowered to delay forwarding the record to the Court of trial pending investigation as to the previous convictions of the accused. All productions, other than documentary evidence, should be forwarded to the Fiscal, who will produce them at the trial.—§165(1). See *General Order* 889(2), and para. 6 *infra.*

(*i*) It is also the duty of the committing Magistrate after committing an accused, " forthwith " to notify the Court of trial of the fact of the committal.—§165(2).

(*j*) From the terms of *General Order* 888(3) it appears that it is the duty of the committing Magistrate to forward a list of witnesses to the Fiscal, and in cases committed to the Supreme Court, to make a note on the list showing the distance of each witness' village from the Sessions Court, or the nearest railway station.

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(*k*) If fresh evidence is discovered after committal, the Magistrate may call for the record from the higher Court and proceed to record such evidence as provided under §161. The Attorney-General may amend the list of witnesses or of the productions contained in the indictment, in which event the Magistrate will have to take the necessary steps to comply with the provisions of the Code with regard to such witnesses and productions. §166

(*l*) If the commitment of a sane person who cannot be made to understand the proceedings is directed, the Magistrate will have to report the case to the Supreme Court under §288 *post*.

3. **Forthwith.**—See §33 para. 3 *ante*.

4. **Subject to the provisions of this Code regarding the taking of bail.**—See §§394 - 400, 410 - 412 *post*.

5. **Warrant of committal.**—

This would run as follows: "Whereas XY stands before the undersigned A.B. Esqr., Police Magistrate for the District of M, for the purpose of commitment for trial on the following charge, to wit, that he did on or about the day of 19 commit the offence of murder by causing the death of one CD, an offence punishable under §296 of the Ceylon Penal Code, these are therefore, in His Majesty's Name, to command you to receive the said XY into your custody in the jail of and there safely keep the said XY until brought to trial upon the said charge before the Supreme Court or until thence delivered by due course of law . . ."

The record of the non-summary inquiry should contain a minute to the following effect:—

"On instructions received from the Attorney-General the accused is committed for trial before the Supreme Court. The indictment, as settled and approved by the Attorney-General, is read over and explained to the accused, and a copy thereof is served on the accused. The accused elects a (Tamil-speaking) Jury. The accused wishes the following witnesses to be summoned:— . . ."

6. **All productions other than documentary evidence**—For another example of the distinction drawn between "documentary evidence" and "real evidence"—see §60 *proviso* (*ii*) Evidence Ordinance.

Offences triable by a District Court may be tried summarily with consent of accused.

166. (1) If the offence being inquired into is within the jurisdiction of a District Court and the Magistrate thinks it expedient so to do, having regard to the character and antecedents of the accused, the nature of the offence, and all the circumstances of the case, he may, if the accused when informed of his right to be tried by a District Court, consents to be tried by the Magistrate, try the case accordingly, and the provisions of *Chapter XVIII.* shall apply to such trial.

(2) A Magistrate trying an accused under this section shall have power to award such accused, if found guilty of the offence charged, both or either of the punishments following (that is to say), imprisonment of either descrip-

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§166 tion for a term not exceeding twelve months and fine not exceeding two hundred rupees, or, if the accused be under sixteen years of age, may order him to be whipped either without or in addition to one of the said punishments.

(3) For the purpose of proceeding under this section the Magistrate, when during the hearing of the case he becomes satisfied by the evidence that it is expedient to deal with the case under this section, shall frame a charge and read and explain the same to the accused and say to him, " Do you desire to be tried by a District Court or do you consent to be tried by me ? " with a statement for the information of the accused, where he is not represented by a pleader, of the difference between trial by a District Court and trial by a Police Court.

Offence.—See §3 *ante.*

Inquired into.—See §3 and *Chapter XVI.*

Jurisdiction of a District Court.—See §§10 - 11, 14, 16 - 17 *ante.*

District Court.—See §3 *ante.*

Magistrate.—See §3 *ante.*

Character and antecedents of the accused.—*C.f.* §53 Evidence Ordinance, and §§81 - 83, 87(3) *ante.*

Trials by consent of the accused.—*C.f.* §§18 *ante* and 384 *post.*

Summary trial of non-summary offences by Magistrate.—§152(3).

Punishments which a Police Magistrate has power to award.—See §§15 - 17 *ante.*

Charge.—See §187 *post* and *Chapter XVII. post.*

Pleader.—See §3 *ante.*

Trial in District Court.—See *Chapter XIX. post.*

Trial in Police Court.—See *Chapter XVIII. post.*

1. *C.f.* §§219(2), (3), 220, 227 of the Criminal Procedure Code, No. 3 of 1883.

There is no provision corresponding to §166 in the Indian Criminal Procedure Code.—See §152 para. 1 *ante.*

2. **Scope of §166.**—

As to the differences between the procedure provided by §166 and §152(3)—see §152 para. 2 *ante.* It should be observed that both under §166 as well as under §152(3) the Magistrate acts as Magistrate, except that under §152(3) it is a condition precedent to his exercising jurisdiction that he should also be a District Judge. This requirement is unnecessary under §166.

Before a Magistrate can lawfully invoke the assistance of the procedure provided by §166, several requirements of the law must be fulfilled. A failure to satisfy these conditions may have the effect of vitiating the proceedings altogether.—564 *P.C. Balapitiya* 27797 (1905) *Lem.* 72 para. 9 *infra.* The requirements of the law are these :—

(*a*) Before the assistance of §166 can lawfully be invoked, there must be a non-summary offence which is the subject of a non-summary investigation before the Court.—See para. 3 *infra.*

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(*b*) The offence under investigation must be one which is "within the jurisdiction of a District Court."—See para. 4 *infra*. §166

(*c*) The investigating Magistrate must form the opinion that it is "expedient" (see para. 5 *infra*) to try the offender summarily, regard being had (i) to his character and antecedents, (ii) the nature of the offence, (iii) and all the circumstances of the case.

(*d*) After forming such opinion, he should frame a charge as in the case of a summary offence, read and explain the same to the accused, and thereafter address him in terms of §166(3). It is also the duty of the Magistrate to inform the accused of his undoubted right to a District Court trial. If the accused is undefended, it is also incumbent upon the Magistrate clearly to explain to the accused the difference between a trial in the District Court and a trial in the Police Court.

All these matters should be duly entered on the record.—*Appu v. Nicholas* para. 9 *infra*.

(*e*) If the accused consents to a summary trial, it is the duty of the Magistrate to record such consent in the very words used by the accused. —See para. 7 *infra*. The trial then proceeds like any ordinary trial by the Magistrate under *Chapter XVIII*.

(*f*) If the accused is convicted, the Magistrate is empowered by §166(2) to award the offender certain punishments which are ordinarily beyond the jurisdiction of the Police Court.—See para. 8 *infra* also §325(1) *post*.

The accused is entitled to have clear notice of any intended change of procedure, and if no such notice has been given, the conviction will be avoided.—*Arnis v. Charles* para. 9 *infra*. If, after obtaining the consent of the accused under §166, the Magistrate finds that the evidence discloses a different offence from that which the accused consented to be summarily tried for, it is the duty of the Magistrate to obtain a fresh consent from the accused.—*Hossen v. Perera* para. 9 *infra*. It is submitted, however, that no fresh consent would be needed if the circumstances are those provided for by §182 *post*.

3. **If the offence being inquired into.**—These words in §166(1) indicate that the procedure in §166 can only be utilised when there is a non-summary inquiry into the commission of an offence actually under investigation. *C.f. Punchirala v. Appu*, *Silva v. Assena*, *Christian v. De Soysa*, *Hossen v. Perera*, *Appu v. Nicholas*, *Arnis v. Charles* para. 9 *infra*.

4. **Within the jurisdiction of a District Court.**—The same expression occurs in §152(3), and in construing these words Pereira, J., in 332 – 336 *P.C. Galle* 8547 (*S.C.M.* May 19, 1915), held that they meant "within the exclusive jurisdiction of a District Court." In the case of *Nadar v. James* para. 9 *infra* it was contended that a similar construction should be adopted in the case of §166(1), but Wood Renton, C. J., declined to do so. Accordingly, a Magistrate cannot, under §152(3), try summarily an offender under §316 of the Penal Code, for the reason that the offence is not exclusively triable by a District Court, whereas the Magistrate may try the offender under §166, although he has concurrent jurisdiction with the District Judge to try the offender without invoking the assistance of §166.

5. **The Magistrate thinks it expedient.**—See para. 2 *supra*.

It is the duty of the Magistrate to record fully, as a matter of record, his reasons for coming to a decision that a case is a proper one for summary trial under §166. This will enable the Appeal Court to ascertain and satisfy

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§166 itself whether the Magistrate's conclusions are sound. The usual record made by the Magistrate under such circumstances is as follows :— "The offence being inquired into is within the jurisdiction of a District Court. In terms of §166(1) of the Criminal Procedure Code I think it expedient to try the accused summarily, because (the accused has pleaded guilty, and it appears that the injury inflicted by the accused is not serious, and that the accused has hitherto borne a good character and in these circumstances it appears expedient that the case should be speedily disposed of, or as the case may be)."

The following cases should be noted on the question of expediency : *Silva v. Assen*, *Christian v. De Soysa*, *Hossen v. Perera*, *Appu v. Nicholas* para. 9 *infra*. No hard and fast rule can be laid down as to the circumstances in which §166 may be resorted to ; and each case must necessarily depend upon its peculiar facts. In coming to a decision the Magistrate must be guided (i) by the character and antecedents of the accused, (ii) the nature of the offence, and (iii) all the circumstances of the case. The Supreme Court has laid down that certain offences, although within the jurisdiction of a District Court, ought not to be tried summarily under §166. Thus, the offence of robbery committed upon a highway between sunset and sunrise (§380 Penal Code), has been held not to be so triable.—*Silva v. Ossen*. With regard to the offence of house-breaking, there is a conflict of judicial opinion. In 564 *P.C. Balapitiya* 27797 (1905) *Lem.* 72, and *Ramasamy v. Sinnochchi*, it was laid down that the offence ought not to be tried summarily as a general rule, whereas in *Nadar v. James* it was held that the offence of housebreaking (§443) was summarily triable. In knife cases if the injuries are serious no summary trial should take place.—*Fernando v. Fernando*. Moreover, certain offenders ought never to be dealt with summarily under §166, *e.g.*, reconvicted criminals.—*In revision P.C. Panadura* 56910 (1917) 4 *C.W.R.* 123. See §193 para. 2 *post*.

In order to decide the question of expediency there ought to be some materials upon the record, such as evidence ; but it is not absolutely necessary that the Magistrate should call evidence specially for this purpose.—See *Punchirala v. Appu*, *Christian v. de Silva*, *Hossen v. Perera*, *Arnis v. Charles*. Note the words " when during the hearing of the case he becomes satisfied by the evidence that it is expedient to deal with the case under this section . . ." in §166(3). *C.f.* §325 *post*.

6. **The charge.**—Before asking the accused whether he consents to a summary trial, it is the duty of the Magistrate to frame a charge against the accused under §187 *post*.—*Kurera v. Fernando*, *Appu v. Nicholas*, 564 *P.C. Balapitiya* 27797, *Naide v. Raltramhamy*. Whether a failure to do this vitiates a subsequent conviction of the accused is a question upon which the decisions of the Supreme Court have not been unanimous.—See *Kurera v. Fernando*, *Appu v. Nicholas*, 564 *P.C. Balapitiya* 27797, *Naide v. Raltramhamy*. The test appears to be whether the accused has been given sufficient notice of the contemplated change of procedure and the nature of the charge he was called upon to meet, and whether the failure to give him such notice has caused him prejudice.—*Arnis v. Charles*.

The charge must be read and explained to the accused in due form. —§§166(3), 187. Thereafter, the Magistrate must address the accused in terms of §166(3), and inform him of his undoubted right to demand a trial before the District Court.—§166(1). If the accused is undefended, it is further incumbent upon the Magistrate to explain to the accused

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the difference between a trial by the District Court and a summary trial before the Police Court. All these details should be duly entered upon the record. This is usually done in these terms : " I frame a charge and it is read and explained to the accused. The accused is addressed as follows :—' Do you desire to be tried by a District Court, or do you consent to be tried by me ? ' The difference between trial by a District Court and that by a Police Court is explained to the accused (or is not explained, as he is represented by a pleader). The accused states, ' I consent to be summarily tried, and I plead Not Guilty to the charge' (or as the case may be)." A failure to observe this procedure may have the effect of vitiating the proceedings.—564 *P.C. Balapitiya* 27797 para. 9 *infra.* §166

7. **The consent of the accused to summary trial under §166.** —See para. 6 *supra.*

The consent of the accused should only be asked for after the charge has been framed.—*Kurera v. Fernando, Appu v. Nicholas,* 564 *P.C. Balapitiya* 27797, *Naide v. Raltramhamy.* The consent should be recorded in the identical words used by the accused.—*Candamby v. Appu, Nadar v. James.* Moreover, the consent should be clear and unambiguous in its effect.

C.f. §§18 *ante,* and 384 *post.*

8. **The Magistrate's powers of punishment under §166.**— By §166(2) the Magistrate, when acting under the provisions of §166, is given enhanced powers of punishment which ordinarily are beyond his authority.—See §§15 – 17 *ante.* Thus, on conviction, he can impose both or either of the punishments following, that is to say, " imprisonment of either description for a term not exceeding twelve months and fine not exceeding two hundred rupees, or if the accused be under sixteen years of age may order him to be whipped either without or in addition to one of the said punishments." *C.f.* §15(1)(*c*) *ante.* See §325(1) *post* as to the release of offenders on probation.

Whipping.—Neither under §15 nor under §166 may a Police Magistrate sentence an *adult offender* to be whipped, unless this power has been specially conferred by legislation. By §12 of the Knives Ordinance No. 28 of 1906 a Police Magistrate is empowered to impose a sentence of whipping whenever any person is convicted of an offence under §315 of the Penal Code. No mention is made of the more serious offence under §317. If a Magistrate summarily tries an adult offender for causing grievous hurt with a knife (§317) under §166 of this Code, it is clear from the terms of §166(2) that he may not on conviction sentence the accused to be whipped, although, were he trying the same accused under *Chapter XVIII.* for causing simple hurt with a knife (§315), he would have the power to impose such a sentence by reason of the provisions of §12 of the Knives Ordinance, 1906. No difficulty can arise in the case of summary trials under §152(3) *ante,* because that section makes it lawful for the Magistrate to impose any sentence which a District Court may lawfully impose, and whipping may lawfully be imposed in cases of grievous hurt (§317) by reason of the provisions of §2(*b*) Ordinance No. 16 of 1889. See §§13 – 17 para. entitled " Whipping " *ante,* and see *General Order* 890.

The Magistrate may also award compensation to the accused under §253B *post,* provided proceedings were initiated under §148(1)(*a*). He may also, under §§253 D-E, order the accused to compensate the prosecution.

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§166

9. **Case law.**—

Silva v. Assana (1885) 7 *S.C.C.* 8.—*Held*, that before a Magistrate could try an accused summarily under §166, he should record the fact that the offence is one within the jurisdiction of a District Court and his opinion that it is expedient that he should deal with it summarily. *Held further*, that an offence of robbery committed after sunset (§380 *P.C.*) should not be tried summarily, even with the consent of the accused.

Punchirala v. Appu (1885) 7 *S.C.C.* 21.—§166 only applies in cases which the Magistrate cannot try summarily. Hence, it is the duty of the Magistrate, before purporting to act under §166, to ascertain whether the offence is so triable.

Candamby v. Appu (1886) 7 *S.C.C.* 202.—It is the duty of the Magistrate to record the precise words used by the accused in consenting to a summary trial.

Kurera v. Fernando (1886) 7 *S.C.C.* 177.—The consent of the accused should be obtained only after he has been formally charged.

Christian v. De Soysa (1891) 9 *S.C.C.* 176.—Conviction under the procedure laid down by §219 of the old Code of 1883. *Held per* Burnside, C. J., & Clarence, J. (Dias, J., dissenting) that in non-summary cases a summary trial by consent should not be had until evidence has been recorded, and the Magistrate, upon such evidence, has formed the opinion that it is expedient that the case should be dealt with summarily.

Hossen v. Perera (1894) 3 *S.C.R.* 137 (referring to *Kurera v. Fernando*, *Christian v. De Soysa*).—It is not essential that the Magistrate should record evidence before trying the accused by consent, provided he examines the complainant, if he is of opinion that it is expedient that the case should be so tried. If, after obtaining the consent of the accused, the Magistrate finds that the evidence discloses an offence different from that for which the consent was obtained, there should be a fresh consent obtained, if such offence is triable non-summarily.

Appu v. Nicholas (1902) 6 *N.L.R.* 87; 3 *Br.* 144, and see 1023 *P.C. Panadura* 54346 *infra*.—The charges against the accused were those of house-breaking (§439) and theft (§369). It appeared that before framing any charges against the accused, the Magistrate had examined one witness, and thereupon made the record "I think this case may be tried summarily. Explained to accused the difference between a Police Court and a District Court trial, and their right to the former. They prefer this Court." The charges were thereafter framed, and the accused were convicted after trial. *Held*, "It has been urged that the Magistrate has committed some irregularities which entitle the accused to have their convictions set aside. Now, at that time (*i.e.*, at the time the record of the consent was made) the Magistrate had framed no charge. So he undoubtedly did not observe the terms of §166(3) and §187(3) of the Criminal Procedure Code. At a later period of the case he did frame a charge, and the case proceeded summarily. A decision was quoted to me, from 7 *S.C.C.* 177, *Kurera v. Fernando* . . . Undoubtedly, the Magistrate was wrong, but to my mind the question in this case is whether any harm has been done. It cannot be said that the accused were ignorant of what they were charged, or what they were going to be charged with . . . There being no doubt that the accused knew what the charge had been, or was about to be brought against them, they must have been well aware of what they were doing when they consented to be tried summarily. In point of

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fact the charge was framed on the same day, and almost immediately after their consent, two or three pages later in the record. When the charge was made and explained to them, they took no objection; they did not consider themselves injured. As far as I know they made no complaint in the Court below on that subject. That being so, I am not willing to set aside the conviction in a case in which substantial justice has been done, and in which the irregularities complained of had no injurious results . . ." *per* Moncreiff, C. J.

564 *P.C. Balapitiya* 27797 (1905) *Lem.* 72.—Grenier, J., set aside a conviction on the ground (*inter alia*) that the Magistrate had not, prior to obtaining the consent of the accused under §166, charged him with the offence regarding which he stood accused. " I should not have attached too much importance to this irregularity were it not that it has always been regarded by this Court as a substantial one, and for good reasons. §166(3) prescribes the manner in which the Magistrate shall proceed in cases where he is given jurisdiction to try cases properly triable before the District Court, and too much care cannot be taken by him to see that the provisions of §166(3) are strictly followed . . . The Magistrate has failed to comply with the requirements of §166(3), and for this reason alone I would quash the conviction." *Held further,* that offences of house-breaking and theft (§§443, 369 *P.C.*) are very serious offences and ought not to be tried summarily under §166. (*N.B.*—This case was decided on October 10th, 1905, and there was no appearance for the respondent at the appeal. It would seem that the case of *Appu v. Nicholas* (*supra*) decided on August 21, 1902, was not cited to the learned Judge.)

Naide v. Raltramhamy (1905) *Lem.* 95.—*Held per* Grenier, J., that, where a Magistrate assumes jurisdiction under §166, he should first charge the accused before addressing him under §166(3).

Nadar v. James (1915) 4 *B.N.C.* 60.—The accused were convicted of house-breaking and theft by night (§§443, 369 Penal Code). The Magistrate dealt with the accused under §166 of the Code. " It has . . . been argued . . . that the Police Magistrate had no jurisdiction to try the case under §166 . . ., inasmuch as the charge under §369 was one that he had power to deal with himself as Police Magistrate, and . . . that it nowhere appeared that the accused had consented to be tried by him summarily. I was referred to the construction put by Pereira, J., on §152(3) of the Criminal Procedure Code in 332 – 336 *P.C. Galle* 8547 (*S.C.M.* May 19, 1915), and counsel contended that the words " within the jurisdiction of a District Court " in §166(1) should be similarly construed as meaning " within its exclusive jurisdiction." The language of §152(3) . . . is, however, different from that of §166(1), and, as at present advised, I do not think that the construction which counsel . . . has asked me to put upon the latter enactment is a sound one. It would in any event have no application to the charge under §443. The . . . Police Magistrate ought, I think, to have seen that an express consent to a trial under §166 was given by each of the accused, and was made a matter of record. But it is perfectly clear that each of the accused did in fact consent to a trial under that section, and the irregularity does not seem to have caused any of them the slightest prejudice . . ." *per* Wood Renton, C. J.

Arnis v. Charles (1914) 18 *N.L.R.* 287.—The Magistrate commenced non-summary proceedings against the accused for causing hurt. After a large body of the evidence had been led, he framed charges under §§314, 315 Penal Code, and dealt with the case summarily, and con-

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§166 victed the accused. There was no record of the change of procedure, nor were the accused informed of such intention. *Held.* that the procedure was incorrect, that the accused were entitled *ex debito justitiae* to have distinct notice of the change from non-summary to a summary trial, and that the defence had been materially prejudiced by the incorrect procedure.—*Daniel v. Romanis* (1910) 4 *S.C.D.* 61 referred to.

R. v. Uduman (1900) 4 *N.L.R.* 1; 1 *Br.* 129 (see *Ramasamy v. Sinnochchi* (1916) 2 *C.W.R.* 2, and 688 - 693 *D.C. Crim. Kalutara*, 34781, July 6, 1915). *Held*, offences under §444 Penal Code ought never to be tried summarily. See §152 para. 6 *ante.*

Ramasamy v. Sinnochchi (1916) 2 *C.W.R.* 2.—See *R. v. Uduman supra. Held*, that offences under §§443, 444 Penal Code should, as a rule, not be dealt with summarily by a Magistrate, even with the consent of the accused.

Jainadeen v. Geomonis (1919) 21 *N.L.R.* 95.—Can a Magistrate try an accused summarily under §166 after dealing with the case non-summarily, and after having forwarded the record of the case to the Attorney-General for instructions ?—See §152 para. 6 *ante.*

In revision P.C. Panadura 56910 (1917) 4 *C.W.R.* 123.—It is irregular for the Magistrate to try summarily, under §166, an habitual criminal within the meaning of Ordinance No. 32 of 1914. See *Paramoo v. Cuppay* (1916) 2 *C.W.R.* 230, and the cases cited thereunder.—§152 para. 6 *ante.*

(1899) *Koch* 8.—" §152 of the new Code must be read with §166, and in the ordinary case (?) it seems more just to confine the jurisdiction of a Police Court to proper Police Court cases in which the accused consents to be tried.

1023 *P.C. Panadura* 54346 (November 1, 1916).—*Appu v. Nicholas* approved.

Fernando v. Fernando (1896) 2 *N.L.R.* 16.—" This is a case of so serious a nature that it should not be heard by a Police Magistrate even with the consent of the accused . . ." *per* Bonser, C. J. In this case the accused had been convicted of causing hurt with a knife (§315). Note the date of the decision.

CHAPTER XVII.

OF THE CHARGE

Before proceeding to lay down the law regulating the procedure to be followed in trials, whether before Police Courts, District Courts, or the Supreme Court, the draftsman of the Code has paused at this stage to deal with the law regulating every kind of criminal charge which may be made in any Court against an accused person. As will be observed, the very first thing that has to be done, whenever an accused is arraigned before the Bar of any Court of trial, is to make him acquainted with the nature and the form of the accusation which the prosecution prefers against him.—See §§187, 204, 219 *post.**

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* *C.f. Gunewardene v. Lebbe* (1911) 15 *N.L.R.* 183. A formal charge is necessary in all cases, and §425 *post* cannot cure any irregularity arising from such a cause.

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It is to be noted that this Code has not defined what is meant by the term "charge." A "criminal charge" is made when the accused is called upon to answer an accusation against him before a competent Court, even though he be informally brought before it.—*R. v. Hughes* 48 *L.J.M.C.*151, *Re Maltby* 50 *L.J.Q.B.*420. §4(1)(*c*) of the Indian Criminal Procedure Code states that "'charge' *includes* any head of charge, when the charge contains more heads than one." This definition, which has no counterpart in the local law, renders obsolete the case of *R. v. Appa.* 8 *Bom.* 200 in so far as it was there held that the term "charge" is used throughout the Indian Criminal Procedure Code as the statement of a specific offence, and not as indicating the entire series of offences of which the prisoner is accused. See also *R. v. Gordon* 9 *Alla.* 525.

Analysis of the provisions of *Chapter XVII.*

1. **What the charge or indictment should contain.**—The charge or indictment should state the following:—

(*a*) The offence of which the prisoner is accused.—§167(1).

(i) If the law which creates the offence gives it a specific name, the offence may be described by that name only.—§167(2) and see illustrations (*a*)-(*c*). *C.f.* §170.

(ii) If the law which creates the offence does not give it a specific name—*e.g.*, §182 Penal Code (see illustration (*d*))—the charge should contain so much of the definition of the offence as would give the accused notice of the subject matter of the accusation.—§167(3). *C.f.* §§168(1), 169, 170.

(iii) In every charge the law and the section of the law under which the offence charged *is punishable* should be stated.—§167(4). *C.f.* §170.

(iv) Every charge should contain sufficient particulars as to the time and the place of the alleged offence (*venue*), and as to the person against whom, or the thing in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is accused, and in order to show that the offence is not statute barred.—§168(1) and see §444 *post.* In cases of criminal breach of trust and of dishonest misappropriation, however, it is sufficient if there is specified the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of §179 *post.* It is to be observed, however, that the time included between the first and last of such dates is not to exceed one year.—§168(2). *C.f.* §179.

(v) If there is a separate indictment against the accused containing previous convictions for the purpose of enhancing punishment after conviction, such indictment should contain the fact, date and place of conviction.—§167(7) and see §253 *post.*

(vi) When the nature of the case is such that the particulars mentioned in §§167 and 168 do not give the accused sufficient notice of the matter with which he is accused, the charge should contain such particulars of the manner in which the alleged offence was committed as would be sufficient for that purpose.—§169, and illustrations.

(*b*) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.—§167(5).

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(c) The charge when it is preferred, whether at the non-summary inquiry or at the trial, shall be read to the accused in a language which he understands.—§167(6). *C. f.* §172(2).

(*d*) In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.—§170. *C. f.* §167(2), (3), (4).

(*e*) No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall, at any stage of the case, be regarded as material, unless the accused was misled by such error or omission.—§171. *C. f.* §177 and see §425 *post.* See also para. 4 *infra.*

2. **The alteration, substitution and addition of charges.**—(*a*) Any Court may *alter* any indictment or charge at any time before judgment is pronounced in Police Court or District Court trials without assessors, or before the opinions of the assessors are expressed in District Court trials with assessors, or before the verdict of the jury is given in trials before the Supreme Court.—§172(1). The *substitution* of one charge for another in an indictment, or the addition of a new charge to an indictment, and in the Police Court the substitution of one charge for another, shall be deemed to be an alteration of the indictment or the charge within the meaning of §172.—§172(3). If such statement as is required by §167 to be stated is found to be omitted from the charge or indictment the Court may *add* the same at any time before sentence is passed.—§167(8). Every alteration made in any charge or indictment shall be read and explained to the accused.—§172(2). *C. f.* §167(6). If any charge or indictment which has been altered alleges an offence in respect of which previous sanction to prosecute is necessary, the case cannot proceed until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered indictment or charge is founded.—§175. See §147 *ante.*

(*b*) If the alteration made in the charge or indictment under §172 is such as not to prejudice the prosecution or the defence by proceeding with the trial, the Court may at once proceed with the trial of the case.—§173. If, however, such a course would work prejudice to either side, the Court may either direct a new trial or adjourn the case for such period as may be necessary.—§174. *C. f.* §289 *post.*

(*c*) Whenever a charge or indictment is altered after the commencement of the trial, the prosecution as well as the defence are entitled to recall the witnesses, who have already been called, or to resummon any such witnesses.—§176.

3. **If the Supreme Court, sitting in its appellate or revisional jurisdiction, finds that any convicted accused has been misled in his defence owing to any error in the indictment or charge, it shall order a new trial upon a charge or indictment framed in whatever manner it thinks fit.**—§177 (1). But if the Court considers that the facts of the case are such that no valid charge can be preferred against the accused in respect of the facts charged, it should quash the conviction.—§177(2). *C. f.* §171 and §425 *post.*

4. **Joinder of distinct offences and offenders.**—

Not only must the charge conform to the rules laid down by §§167–169, but it must also satisfy the rules regulating the joinder of charges or counts and of accused persons.

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A. **Joinder of charges.—**

The general rule.—(*a*) For every distinct offence of which any person is accused, there should be a separate charge, and (*b*) every such charge should be tried separately.—178. §167-170

Exception 1.—Where a person is charged with committing, within the space of twelve months, three offences of the same kind, all the three offences can be joined in one charge or indictment and tried together.—§ 179(1). §179(2) defines what is meant by "Offences of the same kind." *C.f.* §168(2) *ante*.

Exception 2.—If in the course of one transaction more offences than one are committed, all such offences can be joined and tried on one charge or indictment.—§180(1) and see illustrations (*a*)- (*f*). See §67 Penal Code and §184 *post*.

Exception 3.—If the acts alleged constitute offences falling within two or more separate definitions defining offences, all such offences can be joined in one charge or indictment and tried together.—§180(2) and see illustrations (*g*)-(*j*). See §67 Penal Code.

Exception 4.—If several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the offender may be charged with and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one or more of such acts, and such charges may be joined in one charge or indictment.—§180(3) and see illustration (*k*). See §67 Penal Code.

Exception 5.—If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences, and any number of such charges may be tried together, or included in the same charge or indictment; or he may be charged with having committed one of the said offences, without specifying which one.—§181.

Exception 6.—If an accused is charged with having committed one offence, and the evidence discloses that he committed a different offence, for which he might have been charged under §181, he may be convicted of that offence although he was not charged with it.—§182.

Exception 7.—(i) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of such minor offence although he was not charged with it.—§183(1). (ii) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although not charged with it.—§183(2). Nothing in §183 shall be deemed to authorize a conviction for any offence referred to in §147 when no complaint has been made as required by that section.—§183(3).

Exception 8.—§§179-181 may be applied severally or in combination —§178.

B. **Joinder of offenders.**

The general rule.—When more persons than one are accused (i) of jointly committing the same offence or different offences committed in the course of one transaction—see §180(1) *ante*; or (ii) when one person is charged as a principal and another as an abettor, or attempting to commit such offence, they may be tried jointly or separately, as the Court

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thinks fit, and the provisions contained in the earlier part of *Chapter XVII.* shall apply to all such charges.—§184.

Exception—§§179 - 181 and 184 may be applied severally or in combination.—§178.

5. **Withdrawal of charges.**—When several charges have been preferred against one person, who has been convicted on one or more of them, the prosecuting officer may, with the consent of the Court, withdraw the remaining charges; or the Court may stay the inquiry into or trial of such charges.—§185(1). *C.f.* §§202, 217, 388 *post.* Any such withdrawal under §185 will amount to an acquittal, unless the conviction which has been obtained is set aside by the Supreme Court, in which event the Court of trial, subject to any orders issued by the Supreme Court, may proceed to try the remaining charges.—§185(2).

6. All indictments presented to the Supreme Court or the District Courts shall be brought in the name of the Attorney-General, and are to be signed by one of the Law Officers, or a Crown Counsel, or by an Advocate duly authorized.—§186(1). The indictment should contain a list of witnesses and productions.—§186(2). The proceedings are not to abate or determine by reason of the death or removal from office of the Attorney-General.—§186(3).

Charge to state offence.

167. (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged.

(4) The law and section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall, when it is preferred, whether at the inquiry preliminary to committal for trial or at the trial, be read to the accused in a language which he understands.

(7) If the accused has been previously convicted of any offence and it is intended to prove such previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the indictment.

(8) If such statement is omitted the Court may add it at any time before sentence is passed.

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Illustrations

(*a*) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Sections 293 and 294 of the Penal Code, that it did not fall within any of the general exceptions of the same Code and that it did not fall within any of the four exceptions to Section 294, or that, if it did fall within exception 1, one or other of the three provisos to that exception applied to it.

(*b*) A is charged under Section 317 of the Penal Code with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by Section 326 of the Penal Code and that the general exceptions did not apply to it.

(*c*) A is accused of murder, cheating, theft, extortion, criminal intimidation, or using a false property-mark. The charge may state that A committed murder or cheating or theft or extortion or criminal intimidation or that he used a false property-mark without reference to the definitions of those crimes contained in the Penal Code.

(*d*) A is charged under Section 182 of the Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Particulars as to time, place and person.

168. (1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

[See § 444.]

[§ 7, 31 of 1919.]

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of **money**, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 179. Provided that the time included between the first and last of such dates shall not exceed one year.

When manner of committing offence must be stated.

169. When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged, the charge shall

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also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Illustrations

(*a*) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(*b*) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(*c*) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(*d*) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(*e*) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(*f*) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

Words taken in sense of law under which offence is punishable.

170. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

This Code.—See §1 *ante*.

Every charge under this Code.—See §§155, 158(2), 187, 204, 219.

Offence.—See §3 *ante*.

Notice.—*C. f.* §§168 – 169.

Section.—See §3 *ante*.

The inquiry preliminary to committal for trial.—See *Chapter XVI.*

The trial.—See *Chapters XVIII., XIX., XX.* and §§152(3), 166.

Read to the accused in a language which he understands.—See §§155, 158(2), 172(2), 187, 204, 219.

Previous convictions of the accused.—*C. f.* §253 *post*.

Court.—See §3 *ante*.

Punishment which the Court is competent to award.—See §§13 – 17 *ante*.

Indictment.—*C. f.* "Indictable offence"—§3 *ante*, and *c. f.* §§158(2) 186, 387 and Form 11 Schedule III. *post*.

Power of Court to add to charge or indictment.—See §§172 – 177.

Offence is not prescribed.—See §444 *post*.

Criminal breach of trust.—See §§388 – 392 Penal Code.

Dishonest misappropriation of money.—*C. f.* §§366 – 367, 369 – 371, 372 *et seq.*, 386 *et seq.*, 393, 398 *et seq.* Penal Code.

Shall not exceed one year.—*C. f.* §179 *post*.

1. §167 of this Code is based upon §196 of the old Code of 1883 and §221 of the Indian Code. §167(6) has no counterpart in the Indian Code, and the same applies to §167(8).

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§168 is based upon §222 of the Indian Code. §168(1) is similar to §197 of the Code of 1883. §167-170

§169 is based upon §198 of the Code of 1883, and follows §223 of the Indian Code.

§170 is based upon §199 of the Code of 1883, and follows §224 of the Indian Code.

N.B.—§168(2) was added to this Code by §7 of Ordinance No. 31 of 1919. See para. 9 *infra*.

2. **Scope of §§167 – 170.**—

See Introduction to *Chapter XVII.* para. 1 *ante*.

This group of sections enumerates the legal requirements of every charge* and indictment preferred against an accused in the course of criminal proceedings held under the Code. It may be stated as a general rule that a formal charge is essential in every criminal case, and an irregularity in this respect as a rule vitiates a conviction.—*Gunewardene v. Lebbe*. *C.f. R. v. James Appu* and *Sandanam v. Appuhamy*. In the last mentioned case, Shaw J., discussed the reasons as to why the law required the framing of charges in criminal cases.

Not only should a charge be framed, but such charge, when it is framed, should conform to certain rules, and should contain certain matters, so as to ensure that the accused is given full notice of the accusation against him. It is with this branch of the law that §§167 – 170 is concerned. These rules may be stated as follows :—

(i) Every charge under this Code "*shall*" state the offence with which the accused is charged §167(1)—provided that if (*a*) the law which creates the offence gives such offence a specific name, the offence "*may*" be described in the charge by that name only—§167(2)—provided that by so doing the accused is given sufficient notice of the matter of the accusation he has to meet—see para. 3 *infra*—and (*b*) if the law which creates the offence does not give it any specific name, so much of the definition of the offence "*must*" be stated as will give the accused notice of the matter with which he is charged.—§167(3), and *c.f.* §§168, 169 – 170.

(ii) In every charge and indictment the law and section under which the offence said to have been committed "is punishable" "*shall*" be mentioned.—§167(4). *C.f.* §170.

(iii) Moreover, every charge and indictment "*shall*" contain sufficient particulars† as to the time and place of the alleged offence, and as to the person (if any) against whom, and as to the thing (if any) in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged, as well as to show that the offence is not statute barred.—§168(1), and see §444 *post* and *Rajapakse v. Silva*. It has been held, however, that "it is the tenor of the accusation and not the wording of the charge that must be considered as the test."—*R. v. Datto* §184 para. 14 *post*. In cases of criminal breach of trust, or "dishonest misappropriation of money," it is not essential to give such particulars, provided the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed,

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* See Introduction to *Chapter XVII. ante*.

† See Merchandise marks Ordinance 1888, §9; Gaming Ordinance 1889, §12; Ceylon Post Office Ordinance 1908, §87; and Ordinance No. 13 of 1910, §23.

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§167-170 without specifying particular items or dates, are set out in the charge or indictment. The time included between the first and last of such dates must not exceed one year.—§168(2). A charge framed under §168(2) shall be deemed to be "a charge of one offence" within the meaning of §179 *post*. See para. 9 *infra*.

(iv) **When the nature of the case is such that the particulars mentioned in §§167, 168 do not give the accused sufficient notice of the matter with which he is charged, the charge or indictment *"shall also contain"* such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.—§169.** See *R. v. Podisinno* (1908) 11 *N.L.R. at p.* 236.

N.B.—By §18(2) of the Married Women's Property Ordinance, 1923, it is provided that in any indictment or charge under §18 in regard to offences committed against the separate property of a married woman, it should be sufficient to allege such property to be her property.

(v) If there is a supplementary indictment against the accused charging him with previous convictions for the purpose of enhancing the punishment which the Court is competent to award, such indictment *"shall"* state the fact, the date and place of such previous convictions.—§167(7). *C.f.* §§167(8), 253 *post*, and see para. 5 *infra*.

If any statements which §167 requires to be set out in the charge or indictment have been omitted, the Court may add the same at any time before sentence is passed.—§167(8). *C.f.* §§172 *et seq. post*. The fact that the charge is made, amounts to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case in which the charge is preferred.—§167(5). See *Batuvantudawe v. Karunaratna*. Whenever the charge is preferred, or the indictment presented, whether at the non-summary inquiry or at the trial, the same "*shall*" be read to the accused in a language which he understands.—§167(6). *C.f.* §172(2), and §§155, 158(2), 187, 204, 219.

In every charge or indictment words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which the offence is punishable.—§170. *C.f.* §§167(2),(3),(4).

It will, therefore, be seen that §§167 – 170 have been framed with the object of ensuring that the charge or indictment preferred against an accused should clearly disclose to him with ease and certainty the nature of the accusation which the prosecution makes against him. The golden rule is that the accusation in the charge or indictment should be made clear to the accused by setting out every material allegation which amounts to criminal liability, together with such particulars of the offence as would be sufficient to give him notice of the charge that is made.—See para. 3 *infra* and *R. v. Sittambaram* (1918) 20 *N.L.R. at p.* 269.

§171 *post* declares that no error in "stating either the offence or the particulars required to be stated in the charge," and no omission to "state the offence or those particulars" shall be regarded at any stage of the case as material, "unless the accused was misled by such error or omission." See also §§177, 425 *post*, and para. 3 *infra*.

Under our law, the duty of drafting the charge in summary trials in the Police Court devolves upon the Magistrate who tries the accused. In trials upon indictment, whether before the Supreme Court or in

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District Courts, the indictment must be drafted and submitted to the Police Court of committal by the Attorney-General.—See §§158(2), 186, 387, 391. §167-170

In proceedings upon a criminal information exhibited by the Attorney-General—§385 *post*, the same rules regarding the formulation of a definite and specific accusation against the accused would apply.

In proceedings under §439 *post* the indictment will be signed either by the Registrar or the Secretary.

Under the English law until quite recently criminal proceedings were liable to be set aside owing to formal defects in the charge or indictment. By the Indictments Act 1915 (5 & 6 *Geo. V., c* 90), the law has been modified and simplified. It is sufficient now if an *indictment* contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge; and notwithstanding any rule of law or practice, an indictment is, subject to the provisions of the Act, not to be open to objection in respect of its form or contents, if it is framed in accordance with the Indictment Rules, 1915. The statement of the offence must describe the offence shortly and in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by Statute, must contain a reference to the section of such Statute. After the statement of the offence, particulars of the offence must be set out in ordinary language, in which the use of technical terms is not necessary. See the observations of Bertram, C. J., in *Batuvantudawe v. Karunaratna*. the case of *R. v. Roger Casement* (1917) 1 *K.B.* 98, *Notable British Trials Series*, affords a striking example of a simplified indictment for high treason framed under the Indictments Act.

Not only must the indictment or charge conform to the rules provided by §§167 – 169, but it must also not offend against the provisions regulating the joinder of counts and different offenders.—§§178 – 181, 184 *post*.

3. **The charge or indictment.—§§167 – 170** (See *General Order* 891 and *Form II. Schedule III. post*).

The following are examples of charges :—

(*a*) **Charge in a summary trial.—**

In the Police Court of Colombo,
November 30th, 1934.

You A.B.

Are hereby charged as follows, that within the jurisdiction of this Court at Etulkotte on November 28th, 1934, you did attempt voluntarily to cause hurt to one X.Y. by means of an instrument for cutting, to wit, a knife, and in such attempt you did an act towards the commission of the said offence, to wit, did attempt to stab the said X.Y. by means of the knife aforesaid, and that you have thereby committed an offence punishable under §§315, 490 of the Ceylon Penal Code.*

(Sgd.) P. Q.
Police Magistrate.

(*b*) **Indictment in a Non-summary case.—**

Rex
v.
A. B.

You are indicted at the instance of the Honourable Sir H.C.G., *K.C.*, His Majesty's Attorney-General, and the charges against you are :—

* See §169 ill. (*b*).

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(1) that on or about the 28th day of November, 1934, at Etulkotte, in the District of Colombo, you did commit murder by causing the death of one X.Y. and that you have thereby committed an offence punishable under §296 of the Ceylon Penal Code.;*

(2) that at the time and place aforesaid, and in the course of the same transaction set out in count 1 you did commit house-breaking by night, by entering the house of the said X.Y. with intent to commit theft, and that you have thereby committed an offence punishable under §443 of the Ceylon Penal Code;†

(3) that at the time and place aforesaid, and in the course of the same transaction aforesaid you did commit robbery of five gold medals, six silver boxes, cutlery and glassware, the property of the said X.Y., and that you have thereby committed an offence punishable under §380 of the Ceylon Penal Code;

(4) that at the time and place aforesaid, and in the course of the same transaction aforesaid you did in a dwelling-house, to wit the house aforesaid, commit theft of the gold medals, silver boxes, cutlery and glassware aforesaid, and that you have thereby committed an offence punishable under §369 of the Ceylon Penal Code.‡

A reference to the above examples will show :—

(*a*) that each charge or count states the offence with which the offender is accused.—§167(1). (*b*) If the law gives such offence a specific name, such name is stated—§167(2) together with as much of the definition which creates the offence as is required by §167(3), as well as particulars as to time, place and the person or thing against whom or which the offence is alleged to have been committed—§168(1)—and such other particulars—§169—as are considered reasonably sufficient to give the accused notice of the matter of the accusation against him. (*c*) The law and the section of the law under which the alleged offence is made punishable are set out.—§167(4), and see *R. v. Abaji* para. 10 *infra*.

The accused is entitled to be told with certainty and accuracy the exact nature of the charge or charges preferred against him—*R. v. Behari*—and this applies with even greater force in cases where it is sought to implicate him in regard to acts not committed by himself, but by others with whom, it is alleged, he was in company at the time the offence was committed, *e.g.*, in charges of unlawful assembly and of offences committed by members of such an assembly in pursuance of a common object. In such cases, each and every member of the unlawful assembly is guilty of all offences committed by their companions, and hence it is that the law requires that the charge in such cases should be made with the utmost precision.—*R. v. Behari*, 332 *P.C. Tangalle* 13461, *R. v. Sabapathy*, *Wijeysinghe v. Carolis*, *R. v. Kudrutullah*, *R. v. Basiraddi* para. 10 *infra*.

It is a fundamental principle of our law that, where no charge has been framed, a conviction cannot be allowed to stand—*Gunawardene v. Lebbe*—nor can a conviction be allowed to stand where a defective charge has been framed, and the defence of the accused has been prejudiced by such defect.—*R. v. James Appu*. See also §§155, 158(2), 187, 204,

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* See §169 ill. (*e*), and §167 ills. (*a*)(*c*).

† *Hami v. Appuhamy* para. 10 *infra*.

‡ See §169 ill. (*a*), and §167 ill. (*c*). *Daises v. Ferdinando*, *R. v. Konnehamy*, and *Laisahamy v.Sahanda* para. 10 *infra*. The joinder of charges in this indictment is justified under §180 *post*.

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219. Moreover, it is the duty of the officers concerned to see that the charge is written out on the correct judicial form.—See *General Order* 891.

A charge which is couched in vague or too general terms will be held to be illegal—*R. v. Fakirappa*, the golden rule being to give the accused in the charge itself, sufficient notice of the accusation he is called upon to meet at the trial.—*R. v. Kellie*, *R. v Podisinno*. Therefore, it is requisite that the charge should contain all the material ingredients which amount to criminal liability—*Welakka v. Appuhamy*, *R. v. Pillai*, *R. v. Kalimuttu*, *R. v. Kanjamanadan*, *Sandanam v. Appuhamy*, *Perera v. Ranhamy*, *Hamine v. Gunesekera*, *Silva v. Simon*, *Rambukpotta v. Menika*, *R. v. Gadlu* para. 10 *infra*—and should show on the face of the charge an offence which is known to the law.—*Welakka v. Appuhamy*, *R. v. Pillai*, *Perera v. Ranhamy*, *R. v. Unanse*, *R. v. Gadlu* para. 10 *infra*. If the allegations in the charge do not amount to an offence which is known to the law, a conviction of the accused may be vitiated, although the evidence led discloses a sufficient offence.—*Welakka v. Appuhamy*, *R. v. Pillai*, *Sandanam v. Appuhamy*, *Perera v. Ranhamy*, *R. v. Gadlu* para. 10 *infra*.*

§§167(2),(3) and §168(2) enable the draftsman of the charge to curtail its length in certain specified cases. Thus, where the offence charged is given a specific name by the law which creates it, §167(2) and illustration (*c*) show that the charge *may* describe the offence by that name only. Again, where the offence has no specific name, the draftsman may describe the offence by merely reproducing so much of the definition creating the offence as is sufficient to give the accused notice of the offence he is accused of.—§167(3). It must, however, be remembered that both §§167(2) and (3) are qualified by other sections in this Chapter and must be read and construed subject to those provisions.—*Welakka v. Appuhamy*, 332 *P.C. Tangalle* 13461; *R. v. Pillai*, *Sandanam v. Appuhamy* para. 10 *infra*. Subject to the special provision contained in §168(2), it is, therefore, incumbent upon the prosecution to see that the charge affords the accused sufficient notice by giving such particulars as are set out in §§168(1), 169, so as to enable him to know the exact nature of the accusation which is being preferred against him. The failure to give the accused notice of such particulars may or may not—have the effect of vitiating a conviction.—*Welakka v. Appuhamy*, *Laisahamy v. Sahanda*, 332 *P.C. Tangalle* 13461, *Daises v. Ferdinando*, *R. v. Kalimuttu*, *Silva v. Appu*, *Gunewardene v. Lebbe*, *R. v. James Appu*, *R. v. Mohideen*, *Sandanam v. Appuhamy*, *Perera v. Ranhamy*, *Hamine v. Gunesekere*, *R. v. Unanse*, *Dureya v Appuhamy*, *Rambukpotta v. Menika*, *R. v. Kudrutullah*, *R. v. Gadlu*, *Bishwanath v. Keshab*, *R. v. Konnehamy*, *Wijeysinghe v. Carolis*, *R. v. Pillai*, *Hami v. Appuhamy*, *R. v. Appuwa*, *R. v. Gunesekera*, *Nell v. Muttu*, *R. v. Tribhuvandas*, *R. v. Basiriddi*, *R. v. Kellie*, *Madawela v. Banda*, *Balmakand v. Ghansamaram* para. 10 *infra*. It is to be observed that §171 *post* declares that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material "unless the accused was misled by such error or omission." This section, however, should be read in the light of the case of *Welakka v. Appuhamy* and the provisions of §§177, 425 *post*. It is for the Supreme Court to say whether, in any given case, an error or omission in the

* But see *R. v. Perera* (1914) 5 *B.N.C.* 91, §171 *post*.

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§167-170 charge has in fact misled the accused, or otherwise prejudiced him in his defence. Unnecessary allegations in the charge may be regarded as mere surplusage—and can be disregarded.—*R. v. Cassidy* para. 10 *infra.*

The Court of trial may make good any omission in the charge of matters required to be stated therein by §167, by adding the same thereto, provided this is done before sentence is passed upon the accused.—§167(8). Moreover, any Court can alter any charge subject to the provisions contained in §§172 - 176 *post.* Such altered charges must conform to the general principles contained in §§167 - 170.

Whenever a charge is made, this brings into existence certain legal presumptions, *viz.*:—

(*a*) the prosecution represents that every legal condition required by law to constitute the offence charged has been fulfilled in the particular case.—§167(5), and illustrations (*a*) and (*b*). See also *Batuvantudawe v. Karunaratna.* In other words, the making of a charge fixes the prosecution with the *onus* of proving the offence against the accused beyond reasonable doubt;

(*b*) in every charge words used in describing the offence must be presumed to have been used in the sense attached to them respectively by the law "under which such offence is punishable."—§170.

4. **Examples of defective charges.**—See the illustrations to §§167, 169 and 171.

(*a*) **Cheating.**—See §398 *et seq.* Penal Code.—The deceit practised by the accused should be stated, as well as his intention. Moreover, the particulars stated in the charge should amount to the offence of cheating. It is illegal to charge an accused for cheating, and to aver particulars which amount only to criminal breach of trust.—*Welakka v. Appuhamy* and §167 illustration (*c*), §169 illustration (*b*). See §171 illustrations (*b*), (*c*).

(*b*) **Theft.**—See §366 *et seq.* Penal Code.—The name of the owner of the stolen property need not be stated.—*R. v. Konnehamy.* This case was not followed in *Laisahamy v. Sahanda.*

The identity of the thing stolen, and the value of the thing should be stated.—*Laisahamy v. Sahanda, Daises v. Ferdinando.* See §167 illustration (*c*), §169 illustration (*a*).

(*c*) **Unlawful assembly, rioting and kindred offences.**—See §138 *et seq.* Penal Code. See *R. v. Gunesekere* (1931) 32 *N.L.R.* 290.

The common object of the assembly should be stated.—332 *P.C. Tangalle* 13461, *R. v. Sabapathy, Wijeysinghe v. Carolis, R. v. Behari, R. v. Kudrutullah, R. v. Basiriddi, Gunaratne v. Soysa.*

(*d*) **Forgery.**—See §452 *et seq.* Penal Code.—In charges of forgery it should be stated that the false document was made with the intention of making it to be believed that it was made by, or by the authority of, another.—*R. v. Kanjamanadan* (as explained by *R. v. Saibo*).

(*e*) **Hurt.**—See §310 *et seq.* Penal Code.—Where a person is charged under §323 with causing hurt to a Police officer with the intention of preventing him from doing his duty, *viz.*, in arresting a third party, the charge should show that the Police officer was acting lawfully at the time the hurt was caused to him. Had the charge not been under §323, but under §315 for causing hurt simply, such an allegation is unnecessary, but if the prosecution elects to proceed under §323, such allegation is essential.—*R. v. Pillai.*

A charge for causing hurt if made in general terms, without giving sufficient particulars as to the time, place and other circumstances, would be bad.—*R. v. Fakirappa.* See §167 illustration (*b*).

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(*f*) **House-breaking.**—See §431 *et seq.* Penal Code.—It is not necessary to allege specifically that the accused had any of the intentions which enter into the definition of criminal trespass.—*Hami v. Appuhamy.*

Under §442 it is unnecessary to specify any of the intentions required for the offence of criminal trespass; it would apparently be otherwise in charges under §443.—*Balmakand v. Ghansamaram.*

(*g*) **Perjury.**—See §188 *et seq.* Penal Code.—The charge should make it plain by means of proper innuendos as to what is meant by the words alleged to have been used by the accused in his perjured statement.—*R. v. Appuwa.*

It is wrong to incorporate the whole of the accused's perjured deposition into the charge.—*R. v. Udit Singh.*

See §169 illustration (*c*).

(*h*) **Criminal intimidation.**—See §483 *et seq.* Penal Code.—The nature of the threat used, and the intention of the accused should be set out.—*Cassim v. Mohamadu,* but see *Fernando v. De Vas* (1928) 9 *C.L. Rec.* 67. See §167 illustration (*c*).

(*i*) **Sedition.**—See §120 Penal Code (see §440A *post*).—Where it is alleged that the accused published a seditious article in a newspaper, unless it is alleged that the *whole* article is seditious, the charge should specify the particular passages which are relied upon as being seditious. —*R. v. Tribhuvandas.*

(*j*) **Criminal libel.**—See §479 *et seq.* Penal Code.—It is necessary that the particular occasion or occasions on which the alleged libel was published should be set out.—*Bishwanath v. Keshab.*

See "**Perjury**" *supra.*

(*k*) **Criminal trespass.**—See §427 *et seq.* Penal Code.—

See "**House-breaking**" *supra.*

The intention of the accused should be set out.—*R. v. Ukkuwa, Hamine v. Gunesekere, Fonseka v. Sardiel, Appu v. Gagrias, Dingiri Banda v. Vander Poorten* (1927) 9 *C.L.Rec.* 40, *Balmakand v. Ghansamaram.* See also *Hami v. Francis* §171 para. 6 *post.*

(*l*) **Receiving and retaining stolen property.**—See §393 *et seq.* Penal Code.—The allegation that the accused had reason to know or to believe that the property was stolen should be set out.—*Perera v. Ranhamy, R. v. Gadlu.*

(*m*) **Using a false property-mark.**—See §471 Penal Code.—The intention of the accused should be stated.—*Perera v. Ranhamy.* See §167 illustration (*c*).

(*n*) **Rescue and escape from lawful custody.**—See §219 *et seq.* Penal Code.—The nature of the offence committed by the person rescued or escaping for which he was taken into custody should be stated.—*Rambukpotta v. Menika. C.f.* §169 illustration (*d*).

(*o*) **Using obscene words, insult, etc.**—See §287 Penal Code.—The words complained of should be set out.—*Nell v. Muttu.* See also *R. v. Gunasekere, Batuvantudawa v. Karunaratne, Ratnaike v. Deonis, Fernando v. Fernando,* §171 para. 6 *post.* See also *R. v. Alfred.*

(*p*) **Possession of dangerous weapons.**—See §449 Penal Code.—The charge must set out what unlawful act the accused intended to commit.—*Simon v. Silva* (1921) 22 *N.L.R.* 442, *Silva v. Charles* (1896) 2 *N.L.R.* 164, *R. v. Perera* (1913) 16 *N.L.R.* 456.

Statutory offences.—

Labour offences.—The act of the accused which it is alleged to amount to an offence must be specified.—*R. v. Kalimuttu.*

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Forest offences.—The description of the acts which constitute the offence must be set out.—*R. v. Mohideen.*

Cattle trespass.—The fact that the accused removed the animals without lawful right, and that the person from whose custody they were removed was entitled to keep them, should be clearly set out.—*Sandanam v. Appuhamy.*

Rice control.—Full particulars of the offence should be stated.—*Dureya v. Appuhamy, R. v. Fernando, Miskin v. Babun Appu, Abeyasuriya v. Jayasekera.*

General.—No charge should be framed in respect of an offence which needs sanction to prosecute unless such sanction has been given.—*Silva v. Appu.*

As to charges framed under By-laws.—See 4 *Leader* 124.

Omission to specify notification on which a charge is based.—*Peries v. Theresa.*

5. **§167(7).**—Apart from anything contained in this Code, or under any other legal enactment, it has been laid down that it is always competent to the Courts of first instance, whether they be Police Courts, District Courts or the Supreme Court, after convicting an accused, to take into consideration in passing sentence the fact that the accused has already been previously convicted.—See *Attorney-General v. Kandaiya* (1911) 14 *N.L.R.* 211, *Nikapota v. Gunesekere* (1911) 14 *N.L.R.* 213, (*Two Judges*), *R. v. Clementu Appu* (1916) 2 *C.W.R.* 1, and *Daniel v. Othoman* (1916) 2 *C.W.R. at p.* 312. Our law on this point is based upon the English Law (see 9 *Halsbury's Laws of England p.* 427), and was held to be applicable under §100 of the Evidence Ordinance, and §6 *ante.* The usual procedure followed in such cases is for the Court, after convicting the accused, to ask whether the accused has any previous convictions, or for the prosecuting officer to bring the fact to the notice of the Judge. In either case, the convictions should be duly proved, unless admitted by the accused.

In addition to the above, Ordinance No. 2 of 1926 provides that in the case of reconvicted criminals who are accused of committing a "crime," they should be tried non-summarily in the Police Court, and duly committed for trial upon indictment before a higher Court—see *Appu v. Noordeen* (1916) 19 *N.L.R.* 223, 2 *C.W.R.* 260; *Paramoo v. Cuppay* (1916) 2 *C.W.R.* 230, *In revision P.C. Panadura* 56910 (1917) 4 *C.W.R.* 123; and that after conviction, such higher Court may, upon proof of previous convictions, award the accused an enhanced sentence of imprisonment, as well as preventive detention, or police supervision. §167(7) of this Code enacts that when such previous convictions are intended to be proved for the purpose "of increasing the punishment which the Court is competent to award," the fact, date and place of the previous conviction must be set out in the indictment. §253 *post* further provides that in trials before *a jury* or *assessors* (*a*) the part of the indictment stating the previous convictions shall not be read out in Court, nor (*b*) may the accused be asked whether he has been previously convicted as alleged, unless and until (i) he has pleaded guilty to the charge, (ii) upon conviction, or (iii) if such previous convictions could lawfully be proved as evidence in the case, *e.g.*, as being relevant to the issue.—See §54 Evidence Ordinance and the explanations thereto. Moreover, if the accused gives evidence of good character at his trial, and denies a previous conviction in cross-examination, he can be contradicted by proof of such conviction under §153 Exception 1 of the Evidence Ordinance.

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On a plea of guilty to a charge or upon conviction, the accused must be asked to admit or deny the previous convictions with which he is charged.—§253(1)(*b*). If he admits them, no difficulty arises, and the Court will at once proceed to pass sentence—§253 (1) (*c*). If he denies them, or refuses or does not answer, the previous convictions must then be duly proved.—§253(1)(*c*). The method of proving previous convictions is provided for by §7 of Ordinance No. 2 of 1926.

In drafting indictments which charge an accused with previous convictions, the usual practice is to set them out in due form on a separate document, so that the chief indictment which charges the accused with the substantive offence can be used in Court and shown to the jury or assessors without infringing the provisions of §253.

Which the Court is competent to award.—The punitive jurisdiction of our criminal Courts is found stated in §§13 – 17 *ante*, and in *Chapter III.* of the Penal Code. Unless the law expressly creates an exception, and enhances the punitive powers of the Courts, as for example by Ordinance No. 2 of 1926, the incidental language used in §167(7) must not be interpreted as extending the punitive jurisdiction of the Courts beyond their ordinary statutory limits.— *R. v. Sinno* para. 10 *infra*. See also §291 para. 2 *post*.

6. **The charge shall be read to the accused in a language which he understands, §167(6).**—See §§155, 158(2), 172(2), 187, 204, 219, 302.

7. **If such statement is omitted, the Court may add it at any time before sentence is passed §167(8).**—This sub-section has no counterpart under the Indian Code. The words "such statement" appear to refer to all statements required to be stated under §167, and are not restricted to the statement referred to in §167(7) alone.

As to amendments of charges.—See §172 *et seq. post*.

8. **That the offence is not prescribed, §168(1).**—See §444 *post*.

9. **§168(2).**—This sub-section was added to the Code by §7 of Ordinance No. 31 of 1919, and is based upon §222(2) of the Indian Criminal Procedure Code. The reason for the amendment of the law was because inconvenience was often caused in the administration of justice in Ceylon, through the absence of such a provision in this Code.

§168(2) is identical in its terms with §222(2) of the Indian Code which was added to the Criminal Procedure Code of India in 1898. Prior to 1898 the position of the law in India was similar to the position in Ceylon up to the time of the amendment effected in 1919.

Owing to the provisions of §§167, 168(1), 169 of the Code great difficulty had been found in bringing guilt home to persons who had committed criminal breach of trust or had misappropriated money in cases where there was a running account, and where the prosecution was unable, as very often was the case, to prove the misappropriation of specific sums of money, where only a general deficiency was proved, although there could be no doubt about the misappropriation.

The Courts had held that it was illegal to charge an accused with misappropriating a general deficiency, and insisted upon the prosecution confining itself to specific items—see *Buchanan v. Conrad, R. v. Pursotan*— but judicial opinion, both here as well as in India, was not unanimous and one finds several cases where it had been laid down that a charge of a general deficiency is not illegal.—*R. v. Fernando, R. v. Pulle, R. v. Sittambaram, R. v. Kellie, R. v. Ramachandra, Buddhu v. Lal.* By Ordinance No. 22 of 1889 the legislature put the matter beyond doubt

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§167-170 in cases of breaches of trust committed by public servants.—See *R. v. Ragal*, and the *Ceylon Hansard* (1889 - 90) *pp.* 11, 20 *et seq.* The law was, therefore, in a most unsatisfactory state, but now §168(2) of this Code places the matter beyond all doubt.

In charges of *criminal breach of trust*, and of *dishonest misappropriation* **of money**, whether the accused is a public servant or not, it is sufficient if the charge or indictment specifies the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates; provided the time included between the first and last of such dates does not exceed twelve months. Such a charge shall be deemed to be "a charge of one offence" within the meaning of §179 *post*. It will, therefore, be seen that §168(2) is in the nature of an exception to the general rule which requires the prosecution to furnish the accused with accurate particulars of the offence charged. As to whether it is essential to specify the owner of the property misappropriated--see *R. v. Godamune*.

§168(2) must be carefully construed and strictly applied. It can only be utilised in the case of the offences specified. Thus, it cannot be used in the case of charges for falsification of accounts under §466A of the Penal Code—*R. v. Visvanathan*, *R. v. Moti Lal*—nor can it be applied to charges of cheating.—*R. v. Raja Khan*.

The words "sufficient to specify the gross sum," clearly indicate that a general deficiency can be charged, even where particular items which have been misappropriated are known and capable of proof, and even where such items exceed three in number.—*R. v. Gulzari*. §168(2) is not confined solely to cases where the prosecution is unable to specify particular items out of a general deficiency, and is perfectly general in its terms.—*R. v. Thomas*. The sub-section admits of the charge of any number of breaches of trust or dishonest misappropriations of money committed within one year as amounting to one offence.—See *R. v. Dorasamy* §179 para. 10 *post*. It does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying details. It dispenses with the necessity for amplification; it does not prohibit enumeration of the particular items in the charge.—*R. v. Datto*. §§168(2) and §179 will jointly sustain an accusation which charges an offence of the kind specified in §168(2), where there have been defalcations committed within one year, although it refers to three different items of money, received from three different persons.—See *R. v. Kashinath* where the scope of §§168(2) and §179 is discussed.

§168(2) applies only to the case of one accused and cannot be used where more accused than one is charged.—*R. v. Girwar*.

While a charge under §168(2) is deemed to be "a charge of one offence" within the meaning of §179 *post*, it cannot be assumed that the acts so charged were committed in the course of "one transaction" within the meaning of §180(1) *post*.—*R. v. Visvanathan*. See also §179 *post*.

10. **Case law.**—See also §171 para 6 *post* and §§177, 425.

Welakka v. Appuhamy (1887) 8 *S.C.C.* 56.—The accused in this case was charged with cheating in the following terms:—"That you did, at Bandarawela, on July 8, 1886, cheat one Welakka by receiving from her the sums of Rs. 59·00 and Rs. 35·00 for the purpose of paying for two fields, which you undertook to purchase on her account, whereas

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you purchased the said fields in your own name and on your own account . . .' The offence was laid under §400 of the Penal Code. *Held, per* Burnside, C. J. "Against the conviction objection to the charge has been urged, not only that it discloses no offence, but in fact that it negatives the most material ingredients in the definition . . . of the offence 'to cheat.' *It is not only not alleged in the charge that the defendant, by deceiving the prosecutrix, fraudulently induced her to part with money,* but it is distinctly stated that *the defendant received her money for a particular purpose,* and that *after* he had received it for that purpose, *he violated that purpose and did something else with the money.* It is, to my mind clear that the particulars of the charge distinctly negative the offence 'to cheat,' however they may disclose the offence of criminal breach of trust; and had the defendant been convicted of criminal breach of trust, it might have been contended that the conviction was good (see §§181 – 182 *post*). It was urged, in support of the conviction, that the charge described the offence by the specific name which the law gives it, and by §200 of the Criminal Procedure Code (No. 3 of 1883—now §171) no error in stating either the offence or the particulars required to be stated in the charge, or the omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission; that the defendant in the present case had made his defence and called witnesses, he, therefore, could not have been misled by anything which appeared in the charge. In support of this contention the *illustrations* to §200 (now §171) were referred to . . . I am free to admit that the words of this section (*i.e.*, §200 of the old Code; §171 of the present Code) . . ., with its *illustrations,* are very comprehensive, and *unless read with other sections of the Code,* would not only support the complainant's contention, but go the length of rendering a charge altogether useless and an encumbrance to judicial . . . proceedings . . . It is manifest that this would give a latitude to criminal charges which the . . . Code itself could scarcely have contemplated. §196 (now §167) . . . requires that every charge should state the offence with which the accused is charged; if the law gives it a specific name, it *may* be described by that name *only.* §197 (now §168) requires that the charge should contain such particulars as to time and place of the alleged offence, and the person against whom, &c., it was committed, as are reasonably *sufficient* to give the accused notice of the matter with which he is charged; and §198 (now §169) declares that when the particulars mentioned in the two previous sections do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose . . . (the learned Judge then proceeded to comment on the *illustrations* to §171, and defined the term 'incorrectly' set out in *illustration* (*b*) to §171) . . . A charge of cheating would be bad and insufficient to sustain a conviction which stated a manner of cheating which did not in law constitute the offence 'to cheat,' although a sufficient manner of cheating had been proved . . . I . . ., therefore, quash the proceedings . . . and send the case back in order that the Magistrate may frame a new charge of cheating or criminal breach of trust as he may decide to do . . ."

Qu.—Why was not the applicability of §§210 – 211 of the old Code considered? See also *R. v. Perera* (1914) 5 *B.N.C.* 91. §171 para. 6 *post.*

R. v. Konnehamy (1888) 8 *S.C.C.* 131 (not followed in *Laisahamy v. Sahanda infra*).—The charge against the accused was for theft

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§167-170 and was as follows :—" That you did on or about October 22, 1887, at Dodanduwa commit theft of seven tins of compressed beef, a jar of tripe, and a bag of currants from the *S.S.* '*Ascalon*' then lying wrecked off the coast of Ceylon, the said goods being worth about Rs. 25·00, and thereby committed an offence punishable under §369 of the Ceylon Penal Code." *Held*, that it was not essential to state in the charge that the stolen goods were the property of a named person. This decision was based upon a construction of §196 (now §167(2) and §167(5)) of the Code of 1883.

Laisahamy v. Sahanda (1889) 8 *S.C.C.* 205 not following *R. v. Konnehamy* (*supra*).—*Held*, that in charges of theft, the article stolen, with its ownership and value, should be set out in the charge.

N.B.—The report gives no authority for this statement of the law, which appears to have been based solely on grounds of convenience.

332 *P.C. Tangalle* 13461 (1899) *Koch* 40, followed in *Wijeysinghe v. Carolis.*—In charges of unlawful assembly, rioting, etc., the common object should be set out. §167(2) cannot be utilised to remedy such an irregularity, and §167(2) cannot be construed alone, but must be regarded as being qualified by other sections in the chapter. §171 *post*, however, may cure such an irregularity.

R. v. Sabapathy (1900) 4 *N.L.R.* 20 followed in *Wijeysinghe v. Carolis.*—In charges of rioting, etc., the common object must be set out. See §171 *post*, and *R. v. Amblavanar* (1892) 1 *S.C.R.* 271, and 22 *Cal.* 276, 11 *Cal.* 106.

Wijeysinghe v. Carolis (1915) 1 *C.W.R.* 207 following *R. v. Sabapathy* (1899) *Koch* 40, *R. v. Amblavanar*, and considering 22 *Cal.* 276, 11 *Cal.* 106.—In a charge of unlawful assembly the omission to set out the common object should not be regarded as material unless the accused was misled by it. Where the evidence made the common object clear, and where the accused was defended, the Supreme Court held that there was no prejudice caused to the accused.

R. v. Kanjamanadan (1903) 7 *N.L.R.* 52 (*Full Court*). Referred to in *R. v. Saibo*, and *R. v. Careem* (1920) 7 *C.W.R.* 303.—Where an indictment alleged more than three offences, but did not show on the face of it that they all formed one single continuous transaction, it was held that it was not open to the prosecution thereafter to lead evidence to show that they were all committed in the course of one and the same transaction. (This should be read in the light of the judgment of Middleton, J. *at pp.* 68 - 9 and the observations of Wood Renton, C. J., in *R. v. Saibo* (1913) 1 *B.N.C. at p.* 36). *Held further*, that where a person was charged with the offence of forgery, the charge should state that the false document was made with the intention of making it to be believed that it was made by, or by the authority of, another.

R. v. Saibo (1913) 1 *B.N.C. at p.* 36.—" . . . It is true that there is nothing on the face of the record to establish the identity of the transaction, but, in my opinion, that is not necessary. The question is one to be established on the evidence. The *dictum* of Sir Charles Layard to the contrary in *R. v. Kanjamanadan* did not receive the support of Middleton, J., at the time, and, as we all know, has not been followed subsequently . . ." *per* Wood Renton, J. See also *R. v. Datto* 30 *Bom.* 49 §184 para. 14 *post.*

R. v. Pillai (1913) 17 *N.L.R.* 235.—Where an indictment charged the accused with voluntarily causing hurt to Police Constable M. with the intention of preventing him from doing his duty, to wit, arresting P.

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on a charge of quitting service without notice, *held*, that on the face of it the indictment was defective, as it made no reference to a warrant of arrest; that, therefore, the indictment disclosed no offence on the part of the accused, and a conviction thereon could not be sustained. The Supreme Court, in the circumstances of the case, refused to amend the conviction or the indictment without giving the accused a further opportunity of defending himself upon the amended indictment, and accordingly directed a new trial before a new Judge. " . . . In the indictment the accused is charged with voluntarily causing hurt to Police Constable Mudiyanse with intent to prevent him from doing his duty. Had the charge ended there, it might be argued that it disclosed an offence, although it might be that sufficient information was not given to the accused of the particulars of the offence with which he was charged. But the indictment proceeds to set forth the particular duty that Mudiyanse was discharging at the time, and it is described as follows :—'Arresting P. on a charge of quitting service without notice.' Now, arresting a person on a warrant duly issued by a competent Court . . . on a charge of quitting service without notice or reasonable cause is one thing; arresting a person on a charge of quitting service without notice is another. Quitting service without notice alone is no offence, and quitting service without notice or reasonable cause is not a cognizable offence, *i.e.*, it is not an offence for which the offender can be arrested by the Police . . . The statement in the indictment negatives the idea of a valid and legal arrest. The indictment, therefore, is bad . . ." *per* Pereira, J. See §§172 – 176 para. 6 *post.*

Silva v. Simon (1921) 22 *N.L.R.* 442.—In a charge under §449 Penal Code for being in possession of a dangerous weapon with intent to commit an unlawful act, the charge must specify what unlawful act the accused was intending to commit. *Silva v. Charles* (1896) 2 *N.L.R.* 164 and *R. v. Perera* (1913) 16 *N.L.R.* 456 approved.

R. v. Podisinno (1908) 11 *N.L.R.* 235, 4 *A.C.R.* iv.—See §§181 – 183 para. 7 *post.*

Madawela v. Banda (1920) 8 *C.W.R.* 263.—"The faulty description of an offence would be of no moment in this case, and I would have taken no notice of it, as it has not prejudiced the accused, but that the failure to appreciate what facts are necessary to constitute the offence is to be found reflected in the evidence upon which the conviction is founded." *per* Schneider, J.

Silva v. Silva (1921) 23 *N.L.R.* 161; 3 *C.L.Rec.* 161.—Charge under the Public Performances Ordinance No. 7 of 1912. Charge that the accused "carried on a comedy in the house of James without obtaining a licence." *Held*, that the charge was defective—there being no such offence known to the law.

Peries v. Theresa (1927) 8 *C.L.Rec.* 116.—Charge based on a notification—omission to disclose notification in charge. Conviction quashed.

Hami v. Appuhamy (1898) 3 *N.L.R.* 101.—In a charge under §442 of the Penal Code (house-breaking by night), it is not necessary to allege specifically that the offender had any of the intentions which enter into the definition of criminal trespass under §427 of the Penal Code.—22 *Cal.* 391 followed. See §§172 – 176 para. 6 *post.*

R. v. Appuwa (1896) 2 *N.L.R.* 6.—The indictment charged the accused with intentionally giving false evidence in the course of a judicial proceeding in that he stated on affirmation "I never sold an undivided half share of this land. I have never been to the notary's office to execute

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§167-170 a deed in defendant's favour, etc. . . ." *Held*, that it must be made plain on the face of the indictment by proper innuendos what was meant by the expressions "this land," "the notary's office," "the notary," etc. *Held*, however, that as no prejudice had been caused to the accused the defect did not vitiate the proceedings. See *R. v. Gunasekera* (1914) 2 *Cr. App. R. at p.* 63.

Daises v. Ferdinando (1916) 3 *C.W.R.* 267.—The charge in a case of theft read as follows:—"That on the 6th day of October, 1916, at Lyndhurst Estate, he did commit theft of articles valued at Rs. 6·90 belonging to the above estate . . ." *Held*, that the charge was defective inasmuch as it did not specify what the articles the accused stole were. Conviction quashed and case sent back for fresh trial.

R. v. Kalimuttu (1920) 2 *C.L.Rec.* 190. *Held*, *per* de Sampayo, J. "§11 of Ordinance No. 11 of 1865 penalises a large number of acts of various kinds, and if a person is to be convicted thereunder, the principal act constituting the offence must be specified and the accused given an opportunity of defending himself against such a charge."

4 *Leader* 124.—Charge laid under a Rule or Bye-Law.

R. v. Sinno (1908) 11 *N.L.R. at p.* 194.—". . . I think we ought not to interpret the incidental language of §167(7) of the . . . Code in which reference is made to proof of a previous conviction increasing the punishment "which the Court is competent to award" as extending the jurisdiction of the District Court beyond its ordinary statutory limits . . ." *per* Wood Renton, J.

236 *P.C. Colombo* 8137 (1899) *Koch* 17.—In this case Withers, J., commented upon §167(7). *Qu.*—Does §167(7) apply to summary trials before a Police Court? Note the use of the word "Indictment."

Silva v. Appu (1898) 1 *Br.* 150.—The charges against the accused were (i) using criminal force to the complainant and (ii) with making a false charge of theft against him (§208 P.C.). The Magistrate convicted the accused under §180 of the Penal Code, *viz.*, for giving false information to a public servant. *Held*, that the conviction was bad (*a*) because no charge under §180 had been framed and (*b*) that the offence under §180 needed sanction to prosecute, and that the proceedings were bad in the absence of such sanction. See §175 *post.*

Cassim v. Mohamadu (1892) 1 *S.C.R.* 254.—In a charge of criminal intimidation the nature of the threat used, and the intention of the accused should be set out. See (1899)*Koch* 17, where this case was considered.

R. v. Gunasekera (1914) 17 *N.L.R.* 476; 2 *Cr.App. R.* 62.—A mere omission in a charge is an irregularity which is curable by §425, unless a failure of justice has been caused. *Gunawardene v. Lebbe* and *R. v. Appuwa* referred to. See *Batuvantudawe v. Karunaratne.*

Gunewardene v. Lebbe (1911) 15 *N.L.R.* 183.—A formal charge is necessary in all cases in which the Code requires one, and §425 cannot cure any such irregularity. See *R. v. James Appu* (1920) 22 *N.L.R. at p.* 209.

R. v. James Appu (1920) 22 *N.L.R.* 206; 8 *C.W.R.* 176. See also 2 *C.L.Rec.* xxxviii, 3 *C. L. Rec.* xi.—The total absence of a charge cannot be treated as a mere irregularity; but where there is a charge contained in a warrant or in a report, even if in the one case the accused appears before the warrant is executed, and in the other the offence is one punishable with imprisonment for more than three months or fine over Rs. 50·00, the failure to frame a separate written charge may amount

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to nothing more than a mere irregularity, and it is the duty of the Court of Appeal, under §425 of the Code, to inquire whether, in the particular case under consideration, the irregularity led to "a failure of justice."

R. v. Mohideen (1921) 22 *N.L.R.* 400.—The charge against the accused was as follows:—"That between the months of February and August, 1919, at Elephant Pass, he did illicitly cut and collect from Crown land 85 bags of avaram bark without a permit issued by a Forest Officer and thereby committed an offence punishable under §21(1)(*c*) of the Rules framed under the Forest Ordinance 1907 and dated April 23, 1918, and punishable under §22 of the said Ordinance." The Magistrate, however, convicted the accused "of having possessed wrongfully between February and August, 1919, 53 bags of avaram bark, the property of the Crown, an offence punishable under §22 of the Forest Ordinance. *Held, per* Schneider, J. "The description of the offence in the conviction is clearly wrong, nor is any offence disclosed by that description . . ."

Sandanam v. Appuhamy (1915) 1 *C.W.R.* 208.—"I am of opinion that the conviction cannot stand. Both the charge and the conviction are faulty and disclose no criminal offence. The charge does not state that the accused removed the cattle without lawful right, or that the Superintendent . . . was entitled to keep or detain the cattle, both of which are essential ingredients of an offence under §12 of Ordinance No. 9 of 1876, under which the accused was apparently intended to be charged. The charge is not in accordance with the provisions of §167 of the . . . Code, particularly sub-sections (1) and (3), and does not seem to me to come within the provisions of sub-sections (2) or (5) . . ." *per* Shaw, J. Object of framing a charge discussed.

R. v. Ukkuwa (1916) 2 *C.W.R.* 66. See *Perera v. Ranhamy, Hamine v. Gunesekera, Fonseka v. Sardial, Andree v. Coore*, 2 *C.L.R.* 203, and *Appuhamy v. Fernando* 2 *S.C.D.* 55 followed.—Where the accused were charged with committing criminal trespass, the intention of the accused should be set out in the charge.

Perera v. Ranhamy (1916) 2 *C.W.R.* 201.—The charges framed in this case were as follows:—"That you did, within the jurisdiction of this Court at Andiambalama, on March 15 and thereabouts retain a stolen black *Wairi* bull, the property of E.P. and that between July, 1914, and March, 1916, you did use false property-marks on the said bull with the intention of causing others to believe that the ownership rested in you and not in the true owner E.P. and thereby committed an offence punishable under §§397 and 471 Ceylon Penal Code." *Held*, that the charges were irregular (i) because the reference to §397 ought to have been to §394, (ii) that there was an omission under §394 to state that the accused had reason to believe the property was stolen property, and (iii) that under §471 there was an omission to set out the allegation that the accused intended to deceive or injure some person.

Hamine v. Gunesekera (1916) 3 *C.W.R.* 42.—A charge of criminal trespass where the intention of the accused is not set out, is defective and would entitle the accused to claim an acquittal or a new trial according to the circumstances. See *Fonseka v. Sardial* (1916) 3 *C.W.R.* 292, and *Appu v. Gagrias* (1923) 1 *T.L.R.* 181.

R. v. Unnanse (1916) 3 *C.W.R.* 102.—"§168 of the . . . Code provides that the charge shall contain such particulars of the time and place of the alleged offence as are reasonably sufficient to give the accused notice of the matter with which he is charged. It is obvious that, as

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§167-170 regards the time, the charge framed in this case does not comply with the provisions of §168 . . ." The material words in the charge were "in or about the years 1908 to 1913, you did unlawfully fell and remove Crown timber . . ."

Duraya v. Appuhamy (1920) 21 *N.L.R.* 413, 7 *C.W.R.* 170 and see *R. v. Fernando* (1919) 6 *C.W.R.* 296, *Miskin v. Babun Appu* (1920) 21 *N.L.R.* 492, *Abeyasuriya v. Jayasekera* (1921) 22 *N.L.R.* 380.—Charge for selling rice above the controlled rate.—Charge held to be irregular as it did not give sufficient particulars.

Rambukpotta v. Menika (1893) 2 *S.C.R.* 73.—A charge under §219 or §220 of the Penal Code must disclose the nature of the offence for which the person escaping or rescued was taken into custody.

Nell v. Muttu (1897) 2 *N.L.R.* 321.—In a charge under §287 of the Penal Code for using obscene language in or near a public place to the annoyance of others, the words complained of must be set out. No prejudice can be caused to the accused by such a defect, if the evidence discloses the nature of such words. See *Ratnayake v. Deonis Appu* (1916) 2 *C.W.R.* 21 and *Fernando v. Fernando* (1897) 2 *N.L.R.* 321.

Batuvantudawa v. Karunaratne (1922) 4 *C.L.Rec.* 64.—On a charge of insult under §484 Penal Code the charge omitted to set out the abusive words or to allege that the insult was likely to give such provocation as would lead to a breach of the peace. *Held*, that the omission was immaterial unless it occasioned a failure of justice. 528 *P.C. Kalutara* 55629 (*S.C.M.* July 30, 1920) not followed. *R. v. Gunesekera* approved.

Appu v. Gagrias (1923) 1 *T.L.R.* 181.—Following *Hamine v. Gunesekere* (*supra*).—In a charge of criminal trespass, the omission to set out the intention of the accused is a fatal irregularity.

Gunaratne v. Soysa (1928) 10 *C.L.Rec.* 1; 6 *T.L.R.* 71; 30 *N.L.R.* 241.—Where certain persons were charged with being members of an unlawful assembly, the common object of which was to commit an offence, the offence not being specified, *held*, that the conviction was bad.

R. v. Alfred (1929) 30 *N.L.R.* 454; 6 *T.L.R.* 114.—In a charge under §287 of the Penal Code, the actual words alleged to have been used should be stated.

Horan v. Silva (1930) 7 *T.L.R.* 136.—Charge under the Motor Car Ordinance 1907, under Rule 26(1) of Schedule 4—Using offensive and quarrelsome language towards passengers. Omission to set out the precise language used in the charge is not fatal to a conviction where no prejudice was caused to accused.

Rajapakse v. Silva (1931) 8 *T.L.R.* 137.—Vague charge.

R. v. Godamune (1931) 32 *N.L.R.* 361.—On a charge of criminal breach of trust is it necessary to designate the owner of the property misappropriated? See *Barber v. Abdulla* (1920) 7 *C.W.R.* 144 and Ordinance No. 12 of 1884, §2.

R. v. Fakirappa 15 *Bom.* 491.—It is not right to charge an accused generally under §321 of the Penal Code, but the various acts should be charged specifically, giving sufficient particulars of time, place, person and circumstances, as would give the accused notice of the matters with which he is charged.

R. v. Tribhuvandas 33 *Bom.* 77.—In the case of offences of sedition (§120 P.C.), where the case for the Crown is that the accused published a seditious article in a newspaper, it is unnecessary to specify in the

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charge particular passages when it is alleged that the article as a whole brings the accused within the terms of §120. *Held further*, that where a charge in fact gives an accused notice of the matter of the accusation against him, §171 would cure any informality in the charge. See also *R. v. Chidambaram* 32 *Mad.* 3; *R. v. Mylapore* 32 *Mad.* 384. §167-170

R. v. Behari 11 *Cal.* 106.—An accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him, more especially when it is sought to implicate him for acts not committed by himself, but by others with whom it is alleged he was in company. Thus, where in a charge of being a member of an unlawful assembly the charge stated that the common object of the assembly was "to resist the theft of crops by violence." *Held*, that the charge, in order to disclose an offence, should have alleged that the common object was "unlawfully to resist by violence the theft of crops" or better still "to defend certain immovable property, to wit, growing crops, against the offence of theft, and in such defence to inflict more harm than was necessary for the purpose of such defence."

R. v. Basiriddi 21 *Cal.* 827.—Where the common object of an unlawful assembly was not stated in the charge, but the evidence disclosed what it was, *held*, that this was not a case in which the Court of Appeal should interfere.

R. v. Kudrutullah 39 *Cal.* 781.—*Held*, that in charges under §144 of the Penal Code it is desirable to set out in the charge what the common object was, but a failure to do so would not vitiate a conviction. On the other hand, where a charge under §146 of the Penal Code is made, it is obligatory that the common object should be stated. In this case a conviction was set aside. See also *R. v. Sabir* 22 *Cal.* 276.

R. v. Udit Singh 25 *W.R.* 46.—In charges of perjury (§190 P.C.) it is wrong to enter the whole of the accused's depositions in the charge.

R. v. Cassidy 4 *Bom. H.C.R.* 17.—Unnecessary allegations in a charge may be regarded as mere surplusage.

R. v. Kellie 17 *Alla.* 153.—"It is enough if the accused person has sufficient notice of the accusation he has to meet."

R. v. Gadlu (1898) *Alla. W.N.* 70.—"The charge simply alleges that the appellant was caught at a certain place with a stolen she-buffalo belonging to the complainant, and goes on to aver that the appellant committed the offence of retaining stolen property. No such offence as that, if it be an offence, which I doubt, is punishable under §394 (P.C.). The charge did not aver that the appellant dishonestly received or retained stolen property knowing or having reason to believe that the same had been stolen. It follows, therefore, that the appellant was not charged with the commission of any offence known to the law and the conviction cannot stand . . ." *per* Burkitt, J.

Balmakand v. Ghansamaram 22 *Cal.* 391.—Charge of criminal trespass. Defence of accused a total denial of the entry. No intention specified in the charge. *Held*, that no prejudice was caused to the accused by this informality. *Held further*, that in charges under §§442, 443 Penal Code any convictions obtained under §442 would not be vitiated for want of specification of the accused's intention in the charge, provided it is made to appear that the intention must have been one or other of those specified in §427, but a conviction under §443 cannot be sustained in the absence of such specification.

R. v. Abaji 15 *Bom.* 189.—Where there are several parts to a section, the charge should be framed in terms of the part applicable.

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Bishwanath v. Keshab 30 *Cal.* 402.—In a case of criminal libel, the charge against the accused stated that "defamation was committed on or about the 12th day of April and afterwards." *Held*, that this was not a proper charge, in that it did not set out the particular occasions so as to give the accused an opportunity of defending himself.

R. v. Moti Lal 26 *Cal.* 560.—*Held*, that §168(2) of the Criminal Procedure Code does not apply to offences of falsification of accounts (§466A P.C.). Hence a charge under §466A, which alleged that X. "wilfully and with intent to defraud between June, 1894, and October, 1896 (inclusive), falsified certain accounts and registers" it was held that the charge was irregular if not absolutely illegal. (*N.B.*—§168(2) *was added to this Code by* §7 *Ordinance No.* 31 *of* 1919, *the alteration had been made in the Indian Code in* 1898).

R. v. Raja Khan 1 *Alla. L.J.* 599.—*Held*, that §168(2) does not apply to offences of cheating.

Sufficient to specify the gross sum.—There are many Indian cases on this point—in particular see *R. v. Kellie* 17 *Alla.* 153, *R. v. Ramachandra* 19 *Bom.* 749, *Buddhu v. Lal* 18 *Alla.* 116, *R. v. Pursotam* 24 *Cal.* 193. In all the foregoing cases it is essential that the date on which the decision was pronounced should be considered. The following cases were decided under the law as amended :—

R. v. Gulzari 24 *Alla.* 254.—§168(2) applies even where the particular items are known, and even though they amount to more than three in number. "It has been argued . . . that because it was in the power, or may have been in the power of the prosecution, to supply further particulars, they ought to have done so, and are not entitled to the benefit of the latter part of the section (*i.e.* §168(2)). I find, however, nothing in the Criminal Procedure Code to warrant such an argument . . ." See also *Samiruddin v. Nibaram* 31 *Cal.* 928, *R. v. Ishtiag* 27 *Alla.* 69.

R. v. Datto 30 *Bom.* 49.—"§222 (*local*—§168) clearly admits of the trial of any number of breaches of trust committed within the year as amounting to one offence. §222 does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying details. It dispenses with the necessity of amplification ; it does not prohibit enumeration of the particular items in the charge . . ."

R. v. Narain 32 *Cal.* 1085.—§§168(2) and 179 will cover an indictment which charges one offence under §392 Penal Code, while specifying three separate sums received from three separate people within one year.

R. v. Thomas 29 *Mad.* 558.—"We cannot accede to the argument . . . that §168(2) is only intended to apply to cases where there is a general deficiency in an account, and where the prosecution is unable to specify the particular items of the deficiency . . ."

R. v. Visvanathan 30 *Mad.* 328.—See §179 para. 10 *post.*—" . . . It is true that §168(2) provides for a charge being framed in respect of the gross sum misappropriated within twelve months from first to last, and enacts that a charge so framed shall be deemed to be a charge of one offence within the meaning of §179, but it does not provide that the acts so charged shall be deemed to be one transaction within the meaning of §180(1) . . ."

R. v. Kashinath 12 *Bom. H.C.R.* 226.—"§179 provides in other words where there have been defalcations in respect of different items in the course of twelve months, then the Court can try a man in respect

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of three offences by selecting different items, combining these items into one lump sum, and making the selection so as to get at three sums, the appropriation of each constituting an offence by itself. Then §168 comes in which engrafts another exception upon the rule, but it is not an exception of the same kind as §179. It is an exception rather to another general rule, *viz.*, that at a trial for an offence certain particulars must be given in the charge. §168(2) modifies the rule as to charges of criminal breaches of trust, etc., but does not restrict in any way the scope and object of §179 . . ." *per* Chandarvarkar, J. Thus, if an accused committed 20 acts of criminal breach of trust as to sums A1 – A20 within the space of twelve months, then the sums A1 – A5 may be added together and the total charged as one offence by virtue of §168(2). Similarly, sums A6 – A15 may be added and charged together as one offence, and sums A16 – A20 may be dealt with in the same way. By reason of the rule in §179 these three offences can be charged together in one charge, or the aggregate amounts of sums A1 – A20 may be added together into one or even to form two offences. The fact that the prosecution chose to charge accused first with regard to A1 – A5 would not be a bar to a subsequent trial in respect of offences connected with A6 – A20, nor would the fact that all the sums could have been charged as one offence affect the question. See also *R. v. Ibrahim* 33 *Alla.* 36 where the scope of §168(2) was fully discussed.

R. v. Girwar 16 *C.W.N.* 600.—§168(2) applies only to the case of a single accused, and not to a joint trial, nor does §184 justify such a joint trial, where it is not found who is the principal and who the abettor. See §178 *post*, and *c.f. R. v. Budhai* §179 para. 10 *post.*

R. v. Fernando 2 *Leader* 81.—In a charge of misappropriation or criminal breach of trust, it is not necessary to state the individual items or exact dates; it is sufficient if the gross sum and dates between which the offence is alleged to have been committed are specified. *N.B.*—These cases were decided before §168(2) was added to the Code. See *R. v. Fernando* §178 para. 10 *post.*

Buchanan v. Conrad (1892) 1 *S.C.R.* 338.—On a charge against a servant for criminal breach of trust, it is not sufficient at the trial to prove a general deficiency in the account. Some specific sum must be proved to have been misappropriated by the accused. See §168(2) Criminal Procedure Code and §1 Ordinance No. 22 of 1889.

R. v. Pulle (1909) 12 *N.L.R.* 63 ; 2 *Leader* 120.—In a charge of criminal breach of trust it is not enough for the prosecution merely to prove that the accused has not accounted for all the money that he has received and for which he was bound to account; the prosecution must prove circumstances from which dishonesty can be inferred. Where the sum in respect of which a charge of misappropriation is laid is made up of several small sums received at different times, it is not necessary to make a separate charge in respect of each of the smaller sums. See *Koch v. Nicholas Pulle* (1898) 3 *N.L.R.* 198.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 261 ; 5 *C.W.R.* 287.—"If a person collects an aggregate sum from various sources under a trust to pay the total sum so collected to a particular person, or for a particular object, this total, or such proportion of it as he may succeed in collecting, when so collected, is a trust fund in his hands, and, if this sum or any part of it is dishonestly appropriated to the use of the person collecting it, it is competent to the Crown to prefer a single charge in respect of the amount so appropriated . . ." *R. v. Balls* (1871) *L.R.*1. *C.C.R.* 328 approved.

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§167-170

R. v. Ragal (1901) 5 *N.L.R.* 314.—The object of Ordinance No. 22 of 1889 was to facilitate proof of dishonesty by presuming a public servant to be dishonest, who, on being required to account for money shown by his accounts to be due from him, could not, within a reasonable time, pay or produce it, or account for the shortage.

N.B.—Reference should also be made to the cases cited in §171 para. 6 *post*.

Effect of errors.

171. No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.

Illustrations.

(*a*) A is charged under Section 237 of the Penal Code with "having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(*b*) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(*c*) A is charged with cheating B and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing to which of them the charge referred and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was in this case material.

Offence.—See §3 *ante*.

Particulars required to be stated in the charge.—See §§167 - 170 *ante*.

Effect of errors or omissions in the charge.—See §§177, 425 *post*.

Charge.—See Introduction to *Chapter XVII. ante*.

1. §171 closely follows §225 of the Indian Code except in the following respects :—(i) the words "*in fact*" are added after the words "unless the accused was" and before the words "misled by such error or omission," and by the addition of the following words at the end of the section : "*and it has occasioned a failure of justice,*" and (ii) the local section omits *illustrations* (*d*) and (*e*) which appear in §225 of the Indian Code.

§171 is very similar to §200 of the old Code of 1883.

2. **Scope of §171.**—

See Introduction to *Chapter XVII.* para. 1(*e*) *ante*, and §177 para. 2 *post*, and §§347 - 348 para. 6 *post*.

§171 should be considered together with §§177 and 425 *post* in so far as errors and omissions in charges and indictments are concerned. §171 refers to errors and omissions in framing a charge, but does not

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specifically deal with the case of an entire absence of a charge,* or the omission to frame any charge at all. Moreover, §171 refers to all stages of the case during trial. (If an error is discovered after trial—see §177(1)). If an error or omission is discovered before judgment, the charge may be amended as provided for by §§172 – 176 *post*. An omission to state any of the matters required to be stated by §167 may be added to the charge at any time before sentence.—§167(8). §171

§177 appears to overlap the provisions of §425. The former section draws attention to the powers of the Supreme Court in its appellate or revisional jurisdiction when dealing with errors in charges. If the accused has been misled by the error, the Court will direct a new trial upon such an amended charge as the Supreme Court will indicate—§177(1); on the other hand, if the Court thinks that the facts of the case are such that no valid charge can be sustained against the accused, the conviction will be quashed.—§177(2).

§425 provides that subject to the provisions "*hereinbefore contained*" no judgment passed by a Court of *competent jurisdiction* "shall be reversed or altered on *appeal* or *revision*" on account of any "*error*, omission or *irregularity* in the . . . charge . . . unless such error, omission, irregularity, or want has occasioned a failure of justice." Hence, §425 must be regarded as being supplementary to the provisions of §177, and in considering §171 both these sections should be considered along with it. See §39 Courts Ordinance, 1889.

The additional words to be found in §225 of the Indian Code do not appear in anyway to affect the force of that section, had those words been omitted. A reference to *illustration* (*a*) of §171 will show that unless the accused was "*in fact*" misled, an error cannot be regarded as being material.

See also §§167 – 170 paras. 2, 3, 4, 10 *ante*.

Analysis of §§171, 177, 425.—(*a*) No error in stating either (i) the offence—§167; or (ii) the particulars required to be stated in the charge —§§168 – 170; and (*b*) no omission to state either (i) the offence—§167; or (ii) the particulars—§§168 – 170—shall be regarded at any stage of the case as material "unless the accused was misled" by the error or omission.—§171. If the Supreme Court in its appellate or revisional jurisdiction is of opinion that a convicted accused was in fact misled in his defence by an error in the indictment (§177 *says nothing about an omission*, but apparently this too would be included), it may do one of two things :—(*a*) direct a new trial upon a fresh charge framed as directed by the Court, or (*b*) quash the conviction, if it thinks that the facts do not show that a legally valid charge could be sustained against the accused—§177; but the Court will not interfere with the judgment of any competent Court, on the ground that the charge contains errors, omissions, or irregularities, unless it is shown that a failure of justice has been occasioned by such defect.—§425. See §39 Courts Ordinance, 1889. The case-law cited in paras. 3 – 4 and 6 *infra*, and in §§167 – 170 para. 10 *ante* clearly show the principles which guide the Supreme Court in coming to a decision as to whether in any given case the accused was misled, or whether a failure of justice has been caused. Just as §425 *post* must be read and construed subject to the provisions "hereinbefore contained," so must §171 be read and construed in the light of the provisions of §§167 – 170.—*Welakka v. Appuhamy* para. 6 *infra*.

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* *Gunawardene v. Lebbe* (1911) 15 *N.L.R.* 183 ; *R. v. James Appu* (1920) 22 *N.L.R.* 206; 8 *C.W.R.* 176.

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§171 3. **Errors and omissions which are regarded as being material.—**

(*a*) **The failure to specify the necessary ingredients making up the offence charged.**—*Welakka v. Appuhamy* §§167 – 170 para. 10 and para. 6 *infra* (and see *R. v. Perera* para. 6 *infra*); *R. v. Kanjamanadan, R. v. Pillai, R. v. Kalimuttu, Sandanam v. Appuhamy, Banda v. Vander Poorten, Silva v. Simon, Madawela v. Banda, Rambukpotta v. Menika, R. v. Abaji* §§167 – 170 para. 10 *ante.*

(*b*) **The charge not disclosing an offence known to law.**—*Welakka v. Appuhamy, R. v. Pillai, R. v. Mohideen, Perera v. Ranhamy, R. v. Gadlu.*—§§167 – 170 para. 10 *ante.*

(*c*) **In charges of theft, and similar offences, failing to specify the articles stolen, their ownership, and value.**—*Laisahamy v. Sahanda* (see *R. v. Konnehamy*), *Daises v. Ferdinando.*—§§167 – 170 para. 10 *ante.*

(*d*) **Failing to state the *mens rea* of the accused—**

(i) **In charges of unlawful assembly, rioting, etc., failing to set out the common object.**—*R. v. Sabapathy,* 332 *P.C. Tangalle* 13461, but see *Wijeysinghe v. Carolis, R. v. Behari, R. v. Kudrutullah.*—§§167 – 170 para. 10 *ante* ; *R. v. Sabir* para. 6 *infra.*

(ii) **Failing to set out the intention, knowledge, etc., of the accused in crimes where *mens rea* is an ingredient.**—*Cassim v. Mohamadu, R. v. Ukkuwa, Perera v. Ranhamy, Hamine v. Gunesekera, Silva v. Simon, Banda v. Vander Poorten, Balmakand v. Ghansaram.*—§§167 – 170 para. 10 *ante*; *Hami v. Francis* para. 6 *infra*; *Modder v. Senathamby.*—§§172 – 176 para. 6 *post.*

(*e*) **Where the offence is one regarding words spoken or written by the accused, (*e.g.*, abuse, defamation, sedition, etc.), the failure to specify the words complained of.**—*Cassim v. Mohamadu, Nell v. Muttu, R. v. Tribhuvandas, R. v. Udit Singh*—§§167 – 170 para. 10 *ante*; *Ratnaike v. Deonis, Fernando v. Fernando, R. v. Chiddambaram, R. v. Mylapore* para. 6 *infra*; *Batuwantudawa v. Karunaratne.* The words should be set out with proper innuendos so as to make the meaning attached to them by the prosecution quite plain.—*R. v. Appuwa.*—§§167 – 170 para. 10 *ante.*

(*f*) **Unless justified under §§182 – 3, the conviction of an accused for an offence other than the one for which he was charged in one and the same trial.**—*Silva v. Appu.*—§§167 – 170 para. 10 *ante.*

(*g*) **Not specifying the particulars of the offence sufficiently.**—*R. v. Unanse, Duraya v. Appuhamy, R. v. Fakirappa, Bishwanath v. Keshab.*—§§167 – 170 para. 10 *ante.*

(*h*) **Misjoinders of, (a) accused.**—*Wijeysekera v. Ratnayaka,* 486 *P.C. Nuwara Eliya* 7199, *R. v. Arlis* para. 6 *infra.* **(b) charges.**—*Appuhamy v. Appuhamy, Keerala v. Appuhamy, R. v. Arlis* para. 6 *infra.*

(*i*) **The consolidation of several trials or indictments.**—*Velaideen v. Zoysa, R. v. Silva, R. v. Cornelis* para. 6 *infra.*

(*j*) **The want of sanction to prosecute.**—*Sourjah v. Pannelokka, R. v. Meera Saibo, R. v. Fernando* para. 6 *infra.*

(*k*) **The total failure to frame a charge.**—*Gunewardene v. Lebbe, R. v. James Appu*—§§167 – 170 para. 10 *ante*; *Rasiah v. Sittambaram-pillai, Perera v. Cooray, Mendis v. Fernando* para. 6 *infra.*

(*l*) **The charge being embarrassing.**—1075—6 *P.C. Panadura* 51001 para. 6 *infra.*

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(*m*) **The failure to inform accused that the charge against him has been amended.**—332 *P.C. Trincomalee* 571 para. 6 *infra.* §171

(*n*) **The failure to state particulars regarding the offence charged—proof that accused was not misled.**—*R. v. Amerasekera* para. 6 *infra.*

4. **Instances where convictions have been upheld, in spite of errors and omissions in the charge.**—

R. v. Konnehamy.—Charge of theft.—Name of owner of articles stolen not stated. See *Laisahamy v. Sahanda* and *Daises v. Ferdinando* §§167 – 170 para. 10 *ante.*

Wijeysinghe v. Carolis.—Charge of rioting.—Failure to state the common object. See *R. v. Basiriddi, R. v. Kudrutullah* §§167 – 170 para. 10 *ante.*

Hami v. Appuhamy.—Charge of house-breaking.—Intention referred to in §427 Penal Code not stated. See §§167 – 170 para. 10 *ante.*

R. v. Appuwa.—Charge of perjury.—Proper innuendos not stated §§167 – 170 para. 10 *ante.*

R. v. Gunasekera.—Mere omissions in the charge are not to be regarded as material. See *R. v. James Appu.*—§§167 – 170 para. 10 *ante.*

R. v. Cassidy.—Unnecessary or superfluous allegations may be treated as surplusage.—§§167 – 170 para. 10 *ante.*

Hamine v. Gunesekera.—If no prejudice caused, the failure to state the *mens rea* of the accused is not material. See *Balmakand v. Ghansaram,* §§167 – 170 para. 10 *ante* and *Hami v. Francis* para. 6 *infra.*

Nell v. Muttu.—In charges for using obscene words, and kindred offences, the failure to state the words complained of in the charge is not material, if the evidence makes good the omission.—*Fernando v. de Vas, Horan v. Silva.* See *R. v. Tribhuvandas* §§167 – 170 para. 10 *ante, R. v. Mylapore, Batuvantudawa v. Karunaratne* para. 6 *infra.*

R. v. Tribhuvandas.—Where in spite of an error or omission in the charge, the accused has full notice.—See *Batuvantudawa v. Karunaratne, R. v. Kellie,* see §§167 – 170 para. 10 *ante.*

R. v. Meera Saibo.—Failure to obtain sanction to prosecute.—See 408 *P.C. Kandy* 1641, *R. v. Fernando* para. 6 *infra.*

Sunderam v. Vedappen.—Failure to specify the date of the offence. —para. 6 *infra.*

Wijeysekera v. Ratnayaka.—Misjoinder of accused, where no prejudice is caused thereby.—See *Keerala v. Appuhamy* para. 6 *infra.*

Abeykoon v. Philip.—Consolidation of trials where no prejudice is caused thereby—para. 6 *infra.*

R. v. Perera.—Charge not stating ingredients of the offence, but accused suffering no prejudice thereby—para. 6 *infra.* See *Welakka v. Appuhamy.*

332 *P.C. Trincomalee* 571.—Failure to inform accused of amended charge, the accused suffering no prejudice thereby—para. 6 *infra.* See also §167 *illustrations* (*a*),(*b*),(*c*); §169 *illustrations* (*a*),(*e*), and §171.

5. **Incorrectly.**—§171 *illustration* (*b*).—See *Welakka v. Appuhamy* para. 6 *infra.* The word means "incorrectly as to the facts" and not "incorrectly as to the law." Note, however, that this opinion was expressed with doubt.

5A. **At any stage of the case.**—See para. 2 *supra* and §177 para. 2 *post.*

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6. **Case law.**—See §167 – 170 para. 10 *ante*, and §§177, 425 *post*.

Welakka v. Appuhamy (1887) 8 *S.C.C.* 56.—See §§167 – 170 para. 10 where the facts are set out. *Held*, " It was urged in support of the conviction that the charge described the offence by the specific name which the law gives it, and by §200 (of the old Code of 1883—now §171) no error in stating either the particulars required to be stated in the charge, or the omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission ; that the defendant in the present case had made his defence and called witnesses, he, therefore, could not have been misled by anything which appeared in the charge. In support of this contention the illustrations to §200 were referred to, in one of which it is said that in a charge of ' having been in possession of counterfeit coin,' the omission of the word ' fraudulently ' would not be material, unless the accused was misled ; and in another—' A is charged with cheating B, and the manner in which he cheated B is not set out, or is set out incorrectly. A defends himself, &c. The Court may infer from this, that the omission, &c., is not material.' I am free to admit that the words of this section of the Code, with its illustrations, are very comprehensive, and unless read with other sections of the Code* would not only support the complainant's contention, but go the length of rendering a charge altogether useless, and an encumbrance to judicial or magisterial proceedings. It would only be necessary that the accused's attention should be directed to any transaction of which the complainant complained, to render good a conviction of any offence which the facts disclosed. It is manifest that this would give a latitude to criminal charges which the Procedure Code itself could scarcely have contemplated . . . (The learned Judge then proceeded to comment on §§196, 197 of the old Code—modern §§167, 168) . . . Reading all these sections together it is manifest that a charge which simply stated that ' A did cheat B ' would not be sufficient, the illustration to §198 (modern §169) particularly requires that it must set out the manner in which A cheated B. Then, if the manner is set out, as in the present case, and discloses that no cheating took place, is such defect cured by the illustration to §200 . . . ? I think not, but I have arrived at the conclusion without much consideration. I think that the word ' incorrectly ' means incorrectly as to the fact, but not as to the law, *i.e.*, that the manner of cheating set out in the charge may be different from the manner of cheating proved ; not that the manner of cheating set out may not constitute the offence ' to cheat,' or, in other words, a charge would be good, although the manner in which the cheating was effected, as stated in the charge, varied from the manner proved, if nevertheless it constituted the offence ' to cheat;' but a charge would be bad and insufficient to sustain a conviction which stated a manner of cheating which did not in law constitute the offence ' to cheat,' although a sufficient manner of cheating had been proved . . ." *per* Burnside, C. J. See *R. v. Perera infra*.

408 *P.C. Kandy* 1641 (1905) *Lem.* 39.—Offence needing sanction to prosecute. Accused charged without such sanction having been obtained. This is not a fatal irregularity, where it has not occasioned a failure of justice.

Velaiden v. Zoysa (1910) 14 *N.L.R.* 140.—Two opposing factions in a riot, or two persons, who commit perjury at one judicial trial,

* Note the words " subject to the provisions hereinbefore contained " in §425 *post*.

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should not be tried jointly, and any irregularity in this respect is incurable, and invalidates the proceedings. But see—*Hewavitarne v. Appuhamy* (1928) 30 *N.L.R.* 33 (*Full Court*), *Weerasinghe v. Ismail* (1932) 33 *N.L.R.* 245 (*Full Court*), *Wickremasinghe v. Don Lewis* (1915) 1 *C.W.R.* 192, *Gooneratne v. Sinno* (1916) 2 *C.W.R.* 20, *Gooneratne v. Gooneratne* (1916) 2 *C.W.R.* 25, *Keegal v. Mohideen* (1918) 5 *C.W.R.* 162, *Samath v. Silva* (1917) 4 *C.W.R.* 238, *R. v. Dineshamy* (1919) 21 *N.L.R.* 127, 6 *C.W.R.* 277, *R. v. Ramen Chetty* (1909) 1 *Curr. L.R.* 64 and *R. v. Mendis* §178 para. 10 *post.*

Ratnaike v. Deonis (1916) 2 *C.W.R.* 21.—In a charge under §287 Penal Code for using obscene language, the failure to set out in the charge the words alleged to have been uttered by the accused is fatal to the conviction, as the proceedings themselves did not disclose in the evidence or elsewhere as to what the words were. Set aside and sent back. *Nell v. Muttu, Fernando v. Fernando* considered.

Sourjah v. Pannelokka (1916) 2 *C.W.R.* 133.—Charge under §69 of the Police Ordinance No. 16 of 1865. No certificate from Attorney-General as required by §98. Conviction set aside.—*Ossen v. Amarasuriya* (1899) *Koch* 31 approved.

Wijeysinghe v. Carolis.—See §167 – 170 para. 10 *ante.*

Sandanam v. Appuhamy.—See §167 – 170 para. 10 *ante.*

R. v. Meera Saibo (1916) 3 *C.W.R.* 149.—Offence needing sanction to prosecute—charge framed against accused without such sanction. *Held*, that irregularity can be cured, unless it has occasioned a failure of justice.

Sunderam v. Vedappen (1916) 3 *C.W.R.* 238.—*Qu.*—Would the omission to state the date of the offence in the charge be held to be a fatal irregularity ? Submitted that it would not, unless the accused had been misled or prejudiced thereby.

R. v. James Appu.—See §167 – 170 para. 10 *ante*, where the questions which arise out of a failure to frame a charge are fully discussed.

Daises v. Ferdinando.—See §§167 – 170 para. 10 *ante.*

Hamine v. Gunesekera.—See §§167 – 170 para. 10 *ante.*

Fonseka v. Sardial.—See §§167 – 170 para. 10 under *R. v. Ukkuwa.*

Appuhamy v. Appuhamy (1917) 4 *C.W.R.* 288.—Misjoinder of charges—the irregularity cannot be cured by the acquittal of the accused on one of the charges. Accused acquitted on appeal, and no further proceedings ordered.

Wijeysekera v. Ratnayaka (1919) 6 *C.W.R.* 281.—Misjoinder of accused—the consent of the accused to such joinder cannot validate joinder—but if no prejudice has been caused to the accused, Supreme Court will not interfere with a conviction.

Keerala v. Appuhamy (1919) 6 *C.W.R.* 338.—Misjoinder of charges—the convictions will be set aside if the accused has been prejudiced by the misjoinder. *C.f. William v. Dinorisa* (1919) 6 *C.W.R.* 365, and *Naide v. Packeer* (1920) 22 *N.L.R.* 284, 8 *C.W.R.* 173.

R. v. Silva (1920) 7 *C.W.R.* 180.—The consolidated trials of two indictments is not merely irregular but illegal. New trial ordered. See *R. v. Mendis* (1913) 16 *N.L.R.* 252, *R. v. Doresamy* (1913) 1 *Crim. App. R.* 25, 17 *N.L.R.* 245.

R. v. Doresamy (1914) 17 *N.L.R.* 245.—Where the Supreme Court quashes a conviction *ab initio* and sends the case back for a new trial, should a fresh charge be framed ? The proceedings reported in 1 *Crim. App. R.* 25 were the proceedings when the Supreme Court quashed the conviction in the first instance.

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§171 *R. v. Cornelis* (1920) 7 *C.W.R.* 168.—May a Magistrate consolidate and try two Police Court cases ? *Held*, in the negative. New trial ordered. See *Anasinghe v. Konnehamy* (1919) 7 *C.W.R.* 103, but if the accused has suffered no prejudice thereby, the Supreme Court will not interfere.—*Abeykoon v. Philip* (1909) 12 *N.L.R.* 145. See also *Gray v. Perera* (1911) 5 *S.C.D.* 59.

Hami v. Francis (1920) 7 *C.W.R.* 184.—Charge of criminal trespass —intention of accused not specified in charge—conviction not avoided, if accused not prejudiced by the irregularity.

R. v. Pillai.—See §§167 – 170 para. 10 *ante.*

Rasiah v. Sittambarampillai (1920) 8 *C.W.R.* 116.—The failure to frame a charge against the accused, vitiates his conviction.

R. v. Mohideen.—See §§167 – 170 para. 10 *ante.*

R. v. Fernando.—See §§167 – 170 para. 10 *ante.*

Miskin v. Babun.—See §§167 – 170 para. 10 *ante.*

Abeyasuriya v. Jayasekera.—See §§167 – 170 para. 10 *ante.*

Gunawardene v. Lebbe.—See §§167 – 170 para. 10 *ante.*

Fernando v. Fernando (1911) 6 *S.C.D.* 33.—In a charge under §287 of the Penal Code for using obscene language, the failure to set out the words alleged to have been used by the accused, is one which cannot be cured. See *Haniffa v. Mala* (1908) 1 *S.C.D.* 35, *Banda v. Gregoris* (1917) 4 *C.W.R.* 299, *Mohamed v. Bastian* (1920) 2 *C.L.Rec.* 24.

Perera v. Cooray (1912) 7 *S.C.D.* 20.—Failure to frame a charge—fatal to a conviction—new trial ordered. See *Banda v. Pabilis* (1912) 7 *S.C.D.* 38, *Silva v. Kandu* (1912) 7 *S.C.D.* 19.

486 *P.C. Nuwara Eliya* 7199 (1913) 5 *B.N.C.* 58.—Misjoinder of accused—fatal to a conviction—new trial ordered.

R. v. Perera (1914) 5 *B.N.C.* 91.—Indictment not disclosing the ingredients of the offence with accuracy.—No prejudice caused to the accused, as he did not object to the indictment, and the evidence made good the missing elements. *C.f. Welakka v. Appuhamy.*

R. v. Gunesekera.—See §§167 – 170 para. 10 *ante.*

R. v. Ambalavanar.—See §§167 – 170 para. 10, noted under *R. v. Sabapathy.*

R. v. Fernando (1909) 1 *Curr. L.R.* 129.—Charge for offence needing sanction to prosecute, without such sanction.—No prejudice caused. —Conviction upheld.

Mendis v. Fernando (1900) 4 *N.L.R.* 104.—No charge framed—conviction avoided—new trial ordered.

R. v. Sabapathy.—See §§167 – 170 para. 10 *ante.*

R. v. Kanjamanadan.—See §§167 – 170 para. 10 *ante.*

Nell v. Muttu.—See §§167 – 170 para. 10 *ante.*

Silva v. Appu (1895) 1 *Br.* 150.—Charge framed for causing criminal force—conviction under §180 for giving false information to a public servant—no charge framed for latter offence—nor sanction obtained. *Held*, conviction avoided. See §§172 – 176 para. 6 *post.*

1075—6 *P.C. Panadura* 51001 (*S.C.M.* November 24, 1915).—The accused was convicted under §450 Penal Code upon a charge which read as follows : "That you were found in an enclosure of the complainant for an unlawful purpose, and did fail to give a satisfactory account of yourself, being found with a gun and running away when seen by complainant," *held*, that this charge was irregular and embarrassing and that the conviction was thereby avoided.

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R. v. Arlis (1920) 2 *C.L.Rec.* 189.—Where W, X, Y, and Z were jointly charged (i) with house-breaking, and theft of goods from A, and (ii) with house-breaking and theft from B, *held*, that §§179 and 180 applied severally or in combination did not justify the joinder, and that the conviction was avoided. §171

332 *P.C. Trincomalee* 571 (*S.C.M.* April 4, 1918).—Charge amended during trial (see §§172 *et seq. post*).—Accused not informed of the amendment—not irregular, if no prejudice caused.

R. v. Tribhuvandas.—See §§167 - 170 para. 10 *ante.*

R. v. Chiddambaram 32 *Mad.* 3.—In charges for uttering seditious speeches, the words complained of should be stated in the charge, but the defect may be curable.

R. v. Mylapore 32 *Mad.* 384.—The requirements of the law are satisfied if the charge gives such a description of the words used (in charges of sedition) as is reasonably sufficient to enable the accused to know the matter of the accusation against him, *i.e.*, if the charge gives substantially the words alleged to have been used, though not with absolute accuracy. "Even if the substance is wholly omitted, the defect will not vitiate a conviction, if no prejudice has been caused to the accused."

R. v. Sabir 22 *Cal.* 276.—In charges of unlawful assembly, where the charge sets out one common object, but the Judge in his charge to the jury suggests a different common object, and the verdict does not show which common object was found by them, *held*, that a conviction was avoided.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 269.—§171 commented upon.

Madawela v. Banda (1920) 8 *C.W.R.* 263.—See §§167 - 170 para. 10 *ante.*

Batuvantudawa v. Karunaratne (1922) 4 *C. L.Rec.* 64. On a charge of insult the omission to set out the words complained against or the allegation that the words were sufficiently provocative as to lead to a breach of the peace are immaterial unless a failure of justice has been caused thereby. *R. v. Gunasekera* approved, 528 *P.C. Kalutara* 55629 (*S.C.M.* July 30, 1920) not followed.

R. v. Amarasekera (1927) 29 *N.L.R.* 33.—Where in a trial before a District Court, the indictment was, before the conviction, altered with respect to the particulars of the offence with which the accused was charged—*held*, that the conviction was good, unless the accused was misled in his defence by the error in the particulars of the offence charged.

Banda v. Vander Poorten (1927) 9 *C.L.Rec.* 40.—Charge of criminal trespass. Intention with which alleged trespass was committed—not set out in charge. *Held*, that this was a fatal irregularity.

Fernando v. de Vas (1928) 9 *C.L.Rec.* 67.—On a charge under §484 of the Penal Code, where the charge did not set out the words complained of and no exception thereto was taken at the trial; *held*, that no objection could be taken in appeal unless serious prejudice had been thereby caused to the accused.

Horan v. Silva (1930) 7 *T.L.R.* 136.—Charge under Rule 26(1) Schedule 4 of the Motor Car Ordinance 1927—using offensive and quarrelsome language to passengers—failure to set out language used is not fatal to a conviction where no prejudice is caused.

***N.B.*—Reference should also be made to the cases cited in §§167-170 para. 10 *ante*.**

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Court may alter charge.

172. (1) Any Court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the Supreme Court or a District Court with assessors, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration shall be read and explained to the accused.

(3) The substitution of one charge for another in an indictment or the addition of a new charge to an indictment and in a Police Court the substitution of one charge for another shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

When trial may proceed on altered charge immediately.

173. If the alteration made under the last preceding section is such that proceeding immediately with the trial is not likely in the opinion of the Court to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may in its discretion after such alteration has been made proceed with the trial as if the altered indictment or charge had been the original indictment or charge.

When new trial may be directed or trial adjourned.

174. If the alteration made under Section 172 is such that proceeding immediately with the trial is likely in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

Stay of proceedings if prosecution of offence in altered charge requires previous sanction.

175. If the indictment or charge as altered under Section 172 alleges an offence for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained unless sanction has been already obtained for a prosecution on the same facts as those on which the altered indictment or charge is founded.

Recall of witnesses when charge altered.

176. Whenever an indictment or charge is altered by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon

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and examine with reference to such alteration any witness who may have been examined. §172-176

Court.—See §3 *ante.*

Indictment.—See *Form* 11 *Schedule III. post*, and see §§158(2), 161(4), 177, 186, 387, 391.

Charge.—See Introduction to *Chapter XVII. ante.*

Judgment.—See *Chapter XXIV. post.*

Supreme Court.—See §3 *ante.*

Trials before the Supreme Court.—See *Chapter XX. post.*

District Court.—See §3 *ante.*

Trials before a District Court.—See *Chapter XIX. post.*

Before the verdict of the Jury is returned.—See §§247 - 249 *post.*

Before the opinions of the assessors are expressed.—See §213 *post.*

Every alteration to be read and explained to the accused.—See §167(6) *ante*, and §§155, 158(2), 187, 204, 219.

Alteration of charge or indictment.—*C.f.* §167(8) *ante.*

Prejudice.—*C.f.* §§171, 177, 425.

Prosecutor.—See §§189(3), 194, 195, 197, 199, 201, 216(2), 392(2).

New trial.—*C.f.* §§177, 347, 357.

Adjournment of trial.—See §289 *post.*

Sanction to prosecute.—See §§147, 104 *ante.*

Recalling witnesses.—*C.f.* §156(4), *ante* and §138, 165 Evidence Ordinance.

Summoning of witnesses.—See *Chapter V. ante.*

1. §172 is very similar to §227 of the Indian Code, and §201 of the Code of 1883.

§173 is very similar to §228 of the Indian Code, and §202 of the Code of 1883.

§174 is very similar to §229 of the Indian Code, and §203 of the Code of 1883.

§175 is very similar to §230 of the Indian Code, and §204 of the Code of 1883.

§176 is very similar to §231 of the Indian Code, and §205 of the Code of 1883.

2. **Scope of §§172 - 176.**—See Introduction to *Chapter XVII.* paras. 2, 3 *ante*, §177 para. 2 *post.*

As to the method of altering an indictment after committal, but before trial owing to the discovery of fresh evidence, see §161 para. 2 *ante.*

See also §§167 - 170 paras. 3, 6, 7 *ante*, and §171 para. 2 *ante*, §§187, 193 *post.*

As to the amendment of charges and indictments by the Supreme Court after trial—See §§177, 347, 357 *post.*

§172 - 176 deal with the law regulating the amendment of charges and indictments by the Court of trial, and during trial when the charge is found to be defective and therefore likely to mislead the accused —see §171 (and §177 para. 2 *post*). The rule may be stated in the following terms : Any Court of trial (subject to the rules which regulate the drafting of charges—§§167 - 170 *ante*, and the joinder of accused and charges—§§178 - 184 *post*, and subject to the rules regarding sanction to prosecute—§§147, 104 *ante*, and §175), may alter any indictment

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or charge at any time during the trial, *i.e.*, in Police Court trials, and in District Court trials without assessors, before judgment is pronounced. —*R. v. Amerasekera*; in District Court trials with assessors, before the opinions of the assessors are expressed; and in trials before the Supreme Court, before the verdict of the jury is returned—§172(1). It is to be observed that §172(1) is silent as to cases tried before the Supreme Court without a jury, *e.g.*, trials for sedition—§440A(1) *post*. In such cases it is submitted that the charge may be amended at any time before the Court pronounces judgment, as in the case of trials in Police Courts and District Courts without assessors. The amendment, however, must be made at the earliest possible stage of the case, or prejudice may be caused to the accused.—*R. v. Mahavala*.

Moreover, if any Court of trial finds that any matter which §167 requires to be stated in the charge has been omitted, the Court may make good the omission at any time before *sentence is passed*.—§167(8).

§172(3) defines what is meant by an " alteration " in an indictment. An " alteration " includes both the substitution of a new charge as well as the addition of a new charge. The Indian Courts have further extended its meaning to include " the withdrawal " of a charge.—*R. v. Mahadeo* para. 6 *infra*.

Every alteration made in the charge or indictment " shall " be read and explained to the accused.—§172(2). The accused should be called upon to plead to the new charge.—*Pulle v. Perera*. See §167(6), and *c.f.* §§155, 158(2), 187, 204, 219.—*Daniel v. Romanis*, *Ingram v. Mudalihamy*, 332 *P.C. Trincomalee* 571, *R. v. Aro Appu*.

After the amendment has been made, it must be read and explained to the accused—§172(2); and the trial may proceed at once, as if the amendment had been contained in the charge or indictment as originally framed, provided the Court considers that neither the prosecution nor the defence will be prejudiced by the trial so proceeding—§173.—*R. v. Appuwa*. If, however, the Court thinks that the trial of the case immediately after the amendment would prejudice either side, it may postpone the case, or direct that a new trial should take place.—§174. See *R. v. Appuwa*, *c.f.* §289 *post*, and *R. v. Govind*, *R. v. Mathura*, *R. v. Wazir Jan*.

§172 only refers to amendments made during the course of a trial, *i.e.*, after the accused has pleaded to the charge, and before the judgment is pronounced, or the verdict of the jury, or the opinions of the assessors are given.—*R. v. Kanjamanadan*, *R. v. Sinnoappu*, and *c.f. Hami v. Appuhamy* para. 6 *infra*. Before the trial begins the Attorney-General may amend the indictment in cases where fresh evidence has been discovered after committal of the accused, but before trial.—§161 para. 2 *ante*. Moreover, it is always open to the prosecuting counsel to move that the indictment be amended before the plea of the accused has been taken. The power to amend a charge or indictment during trial is vested in the Court alone.—*R. v. Sinnoappu*. It may act either *ex mero motu*, or upon an application made for an amendment by either side. If an application for an amendment is made, it is the duty of the Court to consider the merits of the application at once. It is irregular for the Court to adjourn the matter.—*R. v. Vajiram*. As a rule an amendment should be allowed, if it would have the effect of convicting the guilty, or securing the acquittal of the innocent, but an application to amend should not be allowed if it would cause substantial injustice to the accused.—*R. v. Sinnoappu*.

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§§167 – 170 *ante* specified what a valid charge should contain, while §171 declared that errors and omissions should not be regarded as being material at any stage of the case unless it misled the accused. §§178 – 184 *post* lay down the rules as to what offenders and what charges can lawfully be joined in one and the same charge. All amendments of charges and indictments must conform to the rules there laid down. If, during the trial, the Court finds that any charge or indictment before it is irregular, in that it does not conform to those general rules, it may lawfully invoke the powers conferred by §172. If a charge does not contain any of the matters which §167 requires it to contain, §167(8) empowers the Court to make good the omission at any time before sentence is passed. This sub-section is peculiar to our law, and finds no counterpart in the Indian Code. **§172-176**

The law gives a Court the power of amending charges, in order to enable it to found a decision on a charge which contains an accusation which is known to the law. Therefore, if the charge as framed is defective, the Court may alter it before judgment is pronounced.—*R. v. Kanjamanadan, R. v. Kabur, Appa v. Subhana.* If the evidence led at the trial does not square with the charge as framed, the Court may amend the charge accordingly.—*Hami v. Appuhamy, R. v. Pillai.* It is to be observed that §§182, 183 *post* enable the Court to convict the accused without any amendment of the charge. The charge may be amended by the addition of a new charge, even though such charge was not brought to the notice of the accused during the non-summary proceedings.—*R. v. Sittambaram* and *c.f. R. v. Mahadeo.* §172 cannot be utilised to cure a charge which, from its inception, was not merely irregular, but illegal—as where it contained more than three offences not forming part of one transaction—*R. v. Mahavala*; nor may it be used with the object or effect of changing the whole nature of the proceedings, *e.g.*, where by the amendment a non-summary proceeding becomes summary—*Arnis v. Charles, Daniel v. Romanis*; but apparently, this does not apply to the converse case, *e.g.*, where, by the amendment, a summary case becomes a non-summary one.—*Cader v. Fernando.* See *R. v. Amith, R. v. Reazuddi, Ingram v. Mudalihamy, R. v. Wazir Jan,* as to what amendments have been considered to be unfair. The general rule which should guide a Judge in allowing or disallowing an application for an amendment is stated in *R. v. Sinnoappu.*

If the amendment involves the addition of a new charge in respect of an offence needing sanction to prosecute—§§147, 104 *ante*; the case cannot be tried until such sanction has been obtained, unless sanction has already been obtained for a prosecution "on the same facts as those on which the amended charge or indictment is founded."—*R. v. Govindu.* See also *Silva v. Appu, R. v. Balaji Sittaram,* and §147 paras. 5, 15 *ante.* Will §425 *post* cure any illegality due to want of sanction to prosecute under §175 or §286 ? This point still awaits decision. What §425 cures is the "want of any sanction required by §147," and no reference is made in §425 either to §175, §104 *ante,* or §286 *post*—see §425 para. 12 *post.* The case law cited in para. 6 *infra* further illustrates the scope of §§172 – 176.

In deciding whether an amendment is really called for during the trial, the Judge will be guided by the terms of §171 *ante.*

2A. **Judgment.**—See §304 para. 2 *post.*

3. **Alteration.**—An alteration in a charge or indictment includes the "substitution" of one charge for another in an indictment, and the "addition" of a new charge thereto; and in the case of Police Court

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§172-176 trials, the "substitution" of one charge for another—§172(3). The Indian Courts have extended the definition to include the "withdrawal" of a charge.—*R. v. Mahadeo* para. 6 *infra*.

The alteration should be made on the face of the original indictment —*R. v. Aro Appu*. If a Magistrate desires to amend a charge by the formulation of new charges, he should proceed to record them in the usual manner.—*Fernando v. Kariya*.

4. **Amendment of charges after conviction.**—See §§177, 347, 357 *post*, and *Pulle v. Perera*. *C.f. R. v. Kanjamanadan*, *Modder v. Senathamby*, *R. v. John Sinno*, *R. v. Pillai*. The Supreme Court acting in appeal or in revision has power to alter or amend an indictment or charge.—*R. v. Baron*, but see *R. v. Amith*.

5. **The Supreme Court acting in appeal or revision will not interfere with the discretion vested in the trial Judge as to amendments of charges and indictments, except where a failure of justice has been occasioned by such amendment.**—*R. v. Sinnoappu*, *R. v. Arnolis*, *R. v. Amerasekera*.

5A. **Direct a new trial.**—See §174 and §177 para. 5 *post*.

6. **Case law.**—*R. v. Kanjamanadan* (1903) 7 *N.L.R.* 52 *at p.* 63. (See also §§167 – 170 para. 10 *ante*)—"I understand counsel for the Crown to argue even if this Court should find (i) that there has been a misjoinder of charges, (ii) that the indictment on the face discloses no offence, and (iii) that the evidence does not disclose the offence of forgery, still this Court, in view of certain provisions of the Criminal Procedure Code . . ., can make such alteration as justice requires, and convict the prisoner of some offence other than the one he has been charged and tried for. First he urges that even if there was an error in stating the offence or those particulars required by law to be stated in the charge under §171, no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission. That simply means no such error shall be regarded as material during the course of the trial, unless the accused was misled and *consequently* §172 *provides that the Supreme Court (i.e., the Court of trial) may alter the indictment for the purpose of correcting any error or omission at any time before verdict, but not after verdict, so as to enable the jury to bring in a verdict of guilty or not guilty of an offence known to the law.* In the present case, the jury have convicted on counts of an indictment which . . ., disclose no offence according to our law, and we have no power to amend the indictment after verdict . . ." See also *R. v. Saibo* (1913) 1 *B.N.C. at p.* 36 (§§167 – 170 *para.* 10 *ante*), where *R. v. Kanjamanadan* is commented upon.

R. v. Sinnoappu (1885) 7 *S.C.C.* 51.—The right to amend an indictment after an accused has pleaded thereto is vested in the Court, and the Attorney-General has no power to amend it without the sanction of the Judge. Matters of such amendments are entirely in the discretion of the Judge of trial, and a Court of appeal will not interfere, except when there has been occasioned a failure of justice by such amendment. An amendment should not be refused by the Judge, unless it is likely to do substantial injustice to an accused (see §§173 – 174). A Judge should be ready to listen to and willing to adopt any amendment which will have the effect of convicting the guilty or securing the acquittal of the innocent.

Modder v. Senathamby (1891) 2 *C.L.R.* 68.—In this case the Supreme Court amended the charge framed in the Police Court when the

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case came up in appeal. See §171 para. 3 *ante*, and *c.f. R. v. John Sinno infra.*

Hamy v. Appuhamy (1898) 3 *N.L.R.* 101, see §§167 - 170 para. 10 *ante.*—In a criminal case, it is too late to quash the indictment after it has once been accepted by the Court and the case for the prosecution closed. If at any stage the case for the prosecution warrants a conviction for an offence, but is not entirely in conformity with the indictment, the Judge should alter the indictment and call upon the accused for his defence.—But see §§210, 234 *post.*

Silva v. Appu (1895) 1 *Br.* 150, see §171 para. 6 *ante.*—The accused was charged with causing criminal force to the complainant and with having made a false charge of theft against the complainant (§208 P.C.). He was convicted, however, under §180 Penal Code with the offence of giving false information to a public servant, an offence needing sanction to prosecute, and an offence for which he had not formally been charged. *Held*, that the conviction could not stand.—See §§182 - 183 *post.*

R. v. John Sinno (1900) 1 *Br.* 161.—The indictment charged the accused with committing house-breaking by night in order to commit *theft. Held*, that the Court of Appeal could not amend the indictment so as to charge the accused with house-breaking with intent to commit *robbery.* "It seems to me that I could not do that consistently with any recognized principles of justice. The men were indicted on a particular charge, and that was the charge they and their counsel had to meet, and to that charge their attention was directed . . ." *per* Bonser, C. J.—*C.f. Modder v. Senathamby supra.*

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 263.—" It is said that the accused may suffer prejudice if he is indicted with an offence not explained to him at the inquiry and with respect to which he is afforded no opportunity of making a statement provided for in §155 ; but he is equally liable to be prejudiced if the Court adds a charge at his trial under §172 . . ." *per* Bertram, C. J.—See the judgment of Ennis, J., *at p.* 269.—" In my opinion this provision (§172) shows that the trial is to be concluded in respect of the offence or offences which the evidence discloses, and is not limited to offences which the accusation originally disclosed." The learned Judge also commented upon §173, and continued "§§171 and 173 show certain kinds of error or omission which may occasion a failure of justice, *viz.*, errors and omissions by which the accused has been misled or prejudiced in his defence . . ."—*C.f. R. v. Mutirakal* 3 *Mad.* 351.

Daniel v. Romanis (1910) 4 *S.C.D.* 61, and see *Arnis v. Charles* (1914) 18 *N.L.R.* 287.—The charge originally framed against the accused was based upon a medical report, and was that the accused had caused grievous hurt to the complainant. Thereafter, the Magistrate ascertained that the hurt was not "grievous," and accordingly altered the charge to one of simple hurt, explained the nature of the amendment to the accused, who stated that he had no further statement to make, and, after trial, the accused was convicted. *Held*, that under §172 the Magistrate had power to make the alteration in the charge, especially as the nature of the alteration had been explained to the accused, who was represented by a pleader.

Arnis v. Charles (1914) 18 *N.L.R.* 287. *Daniel v. Romanis* dissented from.—" Referring to these decisions (*Saram v. Meera* 1 *N.L.R.* 95, *Charles v. Charles* 2 *N.L.R.* 137) Wood Renton, J., in *Daniel v. Romanis*, observed that they were given prior to the . . . Code of 1898, and con-

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§172-176 sidered that, in view of §172 of that Code, they were no longer applicable. With deference I am unable to take the same view. §172 . . . merely authorizes a Court to alter any charge at any time before judgment is pronounced, but requires such alteration to be read and explained to the accused; *and exactly similar provisions were contained in* §201 *of the . . . Code of* 1883, *so that the authority of the above decisions is not affected by the enactment of the new . . . Code.* Moreover, the present case is not an alteration of charges, as was the case in *Daniel v. Romanis*; the charges remain identically the same, but the nature of the proceedings is wholly altered and of this, I think, the accused were entitled, *ex debito justitiae*, to have distinct notice . . ." *per* de Sampayo, J.

Cader v. Fernando (1902) 6 *N.L.R.* 95.—The charge against the accused originally was under §315 Penal Code, and witness had been examined, and the case postponed. Thereafter, the injury having become "grievous," the charge was altered into one under §317 to which the accused pleaded Not Guilty, and the witnesses were recalled and re-examined, and cross-examined. *Held*, that the procedure was in order.

R. v. Pillai (1913) 17 *N.L.R.* 235, *at p.* 237.—See §§167 - 170 para. 10 *ante.* "The . . . Solicitor-General asked me to amend the conviction. A conviction is usually amended by this Court in appeal to harmonize with the charge. Where a certain charge with certain particulars is deliberately made, evidence that does not support the particulars is irrelevant, and it is too much to expect this Court to amend the indictment without allowing the accused a further opportunity of meeting it . . ." *per* Pereira, J.

Ingram v. Mudalihamy (1913) 1 *B.N.C.* 24.—Alteration of charge during trial.—New charge should be read and explained to the accused. "§172 and the following sections of the Code authorize an alteration of a charge, or substitution of a different charge, but they also provide for the new charge being read and explained to the accused and for his having a full opportunity of defending himself in respect of the new charge . . ." *per* de Sampayo, J. In this case a charge of retaining stolen property under §394 Penal Code was altered into one of being found in possession of property which was reasonably suspected of being stolen and without being able to account for his possession, under a special Ordinance penalising possession and which cast the *onus* upon the accused.

R. v. Punchimahatmaya (1913) 1 *B.N.C.* 63.—Indictment charging accused with unlawful assembly. Conviction of accused for criminal trespass without amendment of indictment.

R. v. Aro Appu (1913) 1 *B.N.C.* 65.—The alteration of an indictment should be made on the face thereof, and should be read out and explained to the accused.

Fernando v. Kariya (1914) 4 *B.N.C.* 71.—Charge of house trespass. —§434 Penal Code. Accused appearing in Court on *summons*, which set out the above offence. Alteration of the summons during the course of the trial, by adding thereto offences of house-breaking—§443; and criminal intimidation.—§486. *Held*, that this procedure was wrong. If the Magistrate desired to formulate fresh charges, he should have formulated and recorded them in the proceedings in the usual way.

R. v. Kabur (1920) 22 *N.L.R.* 105, 7 *C.W.R.* 268.—X, a jail-guard, was entrusted with a railway warrant and was ordered to accompany a prisoner, who had served his sentence, to the railway station, exchange the warrant for a ticket, and give the ticket to the accused. X obtained

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the ticket, but sold it to Y, and appropriated the proceeds. The indictment charged X with having committed criminal breach of trust of the warrant, but the District Judge intimated that no such offence was disclosed by the facts. Thereupon prosecuting counsel desired the Judge to amend the indictment by adding thereto a charge of misappropriation of the railway ticket, and the application was refused. *Held*, "I think he (*i.e.*, the District Judge) might well have done this without prejudice to the accused"—*per* de Sampayo, J.

R. v. Reazuddi 16 *C.W.N.* 1077.—Charge under §§316 and 146 Penal Code. *Held*, that such a charge was an intimation to the accused that they are themselves not charged with having committed a specific act of grievous hurt, and where the substantive charge of unlawful assembly failed, they cannot be convicted under §316 Penal Code on the ground that the evidence shows that they did in fact commit such act, where that evidence has not been given effect to by an amendment of the charge. Nor can §32 Penal Code be utilised, for that section only applies where there is a substantive charge of a specific act.—See *R. v. Punchimahatmaya* (1913) 1 *B.N.C.* 63, §§181 – 183 para. 7 *post.*

R. v. Wazir Jan 10 *Alla.* 58.—Charge under §168 Penal Code. Subsequently, after evidence had been led, a further charge under §373 Penal Code added. *Held*, "In this case the facts and the evidence on which the conviction proceeded would not vary by reason of such alteration or addition, and there was, therefore, no prejudice to the petitioner by reason of the charge having been amended."

332. *P.C. Trincomalee* 571 (*S.C.M.* April 23, 1918).—Charge amended under §172. Failure to read out amended charge to accused. No prejudice caused to the accused thereby.

Appa v. Subhana 8 *Bom.* 200.—The provisions relating to charges are intended to provide that the charge shall give full notice of the offence charged against him, and that the only result of any defect in the charge shall be an amendment on terms as to delay or a new trial, if the accused seems to have been misled.

R. v. Vajiram 16 *Bom.* 414.—The merits of an application to amend a charge should be considered immediately and not postponed.

R. v. Mahavala 29 *Mad.* 569.—Where the charge originally included more than three offences (see §179 *post*) and the Judge amended the charge after trial, but before judgment, by striking out certain of the counts, *held*, "It may be that the words of §227 (*local*—§172) are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, but it seems to me that the section does not warrant the striking out of a charge for the purpose of curing an illegality which had already been committed. One of the objects of the limitations contained in §234 (*local*—§179) is to prevent the accused being embarrassed by a multiplicity of charges. I am unable to hold that a charge which is bad on the face of it, can be cured by an amendment made at a stage of the proceedings when the mischief which the Legislature intended to guard against by the enactment which has been contravened (*viz.*, §179) may already have been done." *Had the amendment been effected at an earlier stage of the trial, the result may have perhaps been different.*

R. v. Khoda 17 *Bom.* 369.—Where the accused had been extradited for the offence of dacoity (§395 I.P.C.), *held*, that the Judge of trial could frame a charge under §379 Indian Procedure Code (*local*—§367) acting under §227 of the Indian Criminal Procedure Code (*local*—§172)

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§172-176 notwithstanding the fact that the accused was extradited only for the offence of dacoity. See *R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287 *at p.* 261 and Dias on *the Law of Extradition p.* 11.

R. v. Mahadeo 12 *Alla.* 551.—The accused was committed for trial under §395 Indian Penal Code, and the trial Judge added thereto charges under §147 of the Indian Penal Code, but later withdrew the latter and only placed the charge under §395 Indian Penal Code before the assessors. *Held*, that there was no law which prohibited a Court from withdrawing a charge framed by itself at the commencement of the trial, and which the Court subsequently thinks to have been an improper charge. To this extent the word "*alter*" in §227 (*local*—§172) must be taken to include "*withdraw.*"

R. v. Govind 11 *Bom. H.C.R.* 278.—After an amendment in the charge, the trial may proceed forthwith only in cases where the amended charges are closely related to the charges originally framed, *e.g.*, a murder and abetment of murder. The fact that counsel for the accused did not demand a new trial, or a postponement, is an indication that the amendment caused no prejudice to the accused. See *R. v. Mahomed* 31 *Bom.* 218.

R. v. Mathura 6 *C.W.N.* 72.—"When such a grave charge—a charge upon which the accused might be condemned to death—was added to such charges like rioting, etc., it is impossible to conceive that they could not have been prejudiced. The Judge ought to have granted an adjournment."

R. v. Govindu 26 *Mad.* 592.—"Same facts as those on which the altered indictment or charge is founded."—§175.

R. v. Balaji Sitaram 11 *Bom. H.C.R.* 34.—When a Court alters a charge and the new charge refers to an offence which needs sanction to prosecute, the Court shall stay further proceedings until such sanction is obtained.

R. v. Appuwa (1907) 10 *N.L.R. at p.* 201, 2 *A.C.R. at p.* 4.—"I must confess that I do not suppose the author of the Criminal Procedure Code contemplated that §202 would be used in the way adopted in the present case, for it seems to me that an amendment (of the indictment) might have been made by the District Judge, and, if necessary, an adjournment given to the accused, if it appeared that an immediate trial after amendment would have prejudiced him, which I doubt . . ." *per* Middleton, J.

R. v. Arnolis (1921) 23 *N.L.R. at p.* 227.—In this case the Court of Appeal, being of opinion that the order of the lower Court was wrong, amended the indictment and convicted the accused.

R. v. Baron (1926) 4 *T.L.R.* 3.—The powers of the Supreme Court under §§347, 357 *post* to alter a verdict on appeal or in revision are not confined to the cases mentioned in §§181, 182 *post.* If an original Court under §172 has power to alter or amend a charge or indictment, *a fortiori*, an appellate or revisional Court has the same powers.

Pulle v. Perera (1927) 5 *T.L.R.* 9.—It is not competent for a Magistrate to alter the charge after the trial is over and the accused had been convicted of the offence originally charged. When a charge is altered or amended during a trial, the accused should be asked to plead thereto, and that fact should appear on the record.

R. v. Amarasekera (1927) 29 *N.L.R.* 33.—Where, in a District Court trial, the indictment was amended before the conviction with regard to the particulars of the offence charged, *held*, that the conviction was good unless the accused was misled in his defence by the error in the particulars of the offence charged.

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R. v. Amith (1930) 7 *T.L.R.* 134.—The Supreme Court refused to direct the District Judge to amend an indictment by adding a fresh charge where, the accused having already been charged in the Police Court with this offence, the prosecuting authorities chose to omit that charge and to indict him for a different offence. §177

Effect of material error.

177. (1) If the Supreme Court, in the exercise of its powers of appeal or revision, is of opinion that any person convicted of an offence was misled in his defence by an error in the indictment or charge, it shall direct a new trial to be had upon a charge or indictment framed in whatever manner it thinks fit.

(2) If such Court is of opinion that the facts of the case are such that no valid charge can be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under section 193 of the Penal Code upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge ; but if it appears probable from the proceedings that A had no such knowledge it shall quash the conviction.

Supreme Court.—See §3 *ante.*

Appeal.—See §§338 – 352 *post.*

Revision.—See §§356 – 360 *post.*

Offence.—See §3 *ante.*

Misled.—*C.f.* §§171, 425.

Indictment.—*Form* 11 *Schedule III. post*, and see §§158(2), 161(4), 186, 387, 391.

Charge.—See Introduction to *Chapter XVII. ante.*

1. §177 is very similar to §232 of the Indian Code and §206 of the Criminal Procedure Code of 1883.

2. **Scope of §177.**—

See Introduction to *Chapter XVII.* para. 1(*e*), §§167 – 170 para. 10 *ante*, §171 paras. 2, 3, 4 and 6, where §§171, 177 and 425 have been considered jointly, and §§347 – 348 para. 6 *post.*

§171 provides that no error or omission in either stating the offence (§167) or the particulars required to be stated in the charge (§§168 – 169) shall, " at any stage of the case " be regarded as material, unless such error or omission has misled the accused. If the Court during trial finds that such an error or omission has misled or might mislead the accused it may, under §§167(8) and 172, amend the indictment or charge. If the amendment is such that prejudice will be caused to either side by immediately proceeding with the trial, the Court may either postpone the case or order a new trial—§174 ; but if the amendment causes no prejudice, the trial can proceed forthwith—§173.

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§177 If when the case comes up before the Supreme Court in appeal or revision, *after a conviction*,* and such Court finds that the accused *has been misled* in his defence by *an error* in the indictment or charge, the conviction should be set aside, and the case sent back for a new trial upon an indictment or charge "framed in whatever manner it thinks fit." —§177(1). It, therefore, follows that where an error in the charge has not misled the accused—the conviction will not be set aside on that ground. On the other hand, if the Court finds that the facts of the case are such that "no valid charge can be preferred against the accused," the conviction will be quashed and the accused acquitted—§177(2). Subject to the provisions of §§171 and 177, §425 *post* declares that no judgment of a competent Court is to be reversed or altered on appeal or revision on account of errors, omissions, or irregularities in the charge, "unless such error, omission, or irregularity has occasioned a failure of justice." See §39 Courts Ordinance.

3. Examples of defective charges.—See §171 para. 3 *ante*.

4. Examples of cases where the Supreme Court has refused to interfere with a conviction in spite of an error in the charge.—See §171 para. 4 *ante*.

5. **Direct a new trial.**—See §177(1). *C.f.* §174 as to circumstances under which the *Court of trial* may order a new trial.

If the Supreme Court sets aside a conviction and merely directs a new trial and nothing more is stated, the case will go back to the Court of trial—see *R. v. Kabur* (1920) 22 *N.L.R.* 105, 7 *C.W.R.* 268. On the other hand, if the Supreme Court sets aside a conviction in a summary case and directs that non-summary proceedings should be taken, the case will go back to the Police Court. In such a case, the accused will have to be duly committed for trial by the Attorney-General in the usual way.

In §174 the words "new trial" appear to indicate a new trial on the amended charge or indictment, in the Court which amended the charge or indictment.—See also §158 para. 2 *ante*.

6. **Charge or indictment framed in whatever manner it thinks fit.**—See §177(1). As to the powers of the Supreme Court in its appellate or revisional jurisdiction to amend a charge or indictment—see *Modder v. Senatamby*, *R. v. John Sinno*, *R. v. Pillai*.—§§172 – 176 para. 6 *ante* and §360 *post*.

7. **Case law.**—

See §§167 – 170 para. 10, §171 paras. 2, 3, 4, §§172–176 para. 6 *ante*, §425 para. 15 *post*.

Joinder of Charges.

Separate charges for separate offences.

[§ 8, 31 of 1919.]

178. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases **mentioned in sections 179, 180, 181 and 184, which said sections may be applied either severally or in combination.**

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*See *R. v. Arnolis* (1921) 23 *N.L.R. at p.* 227.

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Illustration.

A is accused of a theft on one occasion and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and the causing of grievous hurt.

Offence.—See §3 *ante*.

Distinct offence.—See §17 *ante*. *C.f.* "**Different offences.**"—§184 *post*.

Charge.—*C.f.* §§155, 167 – 170, 187, 204, 219.

1. §178 was similar to §233 of the Indian Code and §207 of the old Code of 1883 until it was amended by §8 of Ordinance No. 31 of 1919. The section as it now stands is identical with §233 of the Indian Code with the exception that the words " which said sections may be applied either severally or in combination " do not appear in the Indian section.

2. **Scope of §178.**—

See Introduction para. 4 *ante*.

Whenever an accusation of a criminal offence is preferred against a person it is a fundamental principle of our law to ensure at the very outset (1) that the accused is told with accuracy and precision the exact nature of the accusation that is made against him. This is the rule which is formulated by §§167 – 169 *ante*. (2) The accused must not be embarrassed or prejudiced by having to face his trial (*a*) with a multiplicity of charges to answer to—§178 ; or (*b*) with a multiplicity of co-accused to share his trial along with him—§184.

§178 lays down two general rules, *viz.*, (*a*) that for every " distinct offence " of which a person is accused, there shall be a distinct charge or " count," and (*b*) that as a rule every such charge or " count " shall be tried separately, and not jointly. §184 provides that, except in the special cases specified therein, every accused person is to be tried separately.

These general rules have been designed on grounds of humanity and fair play. The most innocent man may well be prejudiced in making his defence by the fact that many charges have been accumulated against him, thereby inducing an undue suspicion against him by the mere fact that several accusations have deliberately been made against him—*R. v. Fakirappa*. The same reason applies in the case of the joinder of co-accused. Moreover, the object of our criminal procedure is to restrict the trial of a criminal charge to the determination of a clear issue, and to see that nothing is allowed to enter into the case which can interfere with the definite proof of a distinct offence—*Ponnan v. Ukkubanda* .

Regarding §178 in the light of the foregoing, one finds that the rule is " Separate trials for distinct offences."—*R. v. Fakirappa*, *R. v. Samaranayaka*. Joint trials for distinct offences can only be justified by virtue of the exceptions specified in §178 itself, *viz.*, §§179–181, 184. It should be noted, however, that even in these exceptional cases, where joint trials are legally permissible, it is open to the accused to apply to the Court of trial to have the charges or the joinder of co-accused separated, upon proof that such joint trial would prejudice him.—*R. v. Fakirappa*, *R. v. Senanayaka*, *R. v. Wijeysinghe*. Judges ought always to be anxious to give effect to any valid application in that behalf—*R. v. Manu*.

The exceptions to the rule in §178, or in other words the cases in which distinct offences or different offenders may lawfully be joined or tried together are as follows :—

(*a*) Where the accused has committed more offences than one " of the same kind " within the space of twelve months from first to last, three of such offences may be joined—§179.

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§178 (*b*) All offences committed in the course of one and the same transaction can be joined, regardless of number—§180(1).

(*c*) If the acts constituting the offence fall within two or more separate definitions of any law in force by which offences are defined or punished, the offender can be charged under such sections—§180(2). *C.f.* §67 Penal Code.

(*d*) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the accused may be charged in respect of the offence constituted by the acts when so combined, as well as for any offences constituted by any one or more of such acts—§180(3). *C.f.* §67 Penal Code.

(*e*) If a single act or a series of acts is of such a nature that it is doubtful which of several possible offences the facts which can be proved will constitute, the accused may be charged with all or any of such offences —§181.

(*f*) Several accused persons may be tried together when they are charged with having committed an offence jointly, or with having committed different offences arising out of the same transaction, or where they are charged as principals and abettors, or where one has committed the offence while another has attempted to commit that offence—§184.

By the amendment of §178 by §8 of Ordinance No. 31 of 1919 there has been settled a point upon which there has been considerable difference of judicial opinion both here as well as in India, *viz.*, whether the exceptions contained in §§179 – 181, 184 are mutually exclusive of each other. §178 as amended now declares that these exceptions may be applied either severally or in combination.—See paras. 6, 8 *infra*.

(*g*) In cases where the accused is charged with criminal breach of trust, or the dishonest misappropriation of **money,** §168(2) *ante* enacts that he may be charged with having embezzled or misappropriated the gross sum shown to be due, without charging specific embezzlements or misappropriations. This provision is tantamount to a further exception to the rule in §178.

It should be remembered that even in cases where distinct offences can lawfully be joined, the first general rule contained in §178 requires that there should be a distinct charge or " count " in respect of each of such offences. Every conviction in respect of distinct offences should have some distinct sentence—*R. v. Samaranayaka, R. v. Cara* and the cases cited thereunder.

The *illustration* appended to §178 deals with a case like this. A commits theft from B on Monday, and causes grievous hurt to B on Wednesday. It is manifest that the two offences are " distinct " and cannot be joined under the provisions of §§179, 180(2), (3), or 181. It is conceivable that they might possibly be joined under §180(1) if it can be shown that the two offences were committed in the course of one and the same transaction; but if this cannot be demonstrated, a joinder of the charges would be illegal.

A breach of the rule in §178 has the effect of vitiating a conviction —*R. v. Subramania* (*Privy Council*), *R. v. Tyler, Anja v. Stewart, R. v. Perera.* Even the consent of the accused himself cannot pardon such an irregularity—*R. v. Silva;* nor does the fact that the accused has been acquitted in respect of some of the charges which were irregularly joined, provided prejudice has been caused to the accused—*R. v. Choragudi.*

3. **Every distinct offence.**—The question whether any given offences are or are not ' distinct offences ' is a question of fact—*R. v. Girwadhari.*

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§178 The Criminal Procedure Code contains no definition of the term "distinct offence." It will be observed that §17 *ante* declared that when a person at one trial is convicted of any two or more "*distinct offences*" the Court of trial may sentence him "for such offences to the several punishments prescribed therefor which such Court is competent to inflict." §17 is based upon §35 of the Indian Code, the *Explanation* and *Illustration* to which indicate that "separable offences which come within §71 of the Indian Penal Code (*local*—§67) are not distinct offences within the meaning of this section." But the *Explanation* and *Illustration* found in §35 of the Indian Code have not been reproduced in our Code, and therefore cannot be regarded as having any force in Ceylon.—See *R. v. Arnolis Appu* (1904) 2 *Bal. at p.* 84. Moreover, it is also to be noted that the *Illustration* to §35 of the Indian Code declares that housebreaking and theft committed in the course of one and the same transaction are not "distinct offences," whereas our Courts have held that they are "distinct offences"—*R. v. Arnolis Appu* (1904) 2 *Bal.* 81 (*Full Court*), *R. v. Arlis Appu* (1920) 2 *C.L.Rec.* 189.

If the exceptions created by §178 are regarded—*viz.*, §§179 - 181, 184—it would seem that the offences falling within their scope are "distinct offences," for otherwise there would have been no purpose in specially excepting them from the general rule—*c.f. R. v. Samaranayaka, Saineris v. Amadoris.*

Offences appear to be "distinct" by reason of differences in:—

(*a*) **Time.**—As where stolen property is received by X on Monday and on Wednesday—*Ponnan v. Ukkubanda.* The following cases supply further examples—*R. v. Unanse, Keerala v. Appuhamy, William v. Dinorisa, Naide v. Packeer, R. v. Careem, Anasinghe v. Konnehamy, R. v. Jamaldeen, R. v. Raghunath, R. v. Rakhal, R. v. Johan, R. v. Chandra, R. v. Girwadhari, Poonit v. Mahadeo, R. v. Mati, Abeywickreme v. Babune, Wijeysekera v. Ratnayaka, Podiya v. Baiya, R. v. Perera.*

(*b*) **Place.**—See *R. v. Jamaldeen, R. v. Johan, R. v. Chandra, Wijeysekera v. Ratnayaka.*

(*c*) **Number of persons accused.**—See §184 *post.* The following cases furnish examples—*Sandanayaka v. Donchia, Jayawardene v. Thomas, Goonetilleke v. Allis, Casupathipillai v. Sabapathipulle, Murugappah v. Kanapathy, Velaiden v. Zoysa, Keegal v. Mohideen, R. v. Podisinno, R. v. Silva, Ponnan v. Ukkubanda, Gooneratne v. Sinno,* (1899) *Koch* 43 *Saineris v. Amadoris, Podiya v. Baiya, Wijeysekera v. Ratnayaka, Ratnayaka v. Deonis,* 7–8 *P.C. Chilaw* 443, *Fernando v. Fernando, R. v. Perera.*

N.B.—Under §184 *post* principals, abettors and persons attempting to commit an offence may be joined.

(*d*) **Number of injured or aggrieved parties.**—See *Arumugathan v. Subramanian, R. v. Girdhari, Abeysuriya v. Jayasuriya, R. v. Johan, R. v. Chandra, R. v. Girwadhari, Poonit v. Mahadeo.*

(*e*) **Number of sections of penal laws applicable.**—§§180 - 181 *post.* See *Gooneratne v. Sinno, R. v. Podisinno, Jayawardene v. Thomas, Sandanayaka v. Donchia, Goonetilleke v. Allis, R. v. Samaranayaka, R. v. Arnolis Appu, R. v. Arlis Appu, Gunesekera v. Peeris, Anja v. Stewart, R. v. Perera.*

(*f*) **The *mens rea* of the accused.**—*C.f. R. v. Cara,* and the cases cited thereunder.

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4. **There shall be a separate charge.**—*i.e.*, for every distinct accusation made against the accused, there should be a distinct charge to support it, and such charge must satisfy the various conditions set out in §§167 – 170 *ante*. If several accusations are lawfully joined in one indictment or charge, each accusation must be supported by a separate 'count.' This is the first rule contained in §178.

5. **Every such charge shall be tried separately.—**

Such charge.—These words obviously refer to the provisions formulated by the first rule in §178. Every accusation in respect of a distinct offence must be tried separately. 'Separate trials' is the rule and 'joint trials' the exception.—*R. v. Fakirappa*. This is the second rule laid down by §178. This rule is meant to prevent embarrassment or prejudice to the accused—*R. v. Fakirappa*, *R. v. Senanayaka*, *R. v. Wijeysinghe*; and to restrict the trial to the determination of a specific issue by leading definite proof in respect of a distinct offence—*Ponnan v. Ukkubanda*. Judges ought always be ready and willing to give effect to an application by the accused for a separation of counts or co-accused, when made by an accused, and when such application has good grounds to support it—*R. v. Manu*. The mere assertion that joint trial would embarrass or prejudice the accused, without proof of the assertion, is worthless in cases where the joinder is justified by law.

Joint trial, therefore, can only be justified in the cases specified in §178.—See §§179 – 181, 184. §168(2) *ante* also creates an exception to the rule as to necessity for separate charges in respect of distinct offences, in cases of criminal breach of trust, or dishonest misappropriation of money.

See §179 paras. 2, 3 *post*.

Note the words "Charged and tried together or separately as the Court thinks fit."—§184.

6. **Which said sections may be applied either severally or in combination.**—Until the amendment of §178 by §8 of Ordinance No. 31 of 1919, there existed a considerable difference of judicial opinion, both in Ceylon and India, as to whether §§179 – 181, 184 were mutually exclusive of each other, or whether, on the other hand, they could be used either severally or in combination. Thus, in *R. v. Bhagwati*, the Court refused to allow the simultaneous application of §§179 and 180 so as to permit the joinder of charges of forgery, cheating, and falsification of accounts. In 16–17 *D.C.Crim. Colombo* 3424 it was held that the exceptions could be made use of severally, but not in combination, while in 75 – 76 *D.C.Crim. Galle* 13771, Lascelles, C.J., was of opinion that the exceptions were mutually exclusive of each other, *i.e.*, although recourse might be had to one or another of them, advantage could not, in any given case, be taken of more than one of them. In *R. v. Tilak* the Indian Courts appear to have realized the inconvenience that could arise by reason of this strict interpretation of the law, and it was there laid down that, although the Code was silent on the point, the exceptions were not mutually exclusive.

While the amendment of §178 has settled this question—see *R. v. Powar*; it has not made the law any easier in its application. The question which now arises is as to the manner in which the exceptions are to be applied severally or in combination. In the case of *R. v. Arlis Appu*, this point was raised and decided. In that case it was proved that four accused, W, X, Y and Z, acting jointly, broke and entered into the houses of A and B, and committed theft therein. The indictment

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charged the accused in four counts as follows: (1) Breaking into the house of A—§443; (2) Committing theft therein—§369; (3) Breaking into the house of B—§443; (4) Committing theft therein—§369. Schneider, J., laid down the law as follows. Offences under §§443, 369 were distinct offences, the *Full Court* having so held in *R. v. Arnolis Appu.* Therefore, in order to sustain the joinder the prosecution would have to show that it came under one or more of the exceptions. In this case there were four distinct offences, involving two distinct transactions. As to the joinder of offences, §179 sanctioned the joinder of the two house-breakings or the two thefts, *but nothing more.* As to the joinder of transactions, §180(1) sanctioned the joinder of house-breaking and theft, which amounted to one transaction *and nothing more.* The other exceptions did not apply to the case, and it was held that §§179 and 180(1), applied either severally or in combination, did not sanction the joinder of the four counts. According to the rule, as laid down in the case, the indictment would have been valid had it charged the accused either with two house-breakings and one theft, or with two thefts and one house-breaking. It is desirable that there should be a decision of a Full Court on this point.

In the case of *R. v. Budhari*—§179 para. 10 *post*, a doubt was expressed whether §179 could be used in cases where more than one accused was charged under §184 *post.* It is obvious that this case must now be read subject to the amendment in §178, and the decision in *R. v. Arlis Appu.* See also *R. v. Shriniwas* 7 *Bom. L.R.* 637—§184 para. 14 *post.*

See para. 8 *infra*, and §184 para. 3 *post.*

7. **May the trials of two distinct indictments or charges summarily triable be consolidated**?—The cases of *R. v. Cornelis* and *R. v. Doresamy* and the other cases cited thereunder are authorities in support of the view that this cannot be done. Such a consolidation, even with the consent of the accused himself, has been held to be irregular—*R. v. Silva.* Where counts which might have been joined in one indictment were charged in two separate indictments, it was held that the consolidation of the two indictments was irregular—*R. v. Mendis.*

It often happens in cases where several accused are charged before the Police Court, and some of them are absconding during the non-summary investigation, that a committal is directed of such of the accused who are before the Court. Thereafter, when the absconding accused have been arrested, they too are committed for trial on the same charges as their co-accused, but on a different indictment. In the District Court, it sometimes happens that, with a view to saving time, the trial of the two indictments is taken simultaneously. This is irregular and vitiates the proceedings. What should be done in a case like that is for the Attorney-General to draft a new indictment against all the accused and have them recommitted on the new indictment which should be taken up for trial.

8. **The decision in R. v. Tribhuvandas.**—See para. 10 *infra.* In this case the indictment contained two counts (1) That he did, on April 4, attempt to *excite disaffection towards Government,* and attempted to *promote enmity between different classes* of the people under §§124A and 153A of the Indian Penal Code. (2) A similar offence, on April 11, under the same sections of the Indian Penal Code. It should be noted that §124A of the Indian Penal Code is similar to §120 of the Ceylon Penal Code, but there is no section in our Code which corres-

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§178 ponds to §153A of the Indian Penal Code. §124A penalises "attempts to excite disaffection towards Government," while §153A penalises "attempts to promote feelings of enmity or hatred between different classes of His Majesty's subjects." Chandavarkar, J., *held* that the reference to §153A was in effect surplusage; that upon a charge under §124A it was open to the Courts, under the sections corresponding to §§181, 182 of our Criminal Procedure Code, to have convicted the accused under §153A even if the indictment contained no reference to that section. It would appear, however, that §§181, 182 are hardly applicable in the manner indicated. If the Indian Court which decided the appeal had conceded that the exceptions to §178 are not mutually exclusive, the joinder could have been held to be justified by the simultaneous application of §§179, 180(1) to the four separate charges. See para. 6 *supra*.

9. **Effect of illegal joinders of charges.**—The *Privy Council* has held in the case of *R. v. Subramania* that a contravention of the general rule in §178 without justification is an illegality which cannot be cured, *e.g.*, by the higher Court striking out one or more of the counts, and dealing with the evidence which, in its opinion, might have been submitted to the jury as applicable to the remaining charges. See *R. v. Tyler*. The consent of the accused cannot validate an illegal joinder—*R. v. Silva ;* nor does the fact that the accused has been acquitted in respect of some of the charges which were irregularly joined make any difference, if such joinder has caused prejudice to the accused —*R. v. Choragudi*. See *Weerakoon v. Mendis* (1925) 27 *N.L.R.* 340.

10A. **Duplicity v. Misjoinder.**—Unless there is a separate charge for every distinct offence, the charge would be bad for duplicity. Whether this is a fatal irregularity or not depends on whether prejudice has been caused to the accused—see *Anja v. Stewart, R. v. Perera*.

10. **Case law.**—*R. v. Samaranayaka* (1892) 1 *S.C.R.* 335.—Where distinct offences have *properly* been joined in one indictment, *e.g.*, under §180 *post*, the accused should be separately sentenced for each separate offence of which he is convicted. A general verdict and sentence is bad. In this case the indictment charged the five accused with having committed the following offences : (i) Criminal trespass ; (ii) Causing hurt to A ; (iii) Causing hurt to B ; (iv) Making a false charge against A and B; (v) Causing criminal proceedings to be instituted against A and B without just cause. It was held that the joinder was illegal. " . . . I call the procedure illegal because our law lays it down that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately. The exceptions to that rule, to be found in §§208, 209, 213 of the . . . Code (of 1883—now §§179, 180, 184) . . . *do not apply to this case . . .*" *per* Withers, J. *C.f. Andris Appu v. Nicholas* (1902) 3 *Br.* 144.

Jayawardene v. Don Thomas (1895) 1 *N.L.R.* 216, see *Sandanayaka v. Donchia* (1916) 3 *C.W.R.* 368.—It is a misjoinder to try a person who is charged with the offence of keeping a common gaming place along with one charged with unlawful gaming. "The fourteenth accused should have been tried separately from the others in accordance with §207 (now §178) Criminal Procedure Code. The offence of keeping a gaming house is quite distinct from the offence of unlawful gaming." But see *Goonetilleke v. Allis* (1908) 4 *A.C.R. iv*, where the contrary opinion was expressed, also *Abeykoon v. Philip* (1909) 12 *N.L.R.* 145 and *Ismail v. Sinno* (1908) 3 *A.C.R. xiii*.

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Sandanayaka v. Donchia (1916) 3 *C.W.R.* 368.—The principle of law stated in *Jayawardene v. Don Thomas* was followed with approval in this case.

Casupathipillai v. Sabapathipulle (1896) 2 *N.L.R.* 152.—Where several persons have been guilty of a breach of some legal duty, *e.g.*, omitting to have their children vaccinated, etc., it is wrong to charge them together in the same proceeding.

Murugappah v. Kanapathi (1899) 1 *Tam.* 22; *Koch* 3.—Where twelve persons fished with prohibited nets in groups of three men to a net, and each group was concerned with its own net and its own fishing, and not connected with the others, *held*, that they could not all be charged together in one and the same proceeding.

R. v. Fernando (1908) 2 *Leader* 81.—Where a servant receives, on behalf of his master, a number of sums of money from different persons, but accounts only for a part, *held*, that the servant has committed one act of misappropriation, and could be charged accordingly. See §168(2) para. 9 *ante*, and the cases there cited, in particular *R. v. Fernando*, and contrast with it *Buchanan v. Conrad*, *R. v. Sittambaram*.

R. v. Cornelis (1911) 5 *S.C.D.* 89 (referred to in *Banda v. Siyatu* (1920) 8 *C.W.R.* 309).—The consolidation in one and the same judicial proceeding of the trial of two indictments is a breach of §178 of the Code, and such an irregularity cannot be cured. See *Velaiden v. Zoysa*, *R. v. Silva*, and *c.f. Abeykoon v. Philip* §171 para. 6 *ante*. See *R. v. Mendis infra*.

Velaiden v. Zoysa (1910) 14 *N.L.R.* 140.—See §171 para. 6 *ante* for other cases on the same point.—A breach of the rule that two opposing factions of a riot, or two persons who have given false evidence in one and the same judicial proceeding, may not be jointly charged in one case, is not merely irregular, but illegal. The illegality cannot be cured. But see *Hewavitarne v. Appuhamy* (1928) 30 *N.L.R.* 33 (*Full Court*), *Weerasinghe v. Ismail* (1932) 33 *N.L.R.* 245 (*Full Court*). See *R. v. Chandra* 20 *Cal.* 537.

R. v. Podisinno (1912) 16 *N.L.R.* 16.—An indictment charged two accused as follows: (1) A joint charge of theft of seven cases of gelignite between July 23 and 27, 1912, (2) the first accused alone with having dishonestly retained 113 cartridges of gelignite knowing them to be stolen property on August 13, 1912, and (3) the second accused alone with having similarly retained 27 cartridges on August 15, 1912. *Held*, that the joinder of counts 2 and 3 with count 1 was bad. See §184 *post* and *Banda v. Siyatu* (1920) 8 *C.W.R.* 309.

R. v. Mendis (1913) 16 *N.L.R.* 252 approved in *R. v. Doresamy* (1913) 1 *Crim. App. R.* 25, *Anasinghe v. Konnehamy* (1919) 7 *C.W.R.* 103.—There were three indictments presented against the accused. *Indictment No.* 1 charged the accused as follows: (*a*) with falsely charging A before a Police Sergeant on a certain date, (*b*) with giving false information to a public servant against A at the same time and place. *Indictment No.* 2 charged the accused as follows: (*a*) with falsely charging A before a Sub-Inspector of Police on a given date (not being the same as in the first indictment), and (*b*) with giving false information against A at the same time and place. *Indictment No.* 3 charged the accused with giving false evidence before an Inquirer into deaths. "There is no objection, as regards joinder of counts, to any one of these indictments, but by some blunder, which has not been explained, the accused was tried simultaneously on all indictments, and

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§178 was convicted on all the charges in each of the indictments. There is no provision in the Criminal Procedure Code which allows such proceedings. It was suggested . . . that the charges all related to acts so connected together as to form the same transaction, and that the joinder of these counts was justifiable under §180(1) of the . . . Code. But even if the acts charged are of this character, the section contemplates of their being included in one and the same indictment, and there is nothing in that section or elsewhere in the Code to authorize the inclusion of these counts in three separate indictments, and the simultaneous trial of the indictments. That the procedure is highly irregular there can be no doubt . . ." *per* Lascelles, C.J. See *Velaiden v. Zoysa*, *R. v. Cornelis supra*, and *R. v. Silva infra*.

R. v. Doresamy (1913) 1 *Crim. App. R.* 25.—The trial of an accused simultaneously on two indictments is illegal. *C.f. Anasinghe v. Konnehamy* (1919) 7 *C.W.R.* 103.

R. v. Silva (1920) 7 *C.W.R.* 180.—Where two indictments charged X and Y, and their trials were taken up simultaneously with the consent of the counsel for the defence, *held*, that the procedure was illegal and incurable.

Ponnan v. Ukkubanda (1913) 4 *C.A.C.* 42; 5 *B.N.C.* 58.—X, Y, and Z were jointly charged with having dishonestly received stolen property. The evidence showed that the receipt by X was at a point of time different from its alleged receipt by Y and Z. *Held*, that the joint trial of X along with the other two was bad and in contravention of §178, and not saved by §184. " I desire to point out that the provisions of the Code of Criminal Procedure, which §178 embodies, are designed to secure to an accused person substantial rights which cannot be denied without injustice. They are intended to enable him to call, if he is so advised, persons who could otherwise be his co-accused, as his own witnesses. They are further intended . . . to restrict the trial of a criminal charge to a clear issue, and to see that nothing is allowed to enter into the case which can interfere with ' the definite proof of a distinct offence which it is the object of all criminal procedure to obtain ' " *per* Wood Renton, C.J.

Arumugathan v. Subramanian (1914) 2 *Crim. App. R.* 58.—Where a bribe was collected from four persons and given to the recipient in a lump sum, the recipient cannot be charged at one trial with the receipt of the whole sum, but only in respect of any three separate items. *C.f. R. v. Girdhari infra.*

Gooneratne v. Sinno (1916) 2 *C.W.R.* 20 (referred to in *Banda v. Siyatu* (1920) 8 *C.W.R.* 309).—A and B proceeded to the house of X and abused him. X then went to complain to the Police, and on his return journey was assaulted by A. A and B were put upon their trial together, and A was convicted of causing hurt to X, while B was convicted of insult and criminal intimidation. *Held*, that the joint trial was irregular.

(1899) *Koch* 43.—*Held*, that a charge against A for kidnapping a young girl (§354 P.C.) should not be joined with a charge against Y, for wrongfully confining the girl (§333 P.C.).

R. v. Unanse (1916) 3 *C.W.R.* 102.—The charge against the accused was that he did " in or about the years 1908 to 1913 unlawfully fell and remove " certain trees from a Crown forest without permission from the proper authority. It appeared that the timber had been cut during the years specified up to at least 1910. *Held, inter alia*, that as the timber had been felled at different times during the years 1908 to

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1913, each act of felling was a separate offence, and that there was a misjoinder of charges under §§178, 179. §178

R. v. Arnolis Appu (1904) 2 *Bal.* 81 (*Full Court*).—Where a person breaks into a house and commits theft therein, he commits two distinct offences, for which he may receive two punishments. The joinder of such charges in one indictment is justified under §180(1). See *R. v. Arlis Appu infra*, and *c.f. Anthony v. Abilinu* (1892) 1 *S.C.R.* 88.

Saineris v. Amadoris (1916) 3 *C.W.R.* 322.—X, Y, and Z were charged together with (i) illicitly digging for plumbago on Crown land, (ii) with committing theft of a certain quantity of plumbago dug from the land, and (iii) with failing to furnish a declaration required by law before a plumbago pit may lawfully be opened. *Held*, that the joinder was not justified. "§178 . . . provides that every distinct offence shall be a separate charge, and that every such charge shall be tried separately, excepting in the cases mentioned in the sections which follow. The present case *cannot be brought under any of the exceptions mentioned in those provisions of the Criminal Procedure Code . . .*" *per* de Sampayo, J.

Keegal v. Mohideen (1918) 5 *C.W.R.* 162.—The principle of law set out in *Velaiden v. Zoysa* was approved and applied in this case.

Keerala v. Appuhamy (1919) 6 *C.W.R.* 338.—The accused were charged with having been found in possession of beef for which they were unable to account and with having committed theft of a cow, *held*, that in the absence of evidence connecting the cow with the beef alleged to have been found with the accused, there was a misjoinder of charges. See *William v. Dinorisa* (1919) 6 *C.W.R.* 365, *Naide v. Packeer* (1920) 22 *N.L.R.* 284, 8 *C.W.R.* 173.

R. v. Careem (1920) 7 *C.W.R.* 300.—Where an indictment charged various accused, some with rescuing a person from lawful custody, others with causing hurt to the Police at the same time and place, aiding and abetting each other, etc., *held*, that as all the offences were committed in the course of one and the same transaction, and as the accused were acting in concert, the indictment was good and valid.

Anasinghe v. Konnehamy (1919) 7 *C.W.R.* 103.—Where trials in respect of two distinct offences committed on different dates were consolidated and tried in one case, *held*, that the procedure was irregular. —*R. v. Mendis* approved.

R. v. Arlis Appu (1920) 2 *C.L.Rec.* 189; 8 *C.W.R.* 236.—Where W, X, Y and Z were jointly indicted for (1) house-breaking by night, and (2) theft of goods from the house of A; (3) house-breaking and (4) theft of goods from the house of B, *held*, that §§179 and 180 *applied severally or in combination* could not sanction such joinder, and that the conviction was illegal. *The scope of the amendment introduced by* §8 *of Ordinance No.* 31 *of* 1919 *discussed.* "The first point arising for consideration is whether house-breaking with intent to commit theft, and theft committed in connection with such house-breaking are distinct offences. In *R. v. Arnolis* (*supra*) the *Full Court held* that they are distinct offences. The joinder of the four accused is sanctioned by the provisions of §184. §179 sanctions the joinder of the two charges of house-breaking only, or of theft only, but not the joinder of one or more of the charges of house-breaking with one or more of the charges of theft. §180(1) sanctions the joinder of one of the charges of house-breaking with the theft which can be regarded as part of the same transaction, but not the joinder of the two charges of house-breaking and of the two charges

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§178 of theft, for they are two distinct transactions. It follows, therefore, that §§179 and 180(1) applied severally or in combination do not sanction the joinder of the four charges . . ." *per* Schneider, J. See *R. v. Tilak infra.*

Gunesekera v. Peeris (1920) 8 *C.W.R.* 89; 2 *C.L.Rec.* 122.—*Qu.*—May a charge of being in possession of rubber suspected of being stolen, under §16 of Ordinance No. 21 of 1908, be joined with a charge of theft of the same rubber ? The question was raised in this case, but not finally decided. *C.f. Keerala v. Appuhamy supra.*

Naide v. Packeer (1920) 22 *N.L.R.* 284; 8 *C.W.R.* 173.—Where there is no evidence identifying beef which is traced to a person's possession with the flesh of an animal which the accused is alleged to have stolen, it is irregular to charge such person with being in unlawful possession of the beef, and with theft of the animal. See *Keerala v. Appuhamy supra.*

Abeysuriya v. Jayasekera (1921) 22 *N.L.R.* 380.—Where the accused, in breach of the rice control rules, sold rice to X, Y and Z on four distinct occasions on the same day, *held*, that each sale constituted a separate offence, and that a joint trial in respect of all *four* offences was irregular. Note the cases cited in the judgment of this case.

R. v. Jamaldeen (1917) 4 *C.W.R.* 248.—" It is the act of dishonest retention which constitutes the offence (under §394 P.C.), and if a collection of stolen things are together found at one time and place in the possession of the person charged, as in this case, however he may have come by them originally, there is, in my opinion, but one act of retention and consequently one offence—" *per* de Sampayo, J. But see *R. v. Ram Sarup* §180 para. 6(*a*) *post.*

R. v. Manu 9 *Cal.* 371.—Judges ought to be anxious to lend a willing ear to any **valid** application for the separation of charges, and for separate trials upon separate charges.

R. v. Fakirappa 15 *Bom.* 491.—" The rule is 'separate trials.' Joint trial is only (justified) by virtue of the exceptions quoted in §233 (*local*—§178). The basis of the rule is that the accused should not be prejudiced by being accused of several things at once." *per* Jardine, J. " In any case if either the accused is likely to be bewildered in his defence by having to meet many disconnected charges, or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters, and tending, by its mere accumulation, to induce an undue suspicion against the accused, then, in any such case, the propriety of combining the charges might well be questioned." *per* Birdwood, J. See *R. v. Manavala* 29 *Mad.* 569; *R. v. Subramania* 25 *Mad.* 61; *R. v. Choragudi* 33 *Mad.* 502; *R. v. Senanayaka* (1917) 20 *N.L.R.* 83; 4 *C.W.R.* 353; *R. v. Wijeysinghe* (1919) 21 *N.L.R.* 232—see §179 para. 10 *post.*

R. v. Tribhuvandas 33 *Bom.* 77.—The accused was charged under two counts as follows: (i)§124A Indian Penal Code (*local*—§120) and §153A (no provision in the Ceylon Penal Code)—with having attempted to excite disaffection towards the Government and attempting to promote enmity between different classes in a newspaper article dated April 4, and (ii) a further charge under the same sections in the same terms with regard to an article dated April 11. It was held that the joinder of charges in this case was justifiable. " It is true that the offence under §124A . . . is not an offence of the same kind as an offence under §153A . . . And the Criminal Procedure Code, no doubt, provides that

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§178 those two offences cannot be tried together, but there is nothing in the Code which directs that, where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the . . . Penal Code, the section . . . in either case being the same, the joinder of charges under those sections is illegal. Substantially, the acts amount in such a case to offences punishable under the same sections of the . . . Penal Code, and, therefore, they are offences of the same kind . . . It was admitted that the charges under §124A in each head could legally be joined. Under §§236, 237 (*local*—§§181, 182) conviction could have followed under §153A even if that section had not been mentioned. The additional mention of §153A, therefore, could not be held to be illegal, but on the other hand gave the accused the advantage of notice . . . " *per* Chandavarkar, J. " §234 (*local*—179) does not say that at most a trial must be limited to three charges ; it says it must be limited to three offences, and that the offences must be of the same kind . . . The offences in this case were two in number . . . These two offences, as charged, were punishable under the same sections of the Indian Penal Code, and were, therefore, it seems to me, offences of the same kind. If the word ' section ' in the second clause of §234 (*local*—§179(2)) be read as incapable of meaning ' sections,' *i.e.*, if it invariably be read as singular, then the argument (for the accused-appellant) is good, not otherwise. But I do not think that it is the intention of the Code, either express or implied, to exclude from the operation of §234 an offence because it is made the subject of more than one charge . . ." *per* Heaton, J.

R. v. Raghunath 20 *Cal.* 413.—Where the accused filed several forged receipts with a written statement at one and the same time, and there was nothing to show that they had been used at any other time, *held*, that the accused had committed one offence, and that one charge was rightly preferred against him.

R. v. Rakhal 36 *Cal.* 808.—Where a person in giving evidence makes several false statements of fact, *held*, that this constituted one offence.

Mahomed v. Cheharu 10 *C.W.N.* 53.—C alleged that the accused, on a certain day, had assaulted him and extorted a bond for a certain sum of money from him, and that on the following day he had paid the accused the amount on the bond. The Magistrate charged the accused that " he did on the two dates in question extort from C the bond and the money." *Held*, that this amounted to a misjoinder of two distinct offences.

R. v. Johan 10 *C.W.N.* 520.—Where the accused attempted to cheat a body of persons by addressing them generally, *held*, that this was one offence.

R. v. Chandra 13 *C.W.N.* 1067.—Where the accused on one day attempted to cheat the villagers at X, and on the next day attempted to cheat the villagers at Y, *held*, that there were two distinct offences, and that a charge in one count was irregular.

R. v. Girwadhari 13 *C.W.N.* 1062.—Where a public servant demanded a gratification of Rs. 14, at the rate of Rs. 2 for registering seven title deeds executed by one person and presented for registration at one and the same time, and it was contended that there were seven offences involved, *held*, " It appears to us that the question is one of fact. If the Registrar attempted to obtain Rs. 2 separately from each of the seven purchasers, and was willing to register any one purchaser's *kobala* if that purchaser paid him Rs. 2, then the contention of the petitioner would prevail, otherwise not . . ."

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§178 *R. v. Girdhari* 11 *P.R.* 1911.—Where a collection is made, and a bribe made up of one lump sum from the amounts collected is paid over with the object of inducing the taker of the bribe to show favour to the subscribers *as a body*, *held*, that it was unnecessary to frame a separate charge in respect of each item subscribed. *C.f. Arumugathan v. Subramanian supra.*

Poonit v. Madho 13 *Cal.* 270.—Where X gave false information against A and B in one and the same statement, *held*, that this amounted to one offence, and that a single charge was valid.

R. v. Mati 26 *Cal.* 560.—Every falsification of a book is a separate offence.

R. v. Tilak 33 *Bom.* 221.—(*This case should now be read in the light of the amendment of* §178 *by* §8 *of Ordinance No.* 31 *of* 1919).—"The petitioner has still to make good the second assumption, *viz.*, that the sections mentioned in §233 (*local*—§178) are mutually exclusive. The words of the section do not favour this view. If it had been intended that §235(2) (*local*—§180(2)) or §236 (*local*—§181) could not be made use of in co-operation with §234 (*local*—§179), this intention could easily have been expressed. If the exceptions are mutually exclusive, the provisions of §236, or 237 (*local*—§182) could never be invoked to prevent a miscarriage of justice arising from failure to make good all the details of a charge joined with two other charges under §234 . . . It is, of course, possible for ingenuity to suggest cases in which the full exercise by the Court of the permissive powers conferred by the sections which we have been discussing may produce embarrassment. In such cases the discretionary power of the Court still remains to decline to avail itself of its full powers . . ." See *R. v. Arlis Appu supra.*

R. v. Bhagwati 2 *P.R.* 1905.—The Court refused to allow §§179, 180 to be applied simultaneously so as to permit charges of forgery, cheating and falsification of accounts as to *three different cheques* to be joined.

R. v. Choragudi 33 *Mad.* 502.—If there has been a misjoinder of charges which has caused embarrassment to the accused, the fact that he has been acquitted in respect of some of the charges cannot validate a trial which *ab initio* was void.

R. v. Subramania 25 *Mad.* 61 *Privy Council.*—Misjoinders of charges in contravention of §§178, 179 are illegalities which cannot be cured by a higher Court striking out one or more of the charges, and dealing with the evidence which, in its opinion, might have been submitted to the jury as applicable to the remaining charges.—See *R. v. Chandra* 35 *Cal.* 161; *R. v. Manawala* 29 *Mad.* 569; *R. v. Kumudini* 28 *Cal.* 104. The ruling of the Privy Council would appear to be applicable to a misapplication of §§180, 181, 184.

R. v. Tyler (1913) 1 *B.N.C.* 28.—See §179 para. 10 *post.*

Abeywickreme v. Babune (1897) 2 *N.L.R.* 344.—Where X at one and the same time committed theft of a hackery and bull, it was held that this was but one offence of theft, and that X was only liable to be sentenced once.

R. v. Para (1895) 1 *N.L.R. at p.* 321; 4 *N.L.R.* 55.—"The distinct character of the offences will be best indicated by the intention of the offender. If, for example, the dominant intention is to injure the person, *there should be but one punishment* (*N.B.*—The learned Judge is dealing with §17 of the Criminal Procedure Code and not with the joinder of charges), though the transaction in its entirety discloses more than

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one injury to the same person. If the transaction, on the other hand, discloses an intention to commit a crime against the person as well as the property of the injured person, the punishments may and should be distinct." It was accordingly held that where house-breaking and theft were committed in the course of one transaction, they were not " distinct offences " within the meaning of §17 *ante*, and that only one sentence could be imposed. In the case of *R. v. Arnolis Appu* (1904) 2 *Bal.* 81, the *Full Court* expressly dissented from this ruling, and from the test applied in *R. v. Cara* as to discovering whether offences are distinct or not.—See *Mendis v. Cornelis* (1898) 3 *N.L.R.* 196; *R. v. Abdul Rahim* (1913) 16 *N.L.R.* 449 ; *In Revision D.C. Crim. Colombo* 4427 (*S.C.M.* October 27, 1916) ; *de Rosairo Udayar v. Muna Wappu* (1919) 6 *C.W.R.* 2 ; *Sangarapulle v. Ratnasekera* (1916) 2 *C.W.R.* 158, *Abeywickreme v. Babune* (1897) 2 *N.L.R.* 344; 74 *D.C. Crim. Colombo* 4283 (*S.C.M.* April 3, 1916). See §§13 – 17 *ante*.

16 – 17 *D.C. Crim. Colombo* 3424 (*S.C.M.* March 3, 1913).—X and Y were jointly charged with committing criminal breach of trust in respect of three sums of money. *Held, per* Ennis, J. : "It has been urged on appeal that the indictment is bad for misjoinder of parties . . . In my opinion advantage can be taken *severally only* of the exceptions to the general rule that each offence is to be charged and to be tried separately. §179 provides that a person may be charged together for three offences of the same kind committed within the space of twelve months; and §184 that all persons jointly committing the same offence, or different offences committed in the same transaction, may be tried together. *To combine* these two would, in my opinion, create another exception to the general rule. If this had been intended, it would not have been necessary to limit §184 to different offences ' committed in the same transaction' . . ." But see §8 Ordinance No. 31 of 1919.

75 – 76 *D.C. Crim. Galle* 13771 (*S.C.M.* August 22, 1912).—*Held, obiter, per* Lascelles, C. J., that the exceptions to §178 are mutually exclusive, and that, although recourse might be had to one or another of them, advantage cannot be taken of more than one of them. But see §8 Ordinance No. 31 of 1919.

Podiya v. Baiya (1913) 1 *B.N.C.* 33.—See §184 para. 14 *post*.

Wijeysekera v. Ratnayaka (1919) 6 *C.W.R.* 281.—See §184 para. 14 *post*.

Ratnayaka v. Deonis (1916) 2 *C.W.R.* 21.—See §184 para. 14 *post*.

7 – 8 *P.C. Chilaw* 443 (January 21, 1916).—See §184 para. 14 *post*.

R. v. Powar (1920) 8 *C.W.R.* 269, *Held*, " It cannot be disputed that the accused was, under §179, properly charged with and tried at one trial for all the three offences. See also §8 of Ordinance No. 31 of 1919 . . ." *per* de Sampayo, J.

Fernando v. Fernando.—See §184 para. 14 *post*.

Anja v. Stewart (1923) 5 *C.L.Rec.* 217, 25 *N.L.R.* 166, 2 *T.L.R.* 21. —" 'Driving negligently' is one offence, and 'Driving in a manner which is likely to endanger human life' is a separate or distinct offence. The charge, therefore, offends against §178 . . . The defect is, however, not necessarily fatal to the conviction, as it is one of *duplicity* and not of *misjoinder*, and it may be cured under §425 of the . . . Code if the accused has not been prejudiced"—*R.v. Singh* (1913) 41 *Cal.* 66—*per* Jayawardene, J. *C.f. Rajendaram v. Enoris* (1926) 4 *T.L.R.* 114.

R. v. Perera (1926) 27 *N.L.R.* 511 (following *Anja v. Stewart, supra*).—A failure to comply with the provisions of §178 of the Criminal Procedure Code prejudices an accused, and such failure is not cured by §425 *post*.

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§178 *R. v. Perera* (1932) 12 *C.L.Rec.* 13.—X (wife) caused hurt to her daughter, Z, on 17-10-31. Y (husband) caused hurt to Z on 18-10-31. Nothing to show that the two offences were committed in the same transaction. *Held*, the joint trial of X and Y amounts to a misjoinder of charges and of accused.

Three offences of same kind within a year may be charged together.

179. (1) When a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code or of any special or local law.

Offence.—See §3 *ante*.

Offences of the same kind.—*C.f.* "**Distinct Offence**"—§§17, 178 *ante*, and "**Same Offence**" §184 *post*.

Committed within the space of twelve months.—*C.f.* §168(2) *ante*.

Trials before the Police Court.—See §§152(3), 166 and *Chapter XVIII*.

Trials before the District Court.—See *Chapter XIX. post*.

Trials before the Supreme Court.—See *Chapter XX. post*.

District Court.—See §3 *ante*.

Supreme Court.—See §3 *ante*.

Indictment.—See Form 11, *Schedule III. post*, and §§158(2), 186, 387.

Penal Code.—See §3 *ante*.

Special or local law.—See §3 *ante*, and §§39, 40 Penal Code.

Section.—See §3 *ante*, and §49 Penal Code.

1. §179 is similar to §234 of the Indian Code, and §208 of the Code of 1883.

2. **Scope of §179.**—See Introduction to *Chapter XVII.* para. 4 *ante*. See §178 paras. 2, 3, 4, 5, 6, 8 *ante*.

§179(1) provides the first exception to the general rule laid down by §178 *ante*. In cases where a person is accused of committing a series of offences, all of which are of " the same kind," and which have been committed within the space of twelve months from first to last, he may be charged at one trial, whether summarily before a Magistrate or upon indictment, with any three of such similar offences. §179(2) defines what is meant by the expression " offences of the same kind." Offences are " of the same kind " when they are punishable (i) with the same amount of punishment under (ii) the same section of the Penal Code, or of any special or local law.—See para. 3 *infra*.

It should be observed that §179 is independent of the provisions of §§180 – 181 which, under certain circumstances, allow the joinder of offences which are not similar to each other in one and the same charge or indictment.

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Before advantage can be taken of the provisions of §179, two conditions must be satisfied. In the first place the offences must be of the same kind, and in the second place the offences from first to last must have been committed within the space of twelve months.—See paras. 3, 4 *infra*. §179

The use of the word " may " in §179 should be noted. The terms of the section are permissive merely, and not imperative. It is always open to an accused who is charged with having committed three similar offences, under §179 to move the Court to direct that the charges should be tried apart, upon proof that a joint trial would either prejudice or embarrass his defence.—See para. 5 *infra* and §178 para. 5 *ante*.

§179 should be read in the light of the provisions of §168(2) *ante*, in so far as charges of criminal breach of trust or dishonest misappropriation of **money** are concerned.—See para. 6 *infra*, and §§167 – 170 para. 9 *ante*.

§179 permits the joinder of three similar offences committed within the space of twelve months regardless of the fact that such offences were committed against three different persons, or that the aggregate value of the subject matter of the three charges exceeds the value limited to the capacity of the Court of trial.—See paras. 3, 9 *infra*.

If an accused has committed twelve different offences within the space of twelve months, there is nothing to prevent four charges or indictments being framed against him, each charging him with three of such offences ; and, subject to the rule regarding bias,* there would be nothing illegal in the Court trying all the four charges or indictments on the same day.—*R. v. Dononjoy*. Moreover, at the trial of a charge or indictment framed under §179 it would, in certain circumstances, be open to the prosecution to lead evidence regarding other offences of the same kind committed by the accused, but with which he is not charged, *e.g.*, under §15 Evidence Ordinance. §179 deals with a rule of **criminal pleading**. The rule of **evidence** is separate and distinct.

§179 may be applied either severally or in combination with §§180 – 181, 184.—See §178 paras. 6, 8 *ante*. An irregular application of §179 would be fatal to a conviction—§178 para. 9, and para. 7 *infra*.

3. **Offences of the same kind.**—Offences are said to be " of the same kind " (i) when they are punished with the same " amount of punishment," and (ii) when they are penalised by the same section of the Penal Code, or of any special or local law. For example, the kidnapping or abduction of any person in order that such person should be murdered is penalised by §355 of the Penal Code, which provides that the maximum penalty for either offence shall be twenty years rigorous imprisonment and fine. In view of the provisions of §179(2) these two offences are " offences of the same kind " although referred to in the Penal Code by two distinct names. Hence, if an accused *kidnaps* A for the purpose of murdering him, and, within twelve months, *abducts* B for a similar purpose, the two charges may lawfully be joined in one indictment under §179(1). *C.f.* the expression " distinct offence " as used in §§17, 178 *ante*.

Special law.—This is defined by §39 Penal Code. The following are examples of Special Laws : Vagrants Ordinance 1841, Lotteries Ordinance 1844, Joint Stock Companies Ordinance 1861, Stamp Ordinance 1909, &c.

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* See *Dias on the Evidence Ordinance p.* 221.

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§179 **Local law.**—This is defined by §40 Penal Code. The following are examples:—Administration of justice in the North-Western Province Ordinance 1887, Chanks Ordinance 1890 (applicable only between Mannar and Chilaw), &c.

The expression "offences of the same kind" does not include "transactions of the same kind."—*R. v. Sheo Saran infra,* and *R. v. Visvanathan* §180 para. 6(*a*) *post,* but *c.f. R. v. Kashinath* para. 6 *infra.*

It is doubtful whether offences of hurt under §§314, 316 of the Penal Code are "offences of the same kind."—*R. v. Aman.* Offences of hurt and criminal force are not offences of the same kind.—*James Appu v. Francis.* Similarly, offences of criminal breach of trust and falsification of accounts are not of the same kind—*R. v. Visvanathan*; nor are offences of criminal breach of trust and insult.—*Gray v. Perera.* Offences which are not of the same kind may be joined together and tried together, if such joinder or trial is justified under §§180 – 181 *post.*

If offences are of the same kind, and may properly be joined under §179, it matters not if the three offences charged were committed against three different persons or complainants.—*R. v. Senanayaka, R. v. Narain, R. v. Prasad. In R. v. Senanayaka* Wood Renton, C.J., *held,* that to insert the words "against the same person" in §179(1) when the Legislature had omitted to do so, would be a stretch of judicial interpretation approximating to actual legislation itself.—See also *R. v. Bhagwan.* It also does not matter if, by reason of a valid joinder of charges under §179, the aggregate value of the subject matter of the offence exceeds the value fixed by law for the jurisdiction of the Court of trial.—(1905) *Lem. & A.* 18.

In the case of *R. v. Budhari* a doubt has been expressed as to whether §179 could be applied in cases where more than one accused is charged; but this case must now be read in the light of the amendment effected in §178 *ante,* and the ruling in *R. v. Arlis Appu.*—§178 paras. 6, 8, and 10 *ante.*

§179 does not authorize the splitting up of what is really one offence so as to constitute two offences, *e.g.*, where a man steals a cart with the bull attached to it he commits but one theft.—*Abeywickreme v. Babune. C.f. Mohamed v. Cheharu,* and *R. v. Rakhal* §178 para. 10 *ante.*

With regard to charges of criminal breach of trust, or of dishonest misappropriation of **money.**—See para. 6 *infra.*

4. **Committed within the space of twelve months from the first to the last of such offences.**—

From.—See §9(1) Interpretation Ordinance 1901, and *c.f.* §168(2) *ante.*

To.—See §9(2) Interpretation Ordinance 1901, and *c.f.* §168(2) *ante.*

When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may lawfully be charged at one trial for any three of such offences, although there may be evidence or material to show that such person has been accused of offences other than those appearing in the charge outside the period of twelve months in which the offences on which he is charged had been committed. It was not the intention of the Legislature to enact that no person could be charged for three offences of the same kind, if it appeared in the course of the trial that he had at some other period committed other offences of a like nature. The language of §179(1) is such as to show that the intention of the Legislature was to extend the powers of any Court to try persons for more

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offences than one of the same kind, where such offences were committed within the space of twelve months, and to limit the number of the offences to be so tried to three.—*R. v. Dorasamy* (*Full Court*). On the other hand, where a person is accused of unlawfully felling Crown timber from a forest at various times between the years 1908 and 1913, each act of felling being a separate offence, no more than three of such charges can be joined in the same charge. A charge that the accused "did between the years 1908 and 1913 fell and remove timber" was accordingly held to be bad.—*R. v. Unanse* §178 para. 10 *ante*.

If there exists a doubt as to whether one of three similar offences was or was not committed within the twelve months, the accused should be given the benefit thereof, and such offence should not be charged along with the other two.—*Colombo Gas Company v. Mahomed*. There is nothing illegal in joining *two* similar offences committed within the space of twelve months.

5. **May.**—§179 is only permissive and not imperative in its terms. The same applies to §§180–181, 184. In any case where distinct offences are lawfully joined under §§179–181, or where different accused are lawfully joined under §184, it is open to the accused to move the Court for a separation, either of the charges, or of the offenders, on proof that such joinder would prejudice his defence or embarrass him in the trial.—See §178 para. 5 *ante*, and §184 paras. 7, 8 *post*. See also *R. v. Bywaters & Thompson*, *R. v. Browne & Kennedy* §184 para. 14 *post*.

6. **§179 and §168(2).**—See §§167–170 para. 9 *ante*.

§168 (2) creates a special exception in cases where a person is accused of committing criminal breach of trust of **money** or with dishonestly misappropriating **money.** It is now sufficient to specify in the charge the gross sum only in respect of which the accusation is preferred, and the dates between which the offence was committed, without stating particular items or exact dates, provided the time included between the first and last of such dates does not exceed one year. Such a charge when preferred is deemed by §168(2) to be a charge of "*one offence within the meaning of* §179." From this it follows that under §179 three such charges, if committed within twelve months, may be joined, although the charges have reference to three separate defalcations, and committed against three distinct complainants.—*R. v. Kashinath* §§167–170 para. 10 *ante*.

7. **Irregular use of §179.**—See §178 para. 9 *ante*. See also *R. v. Kanjamanadan* para. 10 *infra*.

In *R. v. Manawala*—§§172–176 para. 6 *ante*—it appeared that the charge, as framed, contained more than three offences. The Judge, however, during the trial and before judgment, amended the charge by deleting therefrom one of the charges. The Indian Courts held that a charge which was bad on the face of it could not be cured by an amendment of this kind. It would seem, however, that had the amendment been made at an earlier stage of the trial than when it was done, the decision might perhaps have been different.

8. **§179 may be used either severally or in combination with the other exceptions.**—See §178 paras. 6, 8 *ante*, and the case of *R. v. Budhari*—para. 3 *ante* and para. 10 *infra*.

See §180 para. 2(i)(*c*) *post*.

9. **Examples.**—

(*a*) *Egan v. Sellambaran.*—Harbouring four coolies—four distinct offences. Such charges may be joined under §180 (1), but not under §179.

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§179 (*b*) *R. v. Senanayaka, R. v. Narain, R. v. Prasad.*—Under §179 it makes no difference even if the three offences charged were committed against three different parties. *C.f. R. v. Budhai, R. v. Sri Bhagwan Arumugathan v. Subramanian, R. v. Budhari, Abeysuriya v. Jayasekera, R. v. Girwadhari.*

(*c*) (1905) *Lem. & A.* 18.—It makes no difference if by reason of a joinder under §179 the aggregate value of the subject matter of the offences exceeds that of the jurisdiction of the Court of trial.

(*d*) *R. v. Unanse.*—The offences charged must have been committed within the space of twelve months from the first to the last. *C.f. R. v. Chandra, R. v. Johan.*

(*e*) *R. v. Aman.*—It is doubtful whether §179 justifies the joinder of charges under §316, 314 Penal Code.

(*f*) *James Appu v. Francis.*—Offences of hurt and criminal force are not of the same kind.

(*g*) *R. v. Visvanathan.*—Offences of criminal breach of trust and of falsification of accounts are not of the same kind.

(*h*) *Gray v. Perera.*—The offence of criminal breach of trust is not of the same kind as the offence of insult.

(*i*) *Abeywickreme v. Babune.*—A person who commits theft of a cart with the bull attached to it, commits but one theft. It is wrong to charge him for the theft of the cart in one count, and for theft of the bull in another. *C.f. Mahomed v. Cheharu. R. v. Rakhal* para. 3 *supra.*

10. **Case law.**— *R. v. Datto* 30 *Bom.* 49—see §167 para. 10 *ante.*

R. v. Manawala 29 *Mad.* 569—§§172–176 para. 6 *ante.*

R. v. Tilak 33 *Bom.* 221—§178 para. 10 *ante.*

R. v. Bhagwati 2 *P.R.* 1905—see §178 para. 10 *ante.*

R. v. Subramania 25 *Mad.* 61 Privy Council—see §178 para. 10 *ante.*

R. v. Fernando (1908) 2 *Leader* 81—see §178 para. 10 *ante.*

Arumugathan v. Subramanian (1914) 2 *Crim. App. R.* 58—see §178 *ante.*

R. v. Unanse (1916) 3 *C.W.R.* 102—see §178 para. 10 *ante.*

R. v. Arlis Appu (1920) 2 *C.L.Rec.* 189, 8 *C.W.R.* 236—see §178 para. 10 *ante.*

Abeysuriya v. Jayasekera (1921) 22 *N.L.R.* 380—see §178 para. 10 *ante.*

Mahomed v. Cheharu 10 *C.W.N.* 53—see §178 para. 10 *ante.*

R. v. Chandra 13 *C.W.N.* 1067—see §178 para. 10 *ante.*

R. v. Johan 10 *C.W.N.* 520—see §178 para. 10 *ante.*

R. v. Girwadhari 13 *C.W.N.* 1062—see §178 para. 10 *ante.*

R. v. Mati 26 *Cal.* 560—see §178 para. 10 *ante.*

R. v. Narain 32 *Cal.* 1085.—§§168(2) and 179 will cover a charge which charges one offence under §392 Penal Code, while specifying three separate sums received from three separate people within one year.

R. v. Visvanathan 30 *Mad.* 328, see §§167–170 para. 10 *ante.*— Where the charge alleged three distinct acts of criminal breaches of trust and three distinct acts of falsification of accounts, *held*, that §179 did not cover such a charge "because the offences of falsification of accounts are not of the same kind as the offences of criminal breach of trust. . ."

R. v. Kashinath 12 *Bom. H.C.R.* 226—see §§167–170 para. 10 *ante.*

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§179

R. v. Dorasamy (1905) 8 *N.L.R.* 79 (*Full Court*).—Where X was accused of committing offences of the same kind, which from first to last, had been committed during a period of about four years, and the indictment charged him with three of such offences alleged to have been committed on August 24, December 24, and December 28, 1903, *held*, that under §179(1) X could be indicted and tried on the charges, as they had been committed within the space of twelve months. "I read the section (§179(1)) as meaning that, when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to last of such offences, he may be indicted . . . for any three of such offences, though there may be evidence or material before the Police Magistrate to show that such person has been accused of offences other than those appearing in the indictment outside the period of twelve months in which the offences on which he is charged in the indictment had been committed. It was not intended by the Legislature to enact that no person could be indicted for three offences of a similar kind if it appeared in the course of the proceedings . . . that he had at some other period committed other offences of a like nature. The language of §179(1) is such as to show that the intention of the Legislature was to extend the powers of any Court to try persons for more offences than one of the same kind, where such offences were committed within the space of twelve months, and to limit the number of the offences to be tried in such a case to three—" *per* Layard, C.J., Moncreiff & Grenier, J.J.

R. v. Kanjamanadan (1903) 7 *N.L.R.* 52.—The indictment in this case contained four counts, three of which charged the accused under §457 Penal Code with having committed forgery, and in the fourth count with having uttered the forged documents. "The first objection taken by the prisoner's counsel is that the indictment contravenes the provisions of §179 . . . as it alleges more than three offences. On the face of it, it admittedly discloses more than three offences. Counsel for the Crown, however, relies on §180(1) . . ." *per* Layard, C.J. See §§167 – 170 para. 10 *ante*.

(1905) *Lem. & A.* 18.—The Magistrate tried and convicted the accused in respect of three distinct offences of theft committed by him within the space of twelve months. As the value of the articles stolen together amounted to more than Rs. 100 in value, it was contended that this precluded the Magistrate from convicting the accused. *Held*, that §179 concluded the matter.

Colombo Gas Co. v. Mahomed (1906) *Lem. & A.* 19.—In this case the accused was convicted in respect of three offences of the same kind. Two offences were proved to have been committed within the space of twelve months, but the evidence left it doubtful as to when the remaining offence was committed. *Held*, that the trial was valid, but that the accused ought not be tried for the third offence in the absence of proof that it was committed within twelve months from the first offence.

Gray v. Perera (1911) *App. Cas.* 29.—The offences of criminal breach of trust and insult cannot be joined in one charge under §179, although committed within the space of one month. *C.f. R. v. Aman infra.*

R. v. Tyler (1913) 1 *B.N.C.* 28.—"Clearly there has been a misjoinder that cannot be justified under §§179 – 181 . . . Two distinct acts of omission which are made penal by Ordinance No. 13 of 1889 have been put together and the accused tried for the two offences at one trial. This, as has been repeatedly held both here and elsewhere, is not a mere curable irregularity . . ." *per* Pereira, J. Note the Indian cases cited.

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§179 *James Appu v. Francis* (1913) 1 *B.N.C.* 32.—See §180 *Illustration* (*g*). "Clearly hurt could not be caused without the use of criminal force . . ." *per* Ennis, J.

R. v. Senanayaka (1917) 20 *N.L.R.* 83, 4 *C.W.R.* 353.—The accused was charged with having on a certain day, during the riots of 1915, broken and entered into the boutiques of three different people and committed theft therefrom. *Held*, that the joinder of charges was not irregular. Wood Renton, C.J. reviewed the Indian authorities, *viz.*, *R. v. Murari* 4 *Alla.* 147, *R. v. Miya* 9 *Cal.* 371 and the Indian Full Court case *R. v. Prasad* 7 *Alla.* 174, and was of opinion "that the later Indian authorities ought to be followed in the construction of §179(1) of our . . . Code. It is always open to the Courts, on the application of an accused person against whom that section is being applied, to order that the trials should be separate, and any possible hardship may be obviated in that way. To insert in §179(1) the words "against the same person" when the Legislature has omitted them, would be a stretch of judicial interpretation approximating to actual legislation itself . . ." See *R. v. Wijeysinghe infra.*

R. v. Wijeysinghe (1919) 21 *N.L.R. at p.* 232.—"It was urged on appeal that the accused has been prejudiced by the trial of three offences at the same time, prejudiced in this, that the fact that other charges were made against him has led to the suspicion that each of them severally must be true. §279 of the Criminal Procedure Code (§179 was meant) permits of three offences of the same kind being tried at one trial. But it is only permissive, and it was open to the Court, when objection was taken at the beginning of the trial, to have directed a separate trial in respect of each separate offence . . ." *per* Ennis, J. This case should be read in the light of the judgment of Wood Renton, C.J., on a similar point in *R. v. Senanayaka supra*, and *R. v. Fakirappa* 15 *Bom.* 491, §178 para. 10 *ante.*

R. v. Aman (1920) 21 *N.L.R.* 375, 1 *C.L.Rec.* 191, 7 *C.W.R.* 154 (*Full Court*).—*Qu.* May offences under §§314, 316 Penal Code be combined in one indictment under §179? *held*, without deciding the point, that in this case the joinder was justified, as the offences were committed in the course of the same transaction—§180(1) *post.*

Egan v. Sellambaram (1908) 3 *A.C.R.* 109.—Where four coolies, who were alleged to have been unlawfully harboured by the accused, deserted from the same estate at the same time and were received together by the accused and harboured together, *held*, that the accused could be tried at one and the same trial for harbouring all four coolies, in view not of §179(1), but of §180(1). See §180(1) *post.*

R. v. Samaranayaka (1892) 1 *S.C.R.* 335.—See §178 para. 10 *ante.*

R. v. Tribhuvandas 33 *Bom.* 77.—See §178 para. 10 *ante.*

R. v. Budhari 33 *Cal.* 292.—"The provisions contained in §234 (*local*—§179) are not applicable where there are several accused, possibly because otherwise complication and confusion in the trial might ensue." *C.f. R. v. Arlis Appu* (1920) 2 *C.L.Rec.* 189, and *R. v. Girwar* §§167–170 para. 10 *ante.*

R. v. Prasad 7 *Alla.* 174 (*Full Court*).—Where a postmaster embezzled various sums of money given to him by different persons to purchase money orders, *held*, that such charges could be joined. See *R. v. Senanayaka supra.*

R. v. Sri Bhagwan 13 *C.W.N.* 507.—"There can be no reason why an offence committed by an accused within twelve months against a series of persons not exceeding three in number should not be tried at one trial."

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R. v. Sheo Saran 32 *Alla.* 219.—" Offences of the same kind " cannot be extended to include " transactions of the same kind," so as to enable three offences under §391 Penal Code and which were connected with three offences under §466A Penal Code being all tried together.

R. v. Dononjoy 3 *Cal.* 540.—There may be any number of *trials* against an accused on the same day, each trial being in respect of three offences of the same kind.

Abeywickreme v. Babune (1897) 2 *N.L.R.* 344.—See §178.

16–17 *D.C. Crim., Colombo* 3424 (*S.C.M.* March 3, 1913).—See §178 para. 10 *ante.*

75 – 76 *D.C. Crim., Galle* 13771 (*S.C.M.* August 22, 1912).—See §178 para. 10 *ante.*

Trial for more than one offence.

180. (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

Offence falling within two definitions.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of such offences, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

Acts constituting one offence, but constituting another offence when combined.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(4) Nothing contained in this section shall affect Section 67 of the Penal Code.

Illustrations.

To sub-section (1).

(*a*) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with and tried for offences under Sections 220 and 324 of the Penal Code.

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§180 (*b*) A has in his possession several seals knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Section 455 of the Penal Code. A may be separately charged with and convicted of the possession of each seal under Section 461 of the Penal Code.

(*c*) A, with intent to cause injury to B, institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence knowing that there is no just or lawful ground for such accusation. A may be separately charged with and convicted of two offences under Section 208 of the Penal Code.

(*d*) A, with intent to cause injury to B, falsely accuses him of having committed an offence knowing that there is no just or lawful ground for such accusation. On the trial A gives false evidence against B intending thereby to cause B to be convicted of a capital offence. A may be separately charged with and convicted of offences under Sections 208 and 191 of the Penal Code.

(*e*) A, with six others, commits the offences of rioting, grievous hurt, and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with and convicted of offences under Sections 144, 316 and 149 of the Penal Code.

(*f*) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with and convicted of each of the three offences under Section 486 of the Penal Code.

The separate charges referred to in *Illustrations* (*a*) to (*f*) respectively may be tried at one trial and included in one and the same indictment.

To sub-section (2).

(*g*) A wrongfully strikes B with a cane. A may be separately charged with and convicted of offences under Sections 343 and 314 of the Penal Code.

(*h*) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with and convicted of offences under Sections 394 and 396 of the Penal Code.

(*i*) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with and convicted of offences under Sections 308 and 297 of the Penal Code.

(*j*) A dishonestly uses a forged document as genuine evidence in order to convict B, a public servant, of an offence under Section 163 of the Penal Code. A may be separately charged with and convicted of offences under Sections 459 (read with 455) and 193 of the same Code.

To sub-section (3).

(*k*) A committs robbery on B and in doing so voluntarily causes hurt to him. A may be separately charged with and convicted of offences under Sections 314, 380 and 382 of the Penal Code.

Act includes omission.—See §3 *ante*. *N.B.*—The word "**act**" and "**omission**" denote a series of acts or omissions as well as a single act or omission—see §31 Penal Code.

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Same transaction.—*C.f.* §6 Evidence Ordinance, and §§184, 238 (1) *post.*

Offence.—See §3 *ante.*

Trial in the Police Court.—See §§152(3), 166 *ante,* and *Chapter XVIII.*

Trial in the District Court.—See *Chapter XIX. post.*

Trial before the Supreme Court.—See *Chapter XX. post.*

Supreme Court.—See §3 *ante.*

District Court.—See §3 *ante.*

Indictment.—See Form 11, *Schedule III. post,* and see §§158 (2), 186, 387.

Definitions.—See §5 *et seq.* Penal Code.

Two or more separate definitions.—*C.f.* §67 Penal Code.

If several acts . . . constitute, when combined, a different offence . . .—*C.f.* §67 Penal Code and §183 *post.*

1. §180 is based upon §235 of the Indian Code and §209 of the Code of 1883. With regard to the *Illustrations* appended to §180, the following table shows the relationship these *Illustrations* bear to those appearing in §235 of the Indian Code and §209 of our old Code :—

Illustration in §180	*Corresponding Illustration in* §235 *Indian Cr.P.C.*	*Corresponding Illustration in* §209 *Code of* 1883
a	a	a
b	d	b
c	e	c
d	f	d
e	g	e
f	h	f
g	i	g
h	j	h
i	k	i
j	l	j
k	m	k

See *R. v. Fakirappa* para. 6 *infra,* where the above *Illustrations* are made the subject of judicial comment.

2. **Scope of §180.**—See Introduction to *Chapter XVII.* para. 4 *ante.*

See §178 paras. 2, 3, 6, 7, 8, 9 *ante.*

See §179 para. 2 *ante* and §323 *post* as to the difference between §180, §17 *ante* and §67 of the Penal Code.

§180 contains three exceptions to the general rule formulated by §178 and allows the joinder of distinct offences in one charge or indictment under the following circumstances :—

(*a*) If a series of acts (or omissions) are so connected together as to form **one and the same transaction,** and more offences than one are committed in the course of such transaction, the offender may, at one trial, be charged with all the offences so committed—§180(1), and *Illustrations* (*a*)-(*f*).

(*b*) If the acts (or omissions), which are alleged to amount to criminal liability, constitute offences falling within **two or more separate definitions of any penal law in force,** the offender may be charged in one and the same proceeding for each of such offences—§180(2), and *Illustrations* (*g*)-(*j*). *C.f.* §§181–183 *post* and §67 Penal Code.

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§180 (*c*) If several acts (or omissions), of which one or more than one would by itself or themselves constitute an offence, **constitute, when combined a different offence**, the accused may be tried at one trial for the offence constituted by such acts or omissions when combined, and for any offence constituted by any one or more of such acts or omissions —§180(3), and *Illustration* (*k*). *C.f.* §§181–183 *post* and §67 Penal Code.

These three exceptions, together with the other exceptions created by §§179, 181, 184, may be applied either severally or in combination—see §178 paras. 6, 8 *ante*.

§180 should also be read and construed along with §8 of the Interpretation Ordinance 1901, §17 *ante*, and §67 of the Penal Code—§180(4). See para. 3 *infra* and §323 *post*.

(i) §180(1).—(*a*) **"Same transaction."**—The Criminal Procedure Code does not define or explain this term, which appears again in §184 *post* and in §6 of the Evidence Ordinance. The case law, however, places the meaning of the term beyond all doubt. A "transaction" may be a continuous one extending over a lengthy period—*Rawson v. Haigh*, *R. v. Sherufalli;* but continuity of the "transaction" should be manifest, and not uncertain.—*R. v. Mahato*, *R. v. Foster*, *R. v. Appuhamy*, and *c.f. R. v. Bedingfield*. So where X committed an offence, and after its completion Y rescued X from arrest, it was held that Y could not be charged with rescuing X from lawful arrest in the same proceeding in which X was charged.—*Weerakoon v. Mendis*. A "transaction" may consist both of physical acts and of words—*Thompson v. Trevanion*, *Du Bost v. Beresford;* and it is submitted, even of omissions, *e.g.*, where the parent of a minor child wilfully omits to prevent the administration of poison to such child by a third person and which the parent knew had been brought by such third party for the purpose of murdering the child. Our local *Full Court* has defined a "transaction" as meaning "that which is done or takes place—an affair," and it was held that a series of acts may, in law, amount to the same "transaction," although each act itself was done or performed under a different motive—*R. v Aman*, and *c.f.* the Indian case of *R. v. Lockley*. In the case of *R. v. Fakirappa*, the Indian Courts indicated that the words "same transaction" referred to cases where there was (i) a continuous series of acts—*Illustration* (*a*), and *c.f. R. v. Sherufalli*, *R. v. Mahato;* (ii) an identity of time—see *Illustrations* (*b*), (*e*), (*f*), and *Illustrations* (*a*), (*b*) to §184 *post*, *c.f. R. v. Vajiram;* (iii) even where there is no identity of time, yet there appears to be the same criminal intention or *mens rea* actuating the acts —see *Illustrations* (*c*), (*d*), and *Illustrations* (*b*), (*c*) to §184. *C.f. Wijeysekera v. Ratnayaka*, *R. v. Vajiram*.

The *Illustrations* to §§180, 184 are not exhaustive, and it is a question which awaits judicial decision whether §§180, 184 should be applied except in such cases as are exemplified in *Illustrations* (*c*) and (*d*) to §180 to cases where the alleged criminal acts "are separated by distinct intervals of time or place, and must be proved by distinct evidence."—*R. v. Fakirappa*.

See also *R. v. Ellis*, *R. v. Stainton*, *R. v. Saibo* as to the meaning of the term "same transaction."

The expression "offences of the same kind" as used in §179 does not mean "transactions of the same kind."—*R. v. Visvanathan*, *R. v. Sheo Saran*. *C.f. R. v. Kashinath* §§167–170 para. 10 *ante*. See also §179 para. 3 *ante*.

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(*b*) The scope of the exception created by §180 (1) may be stated as follows. If several offences are so related to each other as to amount to a single "transaction," such offences may be charged and tried together, subject to the right of the accused person to ask the Court of trial for a separation of the charges, upon leading proof that the joinder of charges is calculated to prejudice or embarrass his defence—see §178 paras. 2, 5 *ante*. On the other hand, if offences which lawfully might have been joined, are charged apart, the Court of trial cannot consolidate such charges and try them at one trial—see §178 para. 7. See also *Aveliya v. Khan* para. 6 *infra*.

(*c*) §180(1) may be applied either severally or in combination with §§179, 181, 184 and with §§180(2) and (3). With regard to the application of §179 and §180(1) in combination, see *R. v. Visvanathan* and *R. v. Sheo Saran*. In considering these cases, it should be borne in mind that the Indian Law differs from our law, in that it does not contain a provision expressly authorizing the application of the exceptions either severally or in combination.

See also §178 paras. 6, 8, §179 para. 8.

C.f. §184 *Illustrations* (*a*), (*b*), (*c*).

See *R. v. Arlis Appu* and *R. v. Bhagwati*—§178 para. 10 *ante*.

(*d*) Examples of the application of §180(1).

1. **Distinct offences committed in the course of one transaction.**—See *Illustrations* (*a*)-(*f*), *Egan v. Sellambaram, Gray v. Perera, R. v. Arnolis Appu, R. v. Careem, R. v. Raghunath, R. v. Rakhal, R. v. Vajiram, R. v. Balwant, R. v. Senanayaka, Aveliya v. Khan, Rawson v. Haigh, R. v. Sherufalli, R. v. Mahato, R. v. Foster, R. v. Appuhamy, R. v. Bedingfield, Thompson v. Trevanion, Du Bost v. Beresford, R. v. Aman, R. v. Lockley, R. v. Fakirappa, R. v. Ellis, R. v. Stainton, R. v. Saibo. Abeykoon v. Philip, Ismail v. Sinno, R. v. Gunesekera.*

2. **Offences committed at the same time, but not in the same transaction.**—*Murugappah v. Kanapathi, Silva v. Lewis.*

3. **Offences committed in the same transaction, (*a*) but charged apart, cannot be consolidated at the trial.**—*R. v. Mendis* and see §178 para. 7 *ante*; **(*b*) but amounting to one act cannot be split up so as to form two acts.**—*Abeywickreme v. Babune, Mahomed v. Cheharu, R. v. Rakhal.* **(*c*) If the continuity of the transaction is not manifest the benefit of the doubt must be given to the accused.**—*Keerala v. Appuhamy, R. v. Mahato, R. v. Bedingfield, R. v. Sherufalli, Weerakoon v. Mendis, R. v. Perera.*

4. **Examples of acts which do not amount to a single transaction.**—*R. v. Chekutty, R. v. Ram Sarup, R. v. Jamaldeen, R. v. Samaranayaka, Gooneratne v. Sinno, Weerakoon v. Mendis, Silva v. Lewis, Weerasinghe v. Wijeysinghe* (1927) 29 *N.L.R.* 208, 8 *C.L.Rec.* 207, *R. v. Perera* (1899) *Koch* 43, see also §178 para. 3 *ante*, and §184 *post*.

(*e*) §180(1) only authorizes the joinder of distinct offences under certain specified circumstances. It is §17 *ante* which regulates the amount of punishment which the Court of trial may lawfully award the offender upon conviction for several distinct offences which have lawfully been joined.—See para. 3 *infra*.

(*f*) Effect of an improper use of the provisions of §180(1).—See para. 5 *infra*.

(*g*) It is always a safe plan, when drafting an indictment or charge, to indicate in the various counts that the offences are

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§180 **alleged to have been committed in one and the same transaction.** It was the omission of this that led to the quashing of the conviction in *R. v. Perera.*

(ii) §180(2).—**(*a*) If two or more penal enactments penalise the same conduct, §180(2) authorizes the joinder of charges framed under each of such penal enactments and the trial of the offender at one trial in respect of all such charges.** *Illustrations* (*g*)-(*j*) illustrate the effect of §180(2). In construing §180(2) the provisions of §8 of the Interpretation Ordinance 1901 must not be overlooked. This section declares that " where any act or omission constitutes *an offence* under two or more laws, whether either or any of such laws came into force before or after the commencement of the Interpretation Ordinance, the offender shall, *unless the contrary intention appears*, be liable to be prosecuted and punished under either or any of those laws, *but shall not be liable to be punished twice for the same offence.*" §8 of the Interpretation Ordinance applies to cases where similar conduct is penalised by one or more Ordinances, *e.g.*, the driving of a vehicle without lights after dark may be penalised under the law regulating vehicles and vehicular traffic, the local by-laws, and other enactments. An accused may lawfully be charged at one trial with committing offences under the enactments above named, but inasmuch as the conduct penalised in each of the three laws is the same, he cannot be punished three times in respect of the same conduct, and it is submitted that a conviction under any one of these laws would be a bar to a subsequent charge under the other laws. Thus, theft by a servant is penalised under §370 of the Penal Code. §60 of the Post Office Ordinance penalises thefts committed by officers of the post office. If a postman commits theft of a postal packet, he may be charged at one trial with having committed offences under §370 of the Penal Code, and with committing an offence under §60 of the Post Office Ordinance. The accused, however, may not be punished twice, *i.e.*, both under the Penal Code and under the Post Office Ordinance—see *Modder v. Perera*, *Peris v. Perera*, 74 *D.C. Crim. Colombo* 4283. In cases like this, even if the charge contains only one offence, it is lawful for the Court of trial, acting under §182 *post*, to convict the accused and to sentence him for an offence created by another law which penalises the conduct proved, even though no charge has been preferred under that law. On the other hand, if, on a charge under §370 of the Penal Code, the accused is acquitted under that section, and the judge does not convict the accused under §60 of the Post Office Ordinance, he may not thereafter be charged in a subsequent proceeding with committing an offence under §60 in respect of the same facts on which the acquittal was pronounced—see §330 *post*, and the *Illustrations* thereto.

On the other hand, there are many cases which appear to fall within the purview of §8 of the Interpretation Ordinance, but which, on closer examination, are found not to be within the rule formulated by that section at all. Thus where a person unlawfully fells timber upon Crown land and removes it, he commits theft—§368 Penal Code, as well as an offence under the Forest Ordinance. Although at first sight it would seem that the conduct penalised under the two laws is the same, yet it will be found that the ingredients in each case which go to form criminal liability are not the same. Thus, theft is a removal of property belonging to another coupled with the intention of dishonestly removing it out of the possession of the possessor; whereas under the Forest Ordinance what is penalised is the removal of the timber without a permit or licence

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—*R. v. Haramanis.* In such cases the accused may not only be charged under both laws, but he can be convicted and sentenced in respect of each offence, and a conviction or acquittal under one of the laws will not bar a subsequent conviction under the other law.—*R. v. Haramanis, R. v. Wappu. C.f.* 74 *D.C.Crim. Colombo* 4283, and *Sangarapulle v. Ratnasekera, Aveliya v. Khan.* §180

§180(2) must also be read in the light of §67 of the Penal Code which enacts, *inter alia*, that where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

§180(4) expressly enacts that nothing contained in §180 shall affect §67 of the Penal Code. Regarding §67 of the Penal Code in the light of the foregoing, it appears that this section does no more than restate the rule formulated by §8 of the Interpretation Ordinance. The principle is that a man is not to be punished twice for identically the same conduct which is penalised by two or more laws, but he may be so punished where the ingredients which go to constitute criminal liability under the various laws are distinct or different. Thus, A gives fifty strokes with a cane to B. A thereby has committed hurt to B—§310 Penal Code, as well as the offence of using criminal force upon B's person—§340 Penal Code. A may lawfully be charged and punished for each of these offences—*Illustration* (*g*) to §180; but he may not be awarded fifty separate sentences for causing hurt or for using criminal force in respect of each stroke given to B—see *Illustration* (*a*) to §67 Penal Code.

§180(2) may be used either severally or in combination with the other exceptions created by §§179, 180(1), 180(3), 181, 184—see para. 2 (i)(*c*) *supra.* See also *R. v. Tilak* §178 para. 10 *ante.*

(*b*) The following cases supply examples of the principle underlying 180(2).—*Gunesekera v. Peeris, Sangarapulle v. Ratnasekera, Modder v. Perera, Peeris v. Perera, Aveliya v. Khan, R. v. Tribhuvandas, Wijeygunesinghe v. Arnolis.*

(iii) **§180(3).**—*Illustration* (*k*) to §180 clearly shows the scope of the principle underlying §180(3). A sets out to pick B's pocket. In order to commit the theft he assaults B and abstracts B's purse from his pocket. Here A has committed theft of the purse, he has caused hurt to B, used criminal force on B's person, and, by a combination of the offences of hurt and theft, A has also committed robbery—§380 Penal Code, as well as robbery accompanied by hurt—§380 Penal Code. In such a case, it is open to the prosecution to charge A at one trial with all the offences above specified. On conviction, however, §67 of the Penal Code provides that in such cases the offender "shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

In *D.C. Crim. Colombo* 4427 the Supreme Court laid down that where an accused was charged with committing robbery with hurt under §§380, 382 Penal Code, it was wrong to impose *consecutive* sentences under each count, inasmuch as the offence under §380 was included in the offence charged under §382. There would be no objection whatever to imposing *concurrent* sentences in such cases.

§180(3) may be used either severally or in combination with §§179, 180(1), (2), 181, 184—see para. 2(i)(*c*) *supra.*

See §§181 – 183 para. 5 *post.*

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§180 **3. §180 and its relationship to §17 *ante* and to §67 of the Penal Code—see §323 *post*.**

The connection existing between §180 and §17 *ante* and §67 of the Penal Code has already been referred to in para. 2 *supra*. While §67 and 67A of the Penal Code and §17 *ante* provide rules for the assessment of punishment upon conviction, §180 only contains rules of procedure regulating the joinder of charges, and does not deal with the sentence that is to be passed upon conviction. §67 of the Penal Code has been made of universal application by §323 *post*, but §323 does not extend the scope of §67A of the Penal Code—but see §307 *post*. §180 is only concerned with the joinder of charges. It contains certain rules of **"criminal pleading"** as to the joinder of counts in the same charge or indictment.

The general principle of law is that a person is not to be punished twice in respect of one and the same offence. Thus, where the accused commits theft of a cart with the bull attached to it, he commits but one theft, and it is wrong to punish him in respect of the theft of the cart, and then impose a separate consecutive sentence in respect of the theft of the bull.—*Abeywickreme v. Babune*. So, where the accused while giving evidence makes two perjured statements—*R. v. Rakhal*; or where a person gives another fifty strokes with a cane, it is wrong to impose distinct punishments. To this general principle there are several exceptions. Thus, as has been pointed out in para. 2 *supra*, where A gives B fifty strokes with a cane, although it is wrong to impose fifty distinct sentences for causing hurt, or to impose fifty sentences for using criminal force, yet it is perfectly lawful for the Court to convict the accused for causing hurt and for using criminal force.—*Illustration* (*g*) to §180. Again where distinct offences committed in one and the same transaction are lawfully joined and tried at one trial, §17 *ante* authorizes the Court to award separate sentences in respect of each offence, whether consecutively or concurrently, provided that in trials before a District Court or Police Court the aggregate punishment awarded shall not exceed twice the amount of punishment which the Court may lawfully impose in its ordinary punitive jurisdiction. §67 of the Penal Code can have no application to such cases in view of the words " unless it be so expressly provided " in §67. If the offence falls within two or more definitions of the law, §67 of the Penal Code and §8 of the Interpretation Ordinance declare that the offender is not to be punished twice in respect of the same conduct.—74 *D.C.Crim. Colombo* 4283 (*S.C.M.* April 3, 1916). The result would be otherwise if the ingredients of criminal liability under the laws penalising the conduct imputed are different under the various laws—see para. 2(ii) *supra*. Where acts which are in themselves offences amount to different offences when combined, §67 of the Penal Code lays down the rule that the offender is not to be punished with a more severe punishment than the Court which tries him could award for any one of such offences—see *R. v. Abdul Rahim* (1913) 16 *N.L.R.* 449 and para. 2(iii) *supra*. See also *R. v. Poddar* para. 6 *infra*.

The following cases should also be considered :—*R. v. Nanduwa*, *R. v. Carupiah*, *R. v. Peris*, *R. v. Suppar*, *R. v. Wappu*, 74 *D.C.Crim. Colombo* 4283 and *R. v. Singh infra*. *R. v. Abdul Rahim* (1913) 16 *N.L.R.* 449.—" The three forgeries were committed on separate occasions. The appellant stands charged with each separately, and the three taken together do not constitute in their combination a distinct and more serious offence"—see §67 clause 3 Penal Code. *Meedin v. Kirihatana*

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(1896) 2 *N.L.R.* 157—offence made up of parts, each part being an offence—see also *Mendis v. Cornelis* (1898) 3 *N.L.R.* 196, *R. v. Arnolis Appu* (1904) 2 *Bal.* 81 (F.B.). *Wilson v. Kolanda* (1897) 3 *N.L.R.* 57—one act causing two distinct offences, *e.g.*, criminal force and mischief. *R. v. William* (1900) 1 *Br.* 17—house-breaking and theft—see also *Appu v. Nicholas* (1902) 3 *Br.* 144. *Anthony v. Abilinu* (1892) 1 *S.C.R.* 88—offence made up of parts which are in themselves offences. *Abeywickreme v. Babune infra*—theft of hackery and bull. *Sangarapulle v. Ratnasekera* (1916) 2 *C.W.R.* 158—offence falling under two penal laws. *R. v. Munawapu* (1919) 6 *C.W.R.* 2—offences of rioting and theft. 74 *D.C.Crim. Colombo* 4283 (*S.C.M.* April 3, 1916)—the accused cannot be sentenced twice because the same acts are described as forming different offences. *In revision D.C.Crim. Colombo* 4227 (*S.C.M.* October 27, 1916)—conviction under §§380, 382 Ceylon Penal Code.

4. **May**—see §179 para. 5 *ante*.

5. **Effect of a misjoinder under §180**—see §178 para. 9 *ante*, §179 para. 7 *ante*.

6. **Case law.—**

(*a*) **§180(1).—**

R. v. Ellis (1826) 6 *B.* & *C.* 145.—Where X was charged with stealing six shillings, marked money, from a till, evidence was allowed of the taking, not only of the amount charged, but also of other moneys taken at the same time, the whole being part and parcel of the same transaction—see §6 Evidence Ordinance.

Thompson v. Trevanion (1693) *Skinner* 402.—As a transaction consists both of the physical acts and the words accompanying such physical acts, whether spoken by the doer of the physical acts, or by other persons present, such words are admissible in evidence as part and parcel of the same transaction—see §32 *Illustration* (*n*) Evidence Ordinance.

R. v. Bedingfield (1879) 14 *Cox* 341.—In a trial for murder, it appeared that the deceased, with her throat cut, came suddenly out of a room in which she had left the prisoner, and that she said something immediately after coming out of the room relative to the cause of her injuries, and that she shortly afterwards died as a result of the injuries received. *Held*, that the statement was inadmissible as it was made after the transaction was completed. Submitted that in Ceylon such a statement if not admissible under §6 Evidence Ordinance, would nevertheless be admissible under §32(1) Evidence Ordinance.

R. v. Foster (1834) 6 *C. & P.* 325.—The accused was charged with having caused the death of the deceased. Nobody saw the accident. A witness who saw the vehicle pass which was driven by the accused went up immediately to the deceased, who was lying on the ground, and who made a statement to him as to the cause of his injury. This statement was admitted as being part and parcel of the transaction which led to the death of the deceased. Such statement would also be admitted under §32(1) Evidence Ordinance.—*C.f. R. v. Appuhamy* (1892 1 *S.C.R.* 59.

Rawson v. Haigh (1824) 1 *C. & P.* 77.—A transaction may be a continuous one extending over a long period. In such a case any words or statements accompanying such continuous transaction at any time during its continuance are admissible as part and parcel of it.

Du Bost v. Beresford (1810) 2 *Camp.* 511.—Declarations of spectators when a defamatory picture of the plaintiff was exhibited are

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§180 admissible to show that it was meant to represent the plaintiff—see *Thompson v. Trevanion supra*, and §32 *Illustration* (*n*) Evidence Ordinance.

R. v. Stainton (1918)*—Where the indictment charged the accused with having committed criminal breach of trust of rubber on November 8, 1916, and the Crown sought to lead evidence that the accused had committed a similar breach of trust in March of the same year, *held*, per Shaw J., but with much doubt, that the two incidents did not form one transaction. *Qu.*—Would not such evidence be admissible either under §14 or §15 of the Evidence Ordinance? The rules of criminal procedure are distinct from the rules of evidence.

R. v. Mahto 3 *Bal. supp.* 39.—X deposed that C ran up to him and stated that he had seen the accused murder his mistress, whom he had met by assignation, and that he (C) had run away from the place in order to save his life. What interval of time elapsed between the murder and the making of the statement by C to X did not appear. *Held*, that the statement was inadmissible.—*C.f. R. v. Bedingfield.* See also *Wills on Circumstantial Evidence* (6th Ed.) *p.* 77.

R. v. Appuhamy (1892) 1 *S.C.R.* 59.—The deceased lay on the road with his skull fractured, which, according to the medical evidence, was due to a fall or a blow. A Police officer, on coming up to the spot, questioned the deceased, who replied "X assaulted me." This statement the deceased repeated to other persons who came up. *Held*, that the statements were admissible.—*C.f. R. v. Foster supra.*

R. v. Aman (1920) 21 *N.L.R.* 375, 7 *C.W.R.* 154, 1 *C.L.Rec.* 191 (*Full Court*).—X, who was intoxicated, had an altercation with A, and stabbed him. He thereafter rushed down a crowded thoroughfare, and, seeing B with whom he had had an altercation the previous day, reminded B of the incident and stabbed him. *Held*, that the stabbing of A and B were part and parcel of one transaction and that the two offences could be joined in one indictment. The following cases were considered by the Full Court :—*R. v. Fakirappa* 15 *Bom.* 491, *R. v. Allibhoy* 27 *Bom.* 135, *R. v. Shahapurkar* 30 *Bom.* 49, *R. v. Vanakatadri* 33 *Mad.* 502, and *R. v. Amrita Lal Hazre* 42 *Cal.* 957. *Held*, *per* Bertram, C. J., Ennis & de Sampayo, J. J.: "The real truth is that in all cases that question is a question of fact. The word 'transaction' is defined in the Imperial Dictionary . . . as 'that which is done or takes place; an affair.' Had the expression in our section been 'a series of acts so connected together as to form the same affair' there would have been no question as to the meaning. The word 'transaction' does not necessarily mean something which takes place between parties. That is explained in the case of *Drinecqbier v. Wood* (1899) 1 *Ch. D.* 397 . . . The word 'transaction', in my opinion, is sufficiently general to cover the case of a man who is reduced to a state of temporary frenzy by drunkenness or drugs, and in pursuance of the condition so generated runs along a street and commits a series of offences, sometimes inspired by one motive and sometimes by another, against persons with whom he comes face to face . . ." See also §179 para. 10 *ante*. *C.f. R. v. Lockley infra.*

R. v. Lockley (1919) 1 *C.L.Rec.* clv.—A charge of receiving stolen property may be joined with a charge of cheating, when the facts constituting the offences form part of the same transaction. The true test as to whether two offences are part and parcel of the same transaction is that there should be a continuous operation of acts leading to the

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* See *Dias on the Evidence Ordinance p.* 13.

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same end, and a common purpose should run through all the acts. But see the local Full Court case of *R. v. Aman supra* in which a different view was expressed. §180

R. v. Sheo Saran 32 *Alla.* 219.—" The expression ' offences of the same kind ' in §179, cannot be construed so as to include ' transactions of the same kind ' "—see §179 para. 10 *ante.*

Egan v. Sellambaram (1908) 3 *A.C.R.* 109.—See §179 para. 10 *ante. at p.* 112. " In my opinion it is precisely to meet a case of this kind that §180(1) of the Criminal Procedure Code was enacted . . ." *per* Wood Renton, J.

Gray v. Perera (1911) *App. Cas.* 29.—Unless committed in the course of the same transaction, offences of criminal breach of trust and cheating committed in the course of one month cannot be charged together—see §179 para. 10 *ante.*

R. v. Visvanathan 30 *Mad.* 328.—" It is true that §168(2) provides for a charge being framed in respect of the gross sum misappropriated within twelve months . . . and enacts that a charge so framed shall be deemed to be a charge of ' one offence ' within the meaning of §179, but it does not provide that the acts so charged shall be deemed to be ' one transaction,' within the meaning of §180(1) . . ." See §§167 – 170 para. 10, §179 para. 10 *ante.*

Murugappah v. Kanapathi (1899) 1 *Tam.* 22, *Koch.* 3—see §178 para. 10 *ante.*

R. v. Mendis (1913) 16 *N.L.R.* 252—see §178 para. 10 *ante.*

R. v. Arnolis Appu (1904) 2 *Bal.* 81 (*Full Court*)—see §178 para. 10 *ante.*

R. v. Arlis Appu (1920) 2 *C.L.Rec.* 189, 8 *C.W.R.* 236—see §178 para. 10 *ante.*

Keerala v. Appuhamy (1919) 6 *C.W.R.* 338—see §178 para. 10 *ante.*

R. v. Careem (1920) 7 *C.W.R.* 300—see §178 para. 10 *ante.*

Naide v. Packeer (1920) 22 *N.L.R.* 284, 8 *C.W.R.* 173—see §178 para. 10 *ante.*

R. v. Raghunath 20 *Cal.* 413—see §178 para. 10 *ante.*

R. v. Rakhal 36 *Cal.* 808—see §178 para. 10 *ante.*

R. v. Senanayaka (1917) 20 *N.L.R.* 83, 4 *C.W.R.* 353—see §179 para. 10 *ante*, and see 20 *N.L.R. at p.* 85.—" We are in these circumstances in the presence of a series of acts constituting one and the same transaction."

R. v. Saibo (1913) 1 *B.N.C. at p.* 36.—" It is true that there is nothing on the face of the record to establish the identity of the transaction, but, in my opinion, that is not necessary. The question is one to be established on the evidence. The *dictum* of Layard, C.J., in *R. v. Kanjamanadan* (1903) 7 *N.L.R.* 52 did not receive the support of Middleton, J., at the time, and, as we all know, has not been followed subsequently . . ." *per* Wood Renton, C.J.—See §§167 – 170 para. 10 *ante.*

Avaliya v. Khan (1914) 17 *N.L.R.* 222.—Ten accused were convicted of committing an affray under §157 Penal Code. Thereafter three of these accused charged the other seven with having caused hurt to them under §314 Penal Code. *Held,* that the latter charge could be maintained. " The law on the matter is clearly laid down in §330(2) of the . . . Code . . . The question then is whether, on the former trial, the accused might have been charged with assaulting the three complainants in addition to the charge of affray. There can be no doubt but

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§180 that the question should be answered in the affirmative. The charges spring out of the same transaction, and they could have been joined in the same charge . . . Then I am referred to §8 of the Interpretation Ordinance of 1901 and the case of *Modder v. Perera* (1913) 16 *N.L.R.* 87. §8 of the Interpretation Ordinance provides that, where any act or omission constitutes an offence under two or more laws, the offender is liable to be prosecuted under either of the laws, but he shall not be punished twice for the same offence . . . In order to render this section applicable to the present case, one has to assume that the offence of affray is the same or substantially the same as the offence of hurt. This obviously is not the case . . ." *per* Lascelles, C.J.

R. v. Fakirappa 15 *Bom.* 491.—" The word ' transaction ' is not defined in the Code, but the *Illustrations* to §235(1) (*local*—§180(1)) refer to cases where there was a *continuous series of acts—Illustrations* (*a*), (*b*), (*c*)—(Note that only *Illustration* (*a*) is reproduced in the local law); or *identity of time—Illustrations* (*d*), (*g*), (*h*)—(Note that these refer to *Illustrations* (*b*), (*e*) in §180 of our Code); or where there is *an interval of time with the same specific criminal intent—Illustrations* (*e*), (*f*)—(*local illustrations* (*c*), (*d*)). The *Illustrations* to §239 (*local*—§184) refer to the same murder by two persons—*Illustration* (*a*); or robbery by two persons during which one of them commits murder—*Illustration* (*b*); or theft by two persons and in the course of the same transaction (the word being used in a restricted sense in this illustration, *i.e.*, during the theft), and one of them commits two other thefts—*Illustration* (*c*). Of course, these illustrations are not exhaustive, yet they furnish some indication of the presumable intention of the Legislature. They seem to show that a wider discretion is given to the Courts in British India than in England as regards the trial of more offences than one at one trial, yet it may well be doubted whether it was ever intended that §235(1) (*local*—§180(1)) and §239 (*local*—§184) of the Code should be applied, except in such cases as *Illustrations* (*e*) and (*f*) (*local*—(*c*) and (*d*)) of §235 (*local*—§180) to cases where the alleged criminal acts are separated by distinct intervals of time or place and must be proved by distinct evidence "—*per* Birdwood, J.

R. v. Vajiram 16 *Bom.* 414.—Eight fraudulent transfers effected in one day with the object of preventing the seizure of lands under a decree. *Held*, that the proximity of time combined with the intention of the accused and the similarity of action brought the case within the words " same transactions." *C.f. R. v. Krishnasami* 26 *Mad.* 125.

R. v. Balwant 14 *Bom. L.R.* 41.—Where an assault was committed with a view to extorting information, and subsequently the accused made certain false entries in order to conceal the offences he had already committed, *held*, that such charges could be joined.

R. v. Chekutty 26 *Mad.* 454.—Where the accused kidnapped a child and a day or two later assaulted the mother who came to demand the child, *held*, that the charges could not be joined.

R. v. Sherufalli 27 *Bom.* 135.—The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself import want of continuity, though the length of the interval may be an important element in determining the question of

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connection between the two. *C.f. R. v. Birendra* 30 *Cal.* 822 and 32 *Cal.* 22, *R. v. Bipin Chandra* 35 *Cal.* 161, *R. v. Choragudi* 33 *Mad.* 502. §180

R. v. Ram Sarup 9 *C.W.N.* 1027.—X and Y were charged with having, on a given day, received or retained eight sets of cooking utensils stolen from eight different persons. There was no evidence to show whether the eight sets were received at one and the same time or on separate occasions. *Held*, that the mere fact that all the articles were retained by the accused at one and the same time would not operate to combine the eight transactions into one whole, so as to justify one charge—see *R. v. Jamaldeen* (1917) 4 *C.W.R.* 248 §178 para. 10 *ante*.

Mahomed v. Cheharu 10 *C.W.N.* 53—see §178 para. 10 *ante*.

R. v. Samaranayaka (1892) 1 *S.C.R.* 335—see §178 para. 10 *ante*.

Gooneratne v. Sinno (1916) 2 *C.W.R.* 20—see §178 para. 10 *ante*.

(1899) *Koch* 43—see §178 para. 10 *ante*.

Wijeysekera v. Ratnayaka (1919) 6 *C.W.R.* 281—see §184 para. 14 *post*.

Silva v. Lewis (1909) 3 *S.C.D.* 53—see §184 para. 14 *post*.

R. v. Moss 16 *Alla.* 88.—"Same transaction"—see §184 para. 14 *post*. See also under §184—*Karu v. Charan* 28 *Cal.* 10, *R. v. Kamudini* 28 *Cal.* 104, *R. v. Abdul* 33 *Cal.* 1256, *R. v. Gobind* 29 *Cal.* 385, *R. v. Balabhai* 6 *Bom. L.R.* 517, *R. v. Kali Das* 38 *Cal.* 453, *R. v. Jethalal* 29 *Bom.* 449, *R. v. Datto* 30 *Bom.* 49, *R. v. Ganesh* 15 *Bom. L.R.* 972, *R. v. Tilukdhari* 13 *C.W.N.* 804, *Podiya v. Baiya* (1913) 1 *B.N.C.* 33, *Abeykoon v. Philip* (1909) 12 *N.L.R.* 145, *Ismail v. Sinno* (1908) 3 *A.C.R.* xiii.

Weerakoon v. Mendis (1925) 3 *T.L.R.* 37, 27 *N.L.R.* 340—see §184 para. 14 *post*.

R. v. Gunasekere (1931) 32 *N.L.R.* 290.—Several accused were charged with being members of an unlawful assembly, the common object of which was to cause hurt, and alternatively with causing hurt and were convicted of simple hurt, *held*, that there was no misjoinder of charges or of accused.

R. v. Perera (1932) 12 *C.L.Rec.* 13.—X and Y (husband and wife) were jointly charged as follows :—(1) X with causing hurt to his daughter Z on 17-10-31—§315; and (2) Y with causing hurt to her daughter Z on 18-10-31—§314. There was nothing in the charge to show that the offences were committed in the same transaction. *Held*, that this was a misjoinder of charges and of accused.

R. v. Tyler (1913) 1 *B.N.C.* 28—see §179 para. 10 *ante*.

R. v. Samaranayaka (1892) 1 *S.C.R.* 335—see §178 para. 10 *ante*.

Gooneratne v. Sinno (1916) 2 *C.W.R.* 29—see §178 para. 10 *ante*.

(1899) *Koch* 43—see §178 para. 10 *ante*.

R. v. Subramania 25 *Mad.* 61 *Privy Council*—see §178 para. 10 *ante*.

R. v. Bhagwati 2 *P.R.* 1905—see §178 para. 10 *ante*.

R. v. Doresamy (1913) 1 *Crim. App. R.* 25—see §178 para. 10 *ante*.

R. v. Podisinno (1912) 16 *N.L.R.* 16—see §178 para. 10 *ante*.

Goonetilleke v. Allis (1908) 4 *A.C.R.* iv.—May the keeper of a common gaming place be charged along with the persons who committed the offence of unlawful gaming therein? See also *Jayawardene v. Thomas, Sandanayaka v. Donchia* §178 para. 10 *ante*.

Abeywickreme v. Babune (1897) 2 *N.L.R.* 344—see §178 para. 10 *ante*.

(*b*) **§180(2).**—

R. v. Tilak 33 *Bom.* 221—see §178 para. 10 *ante*.

Gunesekera v. Peeris (1920) 8 *C.W.R.* 89, 2 *C.L.Rec.* 122—see §178 para. 10 *ante*.

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§180 *James Appu v. Francis* (1913) 1 *B.N.C.* 32—see §179 para. 10 *ante*.

Sangarapulle v. Ratnasekera (1916) 2 *C.W.R.* 158.—The fact that there are two Ordinances, both of which provide penalties for the same act or omission, enables the prosecutor to elect under which Ordinance proceedings shall be taken, unless there is something in either Ordinance to show that it is intended to give exclusive jurisdiction by that Ordinance. *C. f. Modder v. Perera* (1913) 16 *N.L.R.* 87, *R. v. Haramanis* (1916) 19 *N.L.R.* 142, 3 *C.W.R.* 105, *Peris v. Perera* (1915) 4 *B.N.C.* 50 and *Avaliya v. Khan* (1914) 17 *N.L.R.* 222.

Modder v. Perera (1913) 16 *N.L.R.* 87 referred to in *Avaliya v. Khan supra*, and see the cases cited under *Sangarapulle v. Ratnasekera supra*. Where an act or omission constitutes an offence under two or more laws, the offender is liable to be prosecuted or punished under either or any of those laws, but may not be punished twice for the same offence.

R. v. Haramanis (1916) 19 *N.L.R.* 142, 3 *C.W.R.* 105 (*Two Judges*). —A person convicted under the Forest Ordinance 1907 for removing Crown timber without a permit, may be lawfully convicted of theft of the same timber under §368 Penal Code. See *Wijeygunasinghe v. Arnolis* (1916) 3 *C.W.R.* 114.

Peris v. Perera (1915) 4 *B.N.C.* 50.—§47 of the Excise Ordinance 1912 and §184 Penal Code deal with the same offence, and a conviction under one of them bars a further conviction under the other.

Avaliya v. Khan (1914) 17 *N.L.R.* 222—see *supra* (*a*) under §180(1).

R. v. Hendrik Sinno (1902) 7 *N.L.R.* 97—see §181 para. 7 *post*.

R. v. Tribhuvandas 33 *Bom.* 77—see §178 para. 10 *ante*.

R. v. Nanduwa (1895) 1 *N.L.R.* 317 followed in *R. v. Carupiah* (1914) 17 *N.L.R.* 383 which was disapproved of in *R. v. Peris* (1914) 18 *N.L.R.* 321, and overruled by the *Full Court* in *R. v. Suppar* (1915) 18 *N.L.R.* 322.

R. v. Wappu (1919) 6 *C.W.R.* 2 distinguishing *R. v. Nanduwa*.—Accused was charged with rioting and committing theft in pursuance of the common object of the rioters. *Held*, that two sentences could lawfully be imposed in respect of each offence, but the Supreme Court ordered the sentences to run concurrently.

74 *D.C.Crim. Colombo* 4283 (*S.C.M.* April 3, 1916).—The accused was convicted under §§456, 459 and 403 Penal Code for uttering a forged document and thereby cheating the complainant. *Held*, that a person could not be sentenced twice for the same offence by calling it by two names. Hence, one of the counts was quashed and sentence enhanced.

R. v. Singh 26 *P.R.* 1889—see §§181 - 183 para. 7 *post*.

(*c*) §180(3).—

Gunesekera v. Peeris (1920) 8 *C.W.R.* 89, 2 *C.L.Rec.* 122—see §178 para. 10 *ante*.

In revision D.C. Crim. Colombo 4427 (*S.C.M.* October 27, 1916).—Conviction under §§380, 382 Penal Code. It is improper to impose consecutive sentences under each charge, for the offence penalised by §380 is included in the offence penalised under §382.

(*d*) §180(4).—

R. v. Poddar (1889) 16 *Cal.* 442 following *R. v. Partab* 6 *Alla.* 121, and overruling *R. v. Sarkar* 11 *Cal.* 349.—*Held*, *per* Pethram, C.J., Mitter, Prinsep & Wilson, JJ.—Tottenham, J. dissenting—Where accused are convicted of rioting (§144 P.C.) and causing grievous hurt

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(§§146, 316) and it appears that the accused individually did not commit the offence of grievous hurt, but were vicariously liable by reason of §146 Penal Code, separate sentences in respect of rioting and of grievous hurt are illegal. Combined effect of §67 of the Penal Code and §180(1) of this Code discussed. §§181. 183

Where it is doubtful what offence has been committed.

181. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences, and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one.

Illustration

A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with " having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating."

When a person is charged with one offence he can be convicted of another.

182. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

Illustration

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

When offence proved included in offence charged.

183. (1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.

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(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence, although he was not charged with it.

(3) Nothing in this section shall be deemed to authorize a conviction for any offence referred to in section 147 when no complaint has been made as required by that section.

Illustrations

(*a*) A is charged under section 390 of the Penal Code with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 389 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 389.

(*b*) A is charged under section 316 of the Penal Code with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 326 of that Code.

Act includes "an omission" as well as "a series of acts".—See §3 *ante* and §31 Penal Code. *C.f.* §34 Penal Code and see §180(1) *ante*.

Doubtful.—*C.f.* §142 *ante* and see §307 *post* and §67A Penal Code.

Offence.—See §3 *ante*.

Charge.—*C.f.* §§155, 167 - 170, 187, 204, 219 *ante*.

Trial in a Police Court.—See §§152(3), 166 and *Chapter XVIII. post*.

Trial in a District Court.—See *Chapter XIX. post*.

Trial in the Supreme Court.—See *Chapter XX. post*.

Police Court.—See §3 *ante*.

District Court.—See §3 *ante*.

Supreme Court.—See §3 *ante*.

Indictment.—Form 11, *Schedule III. post*, and §§158(2), 186, 387.

Different offences.—*C.f.* "**Distinct offences.**"—§§17, 178 *ante*.

Sanction to prosecute.—See §§104, 147, 175, 286(2), 380, 384, 425.

***Autrefois* acquit or convict.**—See §§330, 331 *post*.

Combination of facts.—*C.f.* §180(3) *ante*.

Conviction for lesser offence.—See §221(2) *post*. *C.f.* §193(1) *post*.

1. §181 is similar to §236 of the Indian Code and §210 of the Code of 1883.

§182 is similar to §237(1) of the Indian Code and §211 of the Code of 1883. Note the terms of §237(2) of the Indian Code—see para. 4 *infra*.

§183 is similar to §238 of the Indian Code and §212 of the Code of 1883.

2. **Scope of §§181 - 183.**—See Introduction to *Chapter XVII.* para. 4 *ante*, §178 *ante*, §179 para. 2 *ante*, §307 para. 2 *post* and §67A Penal Code.

§181 deals with cases in which it is doubtful which of several cognate offences the provable facts constitute, and allows the joinder in the alternative of counts charging the accused

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with the commission of all such offences in the same charge or indictment—see para. 3 *infra*. It will be seen, therefore, that §181 is an exception to the general rule stated in §178.

§§182-183 deal with cases where the charge or indictment has made a specific accusation or accusations against an accused, but the evidence led at the trial shows that he has not committed the offences charged, but some other offence. The application of these sections must be carefully limited, as an extended application would lead to results which would be very unfair to an accused person—*Premawardene v Siriwardene*. §§182 - 183 permit the Court, under certain conditions, to convict the accused of the offence so disclosed by the evidence, although he was not charged with it, and without amending the charge or indictment under §172 *ante*. Thus, (*a*) if X is charged with having committed a certain specific offence, and the evidence led at the trial discloses that X has not committed the offence charged, but another for which he might have been charged in the alternative under §181, the Court may proceed to convict him of the offence so disclosed—§182. See para. 4 *infra*. It will be seen that §182 is exactly the converse of §181. (*b*) If X is charged with having committed a specific offence, but the evidence shows that, although the accused has not committed the offence charged, he has nevertheless committed a complete minor offence, the Court of trial may at once proceed to convict him of such minor offence—see §183(1) para. 5 *infra*. (*c*) If X is charged with committing a certain offence, and he succeeds in proving facts which reduce such offence to a minor offence, the Court may convict him of such offence—§183(2) para. 5 *infra*. It should be observed, however, that nothing that is contained in §183 is to be taken as justifying the conviction of a person of an offence " referred to in §147 when no complaint has been made as required by that section "—§183(3), and see para. 5 *infra*.

Under §193(1) if a Magistrate holding a summary trial finds that the facts admitted or proved disclose an offence not charged against the accused and not within the purview of §§182 - 183, he can convict him of such offence provided he first frames a charge against the accused—see §190 para. 3(xiv) and §193 *post*.

If the Judge finds that the facts proved disclose an offence under the Penal Code, but he is doubtful which of two or more offences have been disclosed by the facts, he should proceed as provided by §307 *post* and §67A Penal Code—see §307 para. 2 *post*.

§§181, 182 should be used with care and only in cases where no injustice is caused to the accused—*Pulle v. Perera*. Moreover, although alternative charges may be laid against an accused, it is irregular to convict him under both such charges—*Perera v. Karunaratne*.

3. **§181**—see §307 para. 2 *post*.

§181 should be read and construed together with §182—see para. 4 *infra*.

§181 furnishes the fifth exception to the general rule stated in §178. Its effect and scope has already been dealt with in para. 2 *supra*. Before §181 can lawfully be applied there must exist a genuine doubt as to which of several offences the acts complained of constitute.—*Weerasinghe v. Wijeysinghe* (1927) 29 *N.L.R.* 208, 9 *C.L.Rec.* 207. The section cannot legitimately be invoked in cases where there can be no doubt as to what the offence is; the only existing doubt being as to the facts which constitute one of the elements of such offence—*R. v. Wafader*, *R. v.*

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Samaranayaka, R. v. Gabriel, Amerasinghe v. Sheriff. §181 contemplates a state of facts which amount to a single offence, but in which it is doubtful whether the facts would constitute one or another of several cognate offences—*R. v. Croft.* The *Illustration* to §181 clearly shows the scope of the section, and the circumstances under which it may lawfully be utilised—*Marley v. Appuhamy, Amerasinghe v. Sheriff, Welakka v. Appuhamy.* Thus, where recently stolen property is found in the possession of a person, a doubt arises whether he is the actual thief or only the guilty receiver—*R. v. Singh*; and, accordingly, such person may be charged under §§367, 394 Penal Code in the alternative. Moreover, if a house is broken into and property stolen therefrom, and soon afterwards some of the stolen property is traced to the possession of the accused, a doubt arises whether the accused committed burglary and house-breaking, or whether he is only the guilty receiver—*Gunasekera v. Thegis* (1896) 2 *N.L.R.* 196, *Nagappa Chetty v. Silva* (1901) 5 *N.L.R.* 295, *Silva v. Ranis* (1897) 5 *N.L.R.* 297. In such a case it is lawful to charge the accused in the alternative under §§369, 394, 443 Penal Code.

Where charges are lawfully joined in the alternative, it is improper to convict the accused for more than one of such offences. Thus, a man cannot be punished for committing theft of an article and also for receiving or retaining such thing well knowing it to have been stolen—(1899) *Koch* 10, and see §67A Penal Code, §307 *post*, and §180 para. 2(ii) *ante*. In *Dingirihamy v. Adonchia* it appears to have been considered that a charge of theft of a bull could not lawfully be joined with a charge of unlawfully possessing beef under §21 of the Butchers Ordinance 1893. If a charge of theft and a charge of receiving stolen property may lawfully be joined in the alternative, it is difficult to follow this decision—*Marley v. Appuhamy.* If an accused is charged with having committed an offence and acquitted altogether, he may not thereafter be charged in respect of an offence for which he might have been charged in the alternative under §181, or for which he might lawfully have been convicted at the first trial—*R. v. Hendrick Sinno*, and see *Illustration* (*a*) to §330 *post*, but see *Murukesu v. Karunakara.*

Where it is not known which of two persons is the principal and which the abettor, a charge in the alternative against each could be framed.—*R. v. Girwar, R. v. Hendrick Sinno.*

The following supply examples of cases which are not within the principle stated in §181—*Windus v. Weerappen, Wickramasinghe v. Kalimuttu, R. v. Durgya, Murukesu v. Karunakara.*

§193 *post* is not applicable to the class of offences contemplated by §§181, 182—*Marley v. Appuhamy.*

In *R. v. Tribhuvandas* §§181, 182 were commented upon, and the Indian Court held that upon a charge under §124A of the Indian Penal Code a conviction under §153A of the same Code might have been pronounced—see §178 para. 8 *ante.*

§181 may be used either severally or in combination with §§179, 180, 184—see §178 paras. 6, 8 *ante.* See also *R. v. Tilak.*

An illegal use of the provisions of §181 would be fatal to a conviction —see §178 para. 9 *ante* and §184 para. 5(i) *post.*

Although the *Illustration* to §181 does not specifically mention the offence of criminal misappropriation, yet the offence is of such a type as to make it fall within §§181 and 182.—*Canagasingam v. Bawa.*

4. §182—see §307 para. 2 *post.*

This section should be read and construed together with §181—see para. 3 *supra.*

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§182 lays down the converse of the rule to that stated in §181, and allows the Court to convict the accused of an offence of which he was not accused in the charge or indictment, without amending the charge under §172, provided the evidence discloses the commission by the accused of an offence in respect of which he might lawfully have been charged in the alternative under §181—see *R. v. Arnolis* and *Weerasinghe v. Wijeysinghe* (1927)29 *N.L.R.* 208, 8 *C.L.Rec.* 107. If an accused is charged with the commission of an offence, and is acquitted without being convicted of an offence for which he might lawfully have been charged, he may not thereafter, so long as the acquittal remains in force, be placed upon his trial in respect of such offence for which he might have been convicted at the first trial—*R. v. Hendrick Sinno*, see para. 3 *supra*.

The *Illustration* to §182 shows the manner in which the section is meant to be used—*Marley v. Appuhamy*. A person charged as a principal may, under §182, be convicted of abetment—*R. v. Hendrick Sinno*, 168 *D.C. Crim. Colombo* 4600. *Qu.*—May a person, who is charged with having committed an offence, be convicted of *attempting* to commit such offence ? In India the point has been placed beyond doubt by the addition of sub-section (2) to §237 of the Indian Code, but which has no counterpart in the local law. It can be argued that inasmuch as a person must necessarily attempt to commit the crime before he can consummate it, that, therefore, an attempt is a " minor offence " of the substantive offence which is charged, and accordingly it is lawful under §183(1) to convict an accused of an attempt where the major offence has been specifically charged. The question, however, is not beyond doubt, and it is desirable that an amendment of §182 should be effected on the same lines as §237(2) of the Indian Code.

A person, who is charged with committing theft of property may, under §182, be convicted of guilty receipt of such property—*Illustration* to §182, *R. v. Singh*, *Marley v. Appuhamy*. Similarly a person charged under §394 of the Penal Code may be convicted of theft—*R. v. Arnolis*, but see *R. v. Amith*. An accused charged under §219 of the Penal Code may be convicted under §323 or §314 of the Penal Code—*Sittanayaka v. Adikaram*. An accused charged with theft or retaining stolen property may be convicted of criminal misappropriation—*Canagasingham v. Bawa*. Where a house is broken into and property stolen therefrom, and some of the property is traced soon after to the possession of the accused, he should be charged with offences under §§369, 443 Penal Code. It is, nevertheless, open to the Court to convict the accused of receiving stolen property under §394 Penal Code without convicting him under the sections charged—*Gunesekera v. Thegis*, *Nagappa Chetty v. Silva*, *Silva v. Ranis*, para. 3 *supra*. On a charge of dishonestly *retaining* stolen property, it is competent for the Court to convict the accused for dishonestly receiving such property and *vice versa*—*Brantha v. Kaliamuttu*. On a charge of cheating it would be competent for the court to convict the accused of criminal breach of trust of the property transferred by such cheating—*Welakka v. Appuhamy*.

Where the accused was entrusted with a railway warrant which he was expected to change for a railway ticket at the railway station, and thereafter hand the ticket over to X, and the accused obtained the ticket, but sold it to Y, the indictment charged the accused with having committed criminal breach of trust of the warrant. The Supreme Court was of opinion that the offence disclosed by the facts was criminal

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breach of trust of the ticket, and sent the case back for a new trial on an amended indictment. *Qu.*—Would it not have been open to the Court of trial to have convicted the accused for the offence disclosed ? See also *Dingirihamy v. Adonchia*, para. 3 *supra*. In *R. v. Godamune* the question was raised whether an accused who is charged with criminal breach of trust could be convicted of criminal misappropriation.

Before convicting an accused under §182 he should be given notice of what is being done, *e.g.*, by informing him that the evidence discloses a cognate offence of which he might have been charged, and call upon him to answer the facts disclosed by the evidence generally—*R. v. Gabriel*, *Amerasinghe v. Sheriff*.

The following cases furnish examples where §182 has been incorrectly applied—*R. v. Gabriel*, *Windus v. Weerappen*, *Wickremasinghe v. Kaliamuttu*, *Amerasinghe v. Sheriff*, *Silva v. Appu*, *R. v. Reauzuddi*, *R. v. Punchimahatmaya*.

An illegal use of §182 would vitiate a conviction—see §178 para 9. *ante*.

When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences will lay the whole case open to the interference of the Court of Appeal, notwithstanding any order of acquittal which the Court of trial may have pronounced in regard to any of such offences. Where, therefore, the Court of Appeal reverses a conviction and orders a retrial, such retrial must be taken to be upon all the charges originally framed, leaving it open to the Court to act under §182 if this appears to be necessary—*R. v. Krishna*.

See also para. 3 *supra*.

As to the distinction which exists between §182 and §193(1) *post* —see §193 para. 2 *post*.

4A. The powers of the Supreme Court under §§347, 357 *post* to alter a verdict on appeal or in revision are not confined to the cases mentioned in §§181, 182—see *R. v. Baron*.

5. §183—see para. 2 *supra*, and §307 para. 2 *post*.

(*a*) Where the facts proved show that the accused has not committed the offence charged, but disclose a complete "minor offence," he may, under §183(1), be convicted of such minor offence, although he was not specifically charged with it; and it is not necessary to amend the charge under §172 *ante* for this purpose. An offence is said to be a "minor offence" when it is found that some of the facts which constitute an offence by themselves constitute a complete criminal offence which is included in the other offence. Thus the offence of robbery is composed of the minor offences of hurt and extortion, or hurt and theft—§§379, 380 Penal Code. On a charge of robbery, therefore, §183(1) enables the Court to convict the accused either of hurt, extortion, or theft. *Illustration* (*a*) to §183 is an example of the rule stated in §183(1). See also §221(2) and §185 para. 2 *post*.

The following cases furnish examples of the correct application of the principle contained in §183(1).—*R. v. Juan*, *R. v. Alwis*, *R. v. Podisinno*, *R. v. Amblavanar*, *R. v. Devji*, *R. v. Lukhinarain*, *R. v. Sitanath*, *R. v. Brimilow*.

The following cases furnish examples of instances which are not within the principle stated in §183(1)—*Windus v. Weerappen*, *Wickremasinghe v. Kaliamuttu*, *R. v. Reauzuddi*, *R. v. Punchimahatmaya*, *R. v. Durgya*, and *c.f. R. v. Alwis*.

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Qu.—Is an attempt a "minor offence" of the substantive offence attempted ?—see para. 4 *supra.*

(*b*) In cases where the accused is charged with committing a certain offence, and he succeeds in proving circumstances which have the effect of reducing the offence charged to a "minor offence," he may lawfully be convicted of such minor offence without amending the charge, even though he was not charged with having committed such "minor offence"—§183(2). Thus, where a person is charged with committing murder, and he succeeds in proving that the offence is reduced to that of culpable homicide not amounting to murder, he may be convicted of such offence. *Illustration* (*b*) is an example of the principle stated in §183(2)—see *Windus v. Weerappen.* In *R. v. Ranhamy*, Lyall Grant, J., *held*, that on a charge for murder the jury could convict for causing death by a rash or negligent act. It is submitted that this decision is wrong as §298 is not a minor offence of which §296 is the major offence.

(*c*) Nothing contained in §183 is to be taken as justifying a conviction for an offence referred to in §147 *ante*, when no complaint has been made as required by that section—§183(3). The case of *Silva v. Appu* demonstrates the scope of §183. See also §147 para. 2 *ante*, and §§172 - 176 para. 2 *ante.*

As to the distinction which exists between §183 and §193(1)—see §193 para. 2 *post.*

6. **May**—see §179 para. 5 *ante.*

6A. **Judgment in the alternative where it is doubtful which of two or more offences under the Penal Code the facts disclose**—see §307 *post.*

7. **Case law**—

R. v. Samaranayaka (1892) 1 *S.C.R.* 335—see §178 para. 10 *ante.*

R. v. Tilak 33 *Bom.* 221—see §178 para. 10 *ante.*

R. v. Tribhuvandas 33 *Bom.* 77—see §178 para. 10 *ante.*

R. v. Subramania 25 *Mad.* 61 *Privy Council*—see §178 para. 10 *ante.*

R. v. Tyler (1913) 1 *B.N.C.* 28—see §179 para. 10 *ante.*

R. v. Singh 26 *P.R.* 1889—Where an accused is found to be in possession of property stolen on *different* occasions from A and B, but it is not known whether the accused is the actual thief or not, or if only the receiver, whether he received the property on one occasion or several, he should be charged in the alternative under §181 Criminal Procedure Code with offences under §§367, 394 Penal Code in regard to the property stolen from A, and similarly separately charged with respect to the property stolen from B, and may be punished separately in regard to each. But if the accused establishes that the property must have been received on one occasion only, then §67 Penal Code will be applicable and only one punishment permissible.

(1899) *Koch* 10—A person cannot be convicted both of stealing a thing under §367 Penal Code, and also of receiving or retaining that thing under §394 Penal Code. "These are alternative charges . . . A man cannot both steal goods and receive them . . . knowing them to have been stolen . . ." *per* Lawrie, C.J.

R. v. Hendrick Sinno (1902) 7 *N.L.R.* 97, *c.f. R. v. Thambipillai* (1920) 21 *N.L.R.* 455, 7 *C.W.R.* 265, 2 *C.L.Rec.* 39.—X and Y had been charged with murdering A, and Y was convicted of the offence, while X was acquitted. X was thereafter placed upon his trial on a charge of abetting Y to commit the murder of A. The accused pleaded

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§§181-183 *autre fois acquit.* "§330(1) of the . . . Code . . . provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall not be liable to be tried again on the same facts for any other offence for which a different charge might have been made under §181, or for which he might have been convicted under §182 . . . At the argument of the questions raised by the plea, the learned Solicitor-General informed me that he relied on the same facts as were put before the jury at the previous trial, but that in the present case he would develop them, *i.e.*, as he explained his meaning he would put them more prominently before the jury in reference to the specific charge of abetment . . . I find that the facts intended to be placed before the jury in proof of the present charge are the same as those put forward at the previous trial, the only question being as to whether these facts would establish the offence of murder or the offence of abetment of murder . . . It is thus a case where it was doubtful whether the facts which could be proved as regards the present accused would constitute the offence of murder or of abetment of murder, and it is, therefore, a case in which the accused might in the former trial have been charged under §181 both with the offence of murder and with the offence of abetment of murder, or with the latter offence only, and in which he might in the former trial have been convicted under §182 of the offence of abetment of murder without a separate charge of abetment. The Solicitor-General argued that a charge of murder and a charge of abetment of murder against the same person could not be joined in the same indictment, and that on an indictment for murder, an accused could not be found guilty of abetment of murder, and he cited in support of his contention the case of *R. v. Nur* 11 *Bom. H.C.R.* 240. I do not think that case quite applies. That case decided that abetment is not a "minor offence" in reference to the offence abetted within the meaning of the section of the Indian Code corresponding to §180 of our Code, and that, therefore, on a charge of murder the accused could not be convicted of abetment without an amendment of the charge. It may be granted that abetment is not a minor offence in that sense, but the decision does not profess to consider the bearing on such a case as the present of §§236 and 237 of the Indian Code, corresponding to §§181, 182 of our Code, and probably the circumstances of that case did not allow of its being brought within these sections, and it was brought merely to justify the conviction in that case under the section of the Indian Code corresponding to §180 of our Code. I am not disposed to follow this decision in the present case, as I am of opinion that in a case coming under §181 of our Code, a charge of murder and a charge of abetment of murder against the same person may be joined, and that even without a separate charge of abetment the accused person may be convicted of abetment of murder on the charge of murder. I find that this view is quite in accordance with the more recent and more authoritative decisions of the High Court of Bombay on the very sections of the Indian Code corresponding to §§181, 182 of our Code. I refer to . . . *R. v. Mendre* 8 *Bom.* 200, in which not only were charges of murder and of abetment so joined, but it was held that, even without a separate charge of abetment, a conviction for such offence would be good on the charge of murder. In my opinion §330(1) . . . applies to this case, and I uphold the accused's plea of previous acquittal." *per* de Sampayo, Commissioner of Assize. *N.B.*—This case leaves open the question whether, on a charge of committing an offence, the accused could lawfully be convicted of *attempting* to commit that offence. Note that the Indian Law has

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avoided the difficulty by amending §237 of the Indian Code by adding thereto a new sub-section—§237(2) which expressly provides that upon the trial of a charge for an offence, the accused might be convicted of attempting to commit that offence, although no charge in respect of the attempt has been preferred. See *R. v. Waite* (1892) 2 *Q.B.* 600, *R. v. Williams* (1893) 1 *Q.B.* 320.*

Dingirihamy v. Adonchia (1906) *Lem. & A.* 46.—The accused were charged with committing theft of a cow. After trial the Magistrate convicted them without framing a fresh charge of being in possession of beef for which they could not give a satisfactory account. *Held*, " The Magistrate regards the case as one covered by §182 . . . That section deals with the same subject-matter as §181, which is concerned with the case of alternative charges, *e.g.*, theft or receiving stolen property, criminal breach of trust or cheating. The offences involved in this case are separate and distinct—one of them cannot be said to be compounded of the other *plus* some new ingredient. §182, therefore, does not dispense with the necessity for a charge of the offence," of which the accused were convicted. See *Keerala v. Appuhamy* (1919) 6 *C.W.R.* 338 and the cases cited thereunder—§178 para. 10 *ante*.

Marley v. Appuhamy (1912) 6 *S.C.D.* 88.—Where the accused was charged with theft, but the Judge amended the charge to one of retaining stolen property and ultimately convicted the accused of criminal misappropriation. *Held*, " This is clearly a case to which the provisions of §§181, 182 . . . are applicable. It is a case where the acts are of such a nature that it is doubtful which of the several cognate offences the facts will prove. In such a case §181 allows any number of such charges to be framed, and §182 provides that, in such a case where the accused is charged with one offence and it is proved that he committed a different offence for which he might have been charged under §181, he may be convicted of the offence, although he was not charged with it. The *Illustration* to §182 makes the matter perfectly clear . . . §§181, 182 are, in my opinion, exactly applicable to the facts of this case, and I do not think that the provisions of §193 are applicable to the class of offences contemplated by §§181, 182 . . ." *per* Lascelles, C. J. *R. v. Gabriel* (1896) 2 *N.L.R.* 170 distinguished and explained.

R. v. Gabriel (1896) 2 *N.L.R.* 170 distinguished and explained in *Marley v. Appuhamy supra.*—The accused was charged with having committed the offence of extortion. After trial, and after judgment had been reserved, the Judge, purporting to act under §211 of the old Code (*modern*—§182), convicted the accused of the offence of robbery. *Held*, that under §211 (§182), if the Judge is of opinion that the evidence fails to establish the charge upon which the accused was brought before the Court, he ought to acquit him, unless the facts are such that it is doubtful whether the facts proved establish the offence charged or some cognate offence. In the latter event, the Judge should so inform the accused and call upon him to answer the facts disclosed by the evidence generally. *Qu.*—Where the offence charged is extortion, may the judge lawfully convict for robbery under §182 ? In the case of *Marley v. Appuhamy supra*, Lascelles, C. J., distinguished *R. v. Gabriel* from the case then under consideration on the following grounds :— (1) In *R. v. Gabriel* the accused had been formally committed for trial upon indictment to the District Court after a non-summary investigation in the Police Court. (2) The offence originally charged in *R. v. Gabriel* in the Police Court was one of

* *Dias on the Evidence Ordinance pp.* 163–164.

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§§181-183 extortion. (3) The offence in respect of which the accused in *R. v. Gabriel* was ultimately convicted was a different offence from extortion, and quite of a different class.

Amerasinghe v. Sheriff (1918) 5 *C.W.R.* 81.—The accused in this case was charged under a Municipal by-law in that he occupied certain stalls without a licence. The Magistrate, however, held that the by-law under which the charge was laid was *ultra vires* and, after having elicited certain evidence, purported to convict the accused under §202 of the Municipal Council's Ordinance 1910 for having, on and after a certain date, sold beef in the premises without permission from the Chairman. *Held*, that §§181, 182 of the Criminal Procedure Code did not sanction the procedure adopted by the Magistrate. "The alleged act of the accused, with which this case is concerned, is not of the ambiguous nature contemplated by §181, as the *Illustration* thereunder will more clearly show; nor does that section justify the conviction of the accused who has not had an opportunity of meeting the allegations made against him . . ." *per* de Sampayo, J.

Windus v. Weerappen (1920) 8 *C.W.R.* 11.—Where the accused, a cooly, was charged with having quitted service without just cause and, after trial the Magistrate convicted him of the offence of having failed and neglected to attend to and carry out his duties as a labourer, *held*, "the offence with which the accused has been convicted, *viz.*, neglecting to work, is different from that of quitting service. I do not think that either §181 or §182, or §183 is applicable to the present case . . ." *per* Schneider, J. *C. f. Wickremasinghe v. Kalimuttu* (1920) 2 *C.L.Rec.* 190 where de Sampayo, J., similarly held that §§181, 182 did not sanction a conviction for an offence under the Labour Ordinance different from the offence originally charged against the accused.

Welakka v. Appuhamy (1887) 8 *S.C.C.* 56.—see §§167 – 170 para. 10 *ante*.

R. v. Reazuddi 16 *C.W.N.* 1077—see §§172 – 176 para. 6 *ante* and see *R. v. Punchimahatmaya infra*.

R. v. Juan (1894) 3 *S.C.R.* 22 (*Two Judges*).—Where a charge of robbery with hurt under §382 Penal Code is preferred against an accused, he may be convicted with causing hurt simply under §314 Penal Code. This may not be done if the charge was for robbery only—§380 Penal Code. See *R. v. Alwis infra*.

R. v. Alwis (1917) 4 *C.W.R.* 328 (following *R. v. Juan* supra).—"§212 of the old Code . . . is identical with the language of §183 of the present . . . Code. It was held under the former of these sections . . . in the case of *R. v. Juan* that, while there may be a doubt as to the legality of convicting of the offence of voluntarily causing hurt a person who is merely charged with robbery (§380 P.C.), such a conviction would be good in the case of a charge under §382. The same principle is applied by analogy in the cases of *R. v. Podi Sinno* (1908) 11 *N.L.R.* 235 and . . . *R. v. Mahaddi* (1880) 5 *Cal.* 871. Moreover . . . §183(1) deals with the matter in express terms. It provides that when a person is charged with an offence which includes within itself a minor offence, there may be a conviction of the latter, even although the remaining particulars which go to make up the complete offence have not been established . . ." *per* Wood Renton, C. J.

Silva v. Appu (1898) 1 *Br.* 150—see §§167 – 170 para. 10 *ante*.

Brantha v. Kaliamuttu (1915) 1 *C.W.R.* 230.—Where an accused was charged under §394 Penal Code with dishonestly retaining stolen

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property, it was held that he could be convicted of dishonestly receiving the same. Shaw, J., after reviewing all the authorities, *held*, " the question is a somewhat academic one, as, if it were necessary, I should have no hesitation in the present case of convicting the accused of dishonest receipt under the powers conferred by §182 of the Criminal Procedure Code."

168 *D.C. Crim. Colombo* 4606 (*S. C. M.* July 27, 1917).—The Supreme Court in its appellate or revisional capacity may, under §182, convict an accused of abetment of the offence charged if the evidence warrants of this being done.

R. v. Podisinno (1908) 11 *N.L.R.* 235, 4 *A.C.R.* iv.—see *R. v. Alwis supra* and *R. v. Perera* (1891) 9 *S.C.C.* 128.—Where the accused was charged with having committed the offence of robbery—§380 Penal Code—*held*, that §183 of this Code permitted the conviction of the accused for the offence of theft—§367 Penal Code. " The indictment was for robbery . . . Under this indictment it was open to the prosecution to prove (§379 P.C.) either (1) theft accompanied by hurt or wrongful restraint, or (2) extortion accompanied by the putting of the person robbed in fear of instant death or hurt . . . Inasmuch, therefore, as it was open to the prosecution to prove a theft as one ingredient of the robbery charged, it was equally open to the Court to convict the accused of theft and acquit him of the other particulars necessary to make up the offence of robbery. The evidence led for the prosecution in the Police Court gives an accused party notice of the form of robbery which it is intended to prove against him; but, if in any case he is in doubt, it would be open to him to require of the prosecution a strict compliance with §169 of the Procedure Code,"—*per* Wendt, J. *R. v. Nur* 11 *Bom. H.C.R.* 240 (see *R. v. Hendrick Sinno supra*) considered and not followed.

R. v. Kabur (1920) 22 *N.L.R.* 105, 7 *C.W.R.* 268—see §§172 - 176 para, 6 *ante*. *Qu.*—In this case would it not have been open to the District Judge to have convicted the accused of the offence of criminal misappropriation of the railway ticket in view of §182 of the Code ? Note that the indictment charged the accused with committing criminal breach of trust of the railway warrant—see *R. v. Wafader infra*.

R. v. Amblavanar (1892) 1 *S.C.R.* 271 (followed in *Wijeysinghe v. Carolis* (1915) 1 *C.W.R.* 207).—The accused were charged with being members of an unlawful assembly armed with deadly weapons—§141 Penal Code. The Judge convicted them of being members of an unlawful assembly—§140 Penal Code. *Held*, that §212 of the old Code (now §183) permitted of this being done, the offence under §140 being a minor offence of that charged.

R. v. Punchimahatmaya (1913) 1 *B.N.C.* 63.—The accused were charged with the offence of being members of an unlawful assembly. *Held*, *per* Pereira, J.: " As regards the question whether the accused can, in the absence of a separate count in the indictment, be convicted of criminal trespass, constituted independently of §146 of the Penal Code, the case of *R. v. Reazuddi* (see §§172 - 176 para. 6 *ante*) is a strong authority that they cannot . . ."

R. v. Wafadar 21 *Cal.* 955.—§181 only authorizes a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute; and not where there may be a doubt as to the facts themselves which constitute one of the elements of the offence.

R. v. Croft 23 *Cal.* 174.—§181 contemplates a state of facts constituting a single offence, but in which it is doubtful whether those facts would constitute one or another of several cognate offences.

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R. v. Girwar 16 *C.W.N.* 600.—Where it is not known which of two persons, A or B, was the principal and which the abettor, a charge in the alternative against each could be framed.

R. v. Krishna 22 *Cal.* 377.—When an act or a series of acts is of such a nature that it is doubtful which of several offences the acts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the Appellate Court, notwithstanding any order of acquittal pronounced by the Court of trial in regard to any of the offences. Where, therefore, the Appellate Court reverses a conviction and orders a retrial, unless it has limited the scope of the retrial, such retrial must be taken to be one upon all the charges originally framed.

R. v. Devji 20 *Bom.* 215.—The offence of culpable homicide not amounting to murder is included in the offence of murder.

R. v. Lukhinarain 33 *W.R.* 61.—The offence created by §326 Penal Code is included in the offence created by §316 Penal Code.

R. v. Sitanath 22 *Cal.* 1006.—The offence created by §356 Penal Code is included in §§357, 358 Penal Code.

R. v. Durgya 1 *Bom. L.R.* 513.—Charge of minor offence, conviction for major offence. "We know of no provision of law which allows of a conviction of a major offence on a charge of a minor offence."

*R. v. Brimilow** (1839) 9 *C. & P.* 366.—On a charge of rape (§364 P.C.) the jury can find the accused guilty of criminal force (§345 P.C.) see *R. v. Eldershaw* (1828) 3 *C. & P.* 396.

R. v. Arnolis (1921) 23 *N.L.R.* 225.—Accused seen emerging from store with stolen property. Charge under §394. District Judge acquitted accused holding offence to be one under §369. *Held*, the Judge should have convicted the accused of theft acting under §182 of this Code. The Court of Appeal convicted the accused.

Murukesu v. Karunakara (1923) 2 *T.L.R.* 64.—Where A and B had been jointly charged with committing an affray under §157 Penal Code and were acquitted, and later A charged B under §483 Penal Code, *held*, that the acquittal of B under §157 could not be pleaded in bar of the present charge. "It cannot be said that the charge in the present prosecution was in respect of the same offence, or in respect of the same facts for which a different charge might have been made under §181 . . ." *per* Jayawardene, J.

R. v. Baron (1926) 4 *T.L.R.* 3.—"The powers of the Supreme Court under §§347, 357 *post* to alter a verdict on appeal or in revision are not confined to the cases under §§181, 182.

Pulle v. Perera (1927) 5 *T.L.R. at p.* 10.—The use of §§181, 182 must be carefully limited to cases where no injustice is caused to the accused by such procedure.

Perera v. Karunaratna (1927) 9 *C.L.Rec.* 49.—Although charges may be laid in the alternative, it is irregular to convict an accused on both of such alternative charges.

Premawardene v. Siriwardene (1928) 6 *T.L.R.* 62, 30 *N.L.R.* 292. —A person was charged under §§332, 343, 486 and 488 of the Penal Code. He was convicted of an offence under §484. *Held*, that he could not be so convicted without a specific charge. "§181 it seems to me is a section the application of which must be carefully limited . . ." *Qu.*

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* *Dias on the Evidence Ordinance p.* 163.

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—Is there not some mistake here ? It is clear that §181 of the Criminal Procedure Code does not authorize the conviction of an accused for an offence with which he has not been *charged*. It is possible that §§182 and 183 are the sections referred to.

Sattinayaka v. Adikaram (1929) 30 *N.L.R.* 406.—Charge under §219 (obstructing a railway policeman in the discharge of his duties). Conviction under §323. Such a conviction is good, if the hurt was caused in consequence of something done by the policeman in the discharge of his duty.

R. v. Amith (1930) 7 *T.L.R.* 134.—X was indicted under §370 of the Penal Code. Y and Z were indicted in the same proceeding with abetment—§§370, 102 Penal Code. The District Judge acquitted the accused holding that the theft by X had not been proved. The District Judge also stated that Z should have been charged with retaining stolen property. On appeal it was held that in the circumstances it was not open to the Court, acting under §182, to convict Z under §394 Penal Code. " The third accused was charged not as a principal, but as an abettor. As far as the first accused, the principal, was concerned there was and could not have been any uncertainty at all as to the offence constituted by the acts alleged against him . . . Similarly in regard to the third accused he was manifestly guilty of abetment if the first accused . . . was guilty of the principal offence . . . Under such circumstances as these I am not prepared to hold that a person charged with abetting another in the commission of theft may, under the provision of §182, be convicted as a principal offender of the offence of retaining stolen property . . ." *per* Garvin, J. *Note.*—Had the indictment contained a count against Z under §394 the difficulty in the case would not have arisen—see §172.

R. v. Ranhamy (1931) 32 *N.L.R.* 100.—*Held, per* Lyall Grant, J., that on a charge of murder it is open to the jury to convict for causing death by a rash and negligent act—§298. See §183 Criminal Procedure Code.

R. v. Godamune (1931) 32 *N.L.R.* 361.—On a charge of criminal breach of trust may the accused be convicted of criminal misappropriation ? See judgment of the Privy Council—34 *N.L.R.* 225.

Canagasingam v. Bawa (1931) 9 *T.L.R.* 31.—On a charge of theft or receiving stolen property the accused may be convicted of criminal misappropriation or *vice versa.*

All persons concerned in committing an offence may be charged together.

184. When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately **as the Court thinks fit**; and the provisions contained in the former part of this chapter shall apply to all such charges.

Illustrations.

(*a*) A and B are accused of the same murder. A and B may be indicted and tried together for the murder.

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(*b*) A and B are accused of a robbery in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on an indictment charging both of them with the robbery and A alone with the murder.

(*c*) A and B are both charged with the theft and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge charging both with the one theft and B alone with the other two thefts.

(*d*) A and B are accused of being members of opposing factions in a riot. They should be indicted and tried separately.

(*e*) A and B are accused of giving false evidence in the same proceeding. They should be indicted and tried separately.

Offence.—See §3 *ante*.

Same offence.—*C.f.* "**Offences of the same kind.**"—§179 *ante*.

Different offences.—*C.f.* "**Distinct offence.**"—§178 *ante*.

Committed in the same transaction.—See §180(1) *ante*, §238(1) *post* and *c.f.* §6 Evidence Ordinance.

Abetment.—See Penal Code §§100 – 113, 209 and §3(1) Ordinance No. 21 of 1901.

Attempt.—See Penal Code §§114, 118, 120, 121, 126, 128, 300, 301, 302, 347, 348, 381, 383, 384, 392, 490.

Charged.—See §§155, 158, 187, 204, 219.

Tried.—See *Chapters XVIII.–XX.* and §§152(3), 166 *ante*.

Court.—See §3 *ante*.

1. §184 is identical with §239 of the Indian Code, except that *Illustrations* (*d*) and (*e*) are peculiar to our Code.

§184 is similar to §213 of the Code of 1883, but it should be observed that *Illustrations* (*d*) and (*e*) do not appear in the old Code.

2. **Scope of §184.**—See Introduction to *Chapter XVII.* para. 4 *ante*.

See also §178 paras. 2, 3, 5, 6, 7, 9, §179 paras. 2, 5, §180 para. 2, §§181 – 183 para. 2 *ante*.

As has already been stated in §178 para. 2 *ante*, §184 draws attention to the second main principle of the law which safeguards the interests of accused persons, *viz.*, that the prisoner is not to be embarrassed or prejudiced in his defence by making him face his trial along with several fellow prisoners. "Upon general principles, each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried"—*R. v. Kadir.* A joint trial of several accused entails certain hardships on the accused. Thus, if X, Y and Z are tried together, X cannot call as his witness the wife of Y, unless Y consents to call her as his own witness. Moreover, it would be difficult for X to call Y or Z as witnesses on his own behalf—*Ponnan v. Ukkubanda.* The hardships which occasionally flow from a joint trial are not confined to the defence alone. Thus, by reason of §30 of the Evidence Ordinance, a confession made by one of several accused who are being tried jointly and which implicates the others cannot be used by the prosecution against the other accused.

§184 enumerates the various cases where joint trials are legally permissible, *viz.*, when more persons than one are jointly accused of (i) committing the same offence—see *Illustration* (*a*); or (ii) of different offences committed in the same transaction—*Illustrations* (*b*) and (*c*);

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or (iii) where one is charged as a principal and another as an abettor—*R. v. Careem, R. v. Girwar, Ahmadu v. Weerakutty, R. v. Kali Das, R. v. Moss;* or of attempting to commit the offence. In all these cases the accused may be charged together or separately **"as the Court thinks fit."** Where a joint charge is made, it is open to the accused, upon proper proof of the fact, to move the Court for a separation of the trial of his case from that of the others on the ground that such joint trial would tend to embarrass or prejudice his defence—*R. v. Fakirappa, R. v. Senanayaka, R. v. Wijeysinghe,* §178 para. 10 *ante*; and Judges should lend a willing ear to such applications if they appear to be supported on good grounds—*R. v. Manu.*

Illustrations (*d*) and (*e*) are peculiar to this Code, and draw attention to cases which at first sight appear to justify a joinder of accused, but which in reality are not within the purview of §184, but which fall within the general rule formulated by §178 *ante.* The *Illustrations* in §184 are not exhaustive—*R. v. Fakirappa,* §180 para. 6 *ante.* See *R. v. Appuhamy* para. 14 *infra.*

§184 may be used either severally or in combination with §§179–181—see §178 paras. 6, 8 *ante.* An irregular joinder of accused will vitiate a conviction—*R. v. Subramania*; but if no prejudice has been caused to the accused thereby, the Supreme Court will order a new trial —*Wijeysekera v. Ratnayaka.* The consent of the accused or of his legal advisers cannot justify an illegal joinder—*Wijeysekera v. Ratnayaka.*

The principle as to the joinder of persons applies to proceedings under §§81–83 *ante—R. v. Dineshamy, R. v. Kadir, Wickremasuriya v. Don Lewis.*

3. **Jointly committing the same offence.**—If several persons jointly commit the same offence, they are all classed together as **principals in the first degree,** and their legal guilt is the same—see §§32, 33, 35, 36, 146, 147, 446 Penal Code.

Persons who are present when an offence is being committed, under such circumstances that if they had been absent at the time the offence was committed they would have been liable as abettors, are classed as **principals in the second degree**—§107 Penal Code, and are liable to the same punishment awarded to a principal in the first degree. Thus, A and B jointly murder C, or A tells B that C will be passing along a certain path and instructs him to lay in wait and murder him, and B does so. In either case A and B are guilty as principals, and can be charged and tried together, and no prejudice can be caused to either of them by reason of such joint trial. But if A commits an offence and, after its completion, A is rescued by B from arrest, A and B cannot be charged jointly, A for committing the original offence and B for rescuing him—*Weerakoon v. Mendis*—see *D.F. Matara v. Carolis.*

Same offence.—*C.f.* "*Offences of the same kind*"—§179 *ante.* If X, Y and Z jointly committed three murders on three different dates within one year, §§179 and 184 applied in combination would justify the joinder of the three offences and of the three accused in one and the same trial. Where the case for the prosecution alleges a conspiracy involving the directors, manager and accountants of a bank, §184 entitles the prosecution to proceed against all such persons at one trial—*R. v. Moss.* Where, on the other hand, several persons not acting jointly or in the course of a single transaction commit similar offences, such persons cannot be tried together—*Silva v. Lewis, Saibo v. Chellam, James v. Manuel.*

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§184

4. **Different offences committed in the same transaction.**—**Different offences.**—*C.f.* "*Distinct offence*"—§178 *ante.*

Same transaction.—See §180 para. 2(i) *ante.*

If A and B set out to commit a robbery, and in the course of such robbery A commits murder with which B has nothing to do, A and B can be charged together in respect of the robbery, and a further charge can be made against A in respect of the murder, because that offence was committed in the same transaction in which the robbery was committed—*Illustrations* (*b*), (*c*). It is open to B to move the Court to have his trial for robbery kept apart from the trial of A for the murder, upon proof that such trial would prejudice or embarrass his defence.

The following cases should be consulted.—*R. v. Podisinno, Banda. v. Siyatu, R. v. Datto, R. v. Ganesh, R. v. Tilukdhari, Fernando v. Bhai, R. v. Aman, Fernando v. Fernando.*

As to examples of offences which are not committed in the course of one transaction—see *Ponnan v. Ukkubanda, R. v. Balabhai, R. v. Jethalal, R. v. Kamudini, Silva v. Lewis, Karu v. Charan, R. v. Gobind, R. v. Tilukdhari, Weerakoon v. Mendis, R. v. Perera,* see para. 13 *infra.*

It is not essential that the charge or indictment should show the identity of the transaction on its face.—*R. v. Saibo, R. v. Datto*; but it is good draftsmanship to do so.

5. (i) **Principal and abettors.**—A person can be charged as a principal and convicted of abetment—*R. v. Hendrick Sinno* §§181–183 para. 7 *ante.*

§184 justifies the joinder in one charge and the joint trial of all principals and abettors—See *R. v. Careem, Ahamadu v. Weerakutty, R. v. Moss, R. v. Kali Das.* See *D.F. Matara v. Carolis.* If there is any doubt as to whether a person is really an abettor, he should be given the benefit of the doubt and not joined—*R. v. Girwar.*

Abettors.—See §3(1) Interpretation Ordinance 1901.

Under the English Law abettors are either **(i) accessories before the fact,** or **(ii) accessories after the fact.** *Chapter V.* of the Penal Code deals with *abettors,* and by §100 defines what is meant by abetment. Thus, a person is an abettor who either (i) actually instigates the commission of the crime, or (ii) engages in a conspiracy for the commission of the crime, or (iii) intentionally aids by any act or illegal omission the commission of a crime. An *accessory after the fact* is a person who, knowing that an offence has been committed by another, receives, comforts, or assists him in order to escape from punishment, or rescues him from arrest, or having him in custody allows him to escape or opposes his lawful apprehension—provided that a wife cannot be regarded as an accessory after the fact to her husband. It will be seen that §§198, 209, 213, 216, 220A Penal Code are all examples of offences committed by accessories after the fact. That these sections do not form part of *Chapter V.* of the Penal Code shows that they should not be construed as if they were parts of *Chapter V.*—*per* Bertram, C. J., in *R. v. Thampipillai* (1920) 21 *N.L.R. at p.* 460, 7 *C.W.R.* 265, 2 *C.L.Rec.* 39. In this case six accused were charged jointly (i) with committing murder and (ii) with causing evidence to disappear under §198 of the Penal Code. The jury acquitted the accused of murder, but convicted them under §198. The *Full Court held* that the conviction was right. *Qu.*—Had the indictment charged A and B with murder, and C and D with causing the evidence of the guilt of A and B to disappear, would

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such joinder be justified ? This point did not arise in *R. v. Thampipillai.* It is submitted that such a joinder cannot be justified, where it is known who are the murderers and who the accessories after the fact, because §184 justifies the joinder of principals and abettors, and inasmuch as persons who cause the evidence of another's guilt to disappear do not fall within the purview of §§100 – 113 of the Penal Code. In *R. v. Thampipillai* it was doubtful all along as to who were the murderers and who the accessories, and the charge was preferred in terms of §181 *ante*. The question of the misjoinder of accused did not, therefore, arise. §184

(ii) **Attempts.**—§184 justifies the joinder of a person who commits a crime along with another who attempts to commit the same offence.

Attempt.—Defined §490 Penal Code. See also §§114, 118, 120 – 121, 126, 128, 300 – 302, 347 – 348, 381, 383 – 384, 392 Penal Code.

See *R. v. Kali Das.*

6. **Offence.**—See *Wickremasuriya v. Don Lewis, R. v. Dineshamy, R. v. Kadir.*

7. **Tried together or separately as the Court thinks fit.**—

(i) If the accused are charged jointly under §184, it is open to any of them upon proper proof to move the Court that his trial should be had apart from the others on the ground that a joint trial would tend to embarrass or prejudice his defence—*R. v. Fakirappa, R. v. Senanayaka, R. v. Wijeysinghe* ; and it is the duty of the Court to lend a willing ear to any valid application in that behalf—*R. v. Manu* and see §178 paras. 2, 5 *ante*. But it is a matter entirely within the discretion of the trial Judge, and the Court of Appeal will not interfere unless the joinder has resulted in a miscarriage of justice—*R. v. Bywaters & Thompson. R. v. Browne & Kennedy.*

(ii) If persons who could have been charged together under §184 are for some reason charged apart, it is irregular for the trial Judge to consolidate such charges and try the accused together—*R. v. Mendis, R. v. Cornelis, R. v. Silva.*

8. **May.**—See §179 para. 5 *ante*, see *R. v. Appuhamy, R. v. Bywaters & Thompson, R. v. Browne & Kennedy* paras. 7 and 14 *infra.*

9. **And the provisions contained in the former part of this chapter shall apply to all such charges.**—*i.e.*, the rules as to stating particulars in the charge—§§167 – 170 *ante*; the effect of errors—§§171, 177 *ante* ; and the rules regarding the amendment of charges—§§172 – 176 *ante.*

10. **§184 may be used severally or in combination with §§179 – 181**—see §178 paras. 6, 8 *ante* and para. 3 *supra.*

See *R. v. Arlis Appu,* 16 – 17 *D.C. Crim. Colombo* 3424, 75 – 76 *D.C. Crim. Galle* 13771, *R. v. Budhari,* §178 para. 6 *ante,* and *R. v. Shriniwas* para. 14 *infra.*

11. **Effect of an irregular joinder under §184**—see §178 para. 9 *ante* and see para. 2 *supra.*

12. **The Illustrations to §184.**—*Illustrations* (*d*) and (*e*) are peculiar to this Code and have no counterpart either in the Indian Code or in the old Code of 1883. With regard to *Illustration* (*d*) see *Velaiden v. Zoysa, R. v. Appuhamy* (*F.C.*), *Weerasinghe v. Sheriff* (*F.C.*) *Keegal v. Mohideen, Wickremasuriya v. Don Lewis.* With regard to *Illustration* (*e*) see *Velaiden v. Zoysa, R. v. Ganesh,* and *Banda v. Sada.*

Illustration (*a*) is an example of the joinder of two persons who are accused of jointly committing the same offence. *Illustrations* (*b*), (*c*) furnish examples of cases where two persons commit an offence jointly

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§184 and where one of them, in the course of that transaction, commits an independent offence. These *Illustrations* are not exhaustive—*R. v. Fakirappa.* The *Illustrations* seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction—*R. v. Jethalal.*

13. **Analysis of the case law.—**

(A) **Joinders of accused not justified under §184.—**

(1) Distinct offences committed by different accused, but not in one and the same transaction—*Weerakoon v. Mendis, James v. Manuel, R. v. Podisinno, Saibo v. Chellam, Collette v. Podda, Silva v. Lewis, Ratnayaka v. Deonis, R. v. Samaranayaka, Gooneratne v. Sinno,* (1899) *Koch* 43, *Casupathipillai v. Sabapathipillai, Murugappah v. Kanapathi, Wijeysekera v. Ratnayaka,* 7 – 8 *P.C.Chilaw* 7459, *R. v. Gobind, R. v. Jethalal, Karu v. Charan, R. v. Kamudini, R. v. Tilukdhari, Banda v. Seyatu, Fernando v. Fernando.*

(2) Joint charge of receiving stolen property, but the evidence showing that the receipt by X to be at a time different from its alleged receipt by Y and Z—*Ponnan v. Ukku Banda, c.f. R. v. Jethalal.*

(2A) Joint charges of persons independently causing hurt to the same person on different dates—*R. v. Perera.*

(3) An accused charged with theft cannot be tried along with an accused charged under §211 Penal Code with having received a gratification to recover the stolen property, unless the offences are part and parcel of the same transaction—*Podiya v. Baiya*; nor may persons who are charged with being in possession of beef for which they are unable to account be charged along with a person charged with committing theft of a bull—*William v. Dinorisa.*

(4) Persons dealt with under §§81 – 83 *ante*—*R. v. Dineshamy, R. v. Kadir, Wickremasuriya v. Don Lewis, Abeywardene v. Fernando.*

(5) Persons charged with gaming tried along with the keeper of the gaming house.—In the following cases the joinder was held to be justified: *Ismail v. Sinno, Abeykoon v. Philip, Goonetilleke v. Allis.*

In the following cases the joinder was held to be bad:—*Jayawardene v. Don Thomas, Sandanayaka v. Donchia.*

(6) The joinder of persons who form members of opposing factions in a riot or affray can be tried together—see *Illustration (d)—R. v. Appuhamy* (Div. Ct.) and *Weerasinghe v. Sheriff, R. v. Gunesekera,* see *Velaiden v. Zoysa, Keegal v. Mohideen, Wickremasuriya v. Don Lewis.* See, however, *Abeywardene v. Fernando.*

(7) Persons committing perjury in the same judicial proceeding should be tried apart—see *Illustration (e)* and *Banda v. Sada, R. v. Ganesh, Velaiden v. Zoysa,* and *c.f. Silva v. Jonna* 4 *N.L.R.* 26. *C.f. Bromley v. Raman* 8 *T.L.R.* 112 §180 of the Penal Code, *D.F. Matara v. Carolis.*

(B) **Joinders of accused which are justified under §184.—**

(1) Offences committed in the course of one transaction.— 616 *P.C. Chilaw* 7459, *Karu v. Charan, R. v. Kamudini, R. v. Kali Das, R. v. Datto, R. v. Ganesh, R. v. Tilukdhari, R. v. Cornelis, R. v. Arlis Appu, R. v. Aman, R. v. Balabhai* and *c.f. R. v. Jethalal.*

(2) Principals and abettors can be tried jointly—*R. v. Moss, R. v. Kali Das, R. v. Datto, R. v. Shriniwas, Ahamadu v. Weerakutty, R. v. Careem, D.F. Matara v. Carolis.*

(3) Attempts—*R. v. Kali Das.*

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14. **Case law.—**

R. v. Girwar 16 *C.W.N.* 600—see §§167 – 170 para. 10 *ante.*

16 – 17 *D.C. Crim. Colombo* 3424 (*S.C.M.* March 3, 1913)—see §178 para. 10.

75 – 76 *D.C. Crim. Galle* 13771 (*S.C.M.* August 22, 1912)—see §178 para. 10.

R. v. Fakirappa 15 *Bom.* 491—see §180 para. 6 *ante.*

R. v. Arlis Appu (1920) 2 *C.L.Rec.* 189, 8 *C.W.R.* 236—see §178 para. 10 *ante.*

R. v. Samaranayaka (1892) 1 *S.C.R.* 335—see §178 para. 10 *ante.*

R. v. Budhari 33 *Cal.* 292—see §178 para. 6, §179 para. 10 *ante.*

Gooneratne v. Sinno (1916) 2 *C.W.R.* 20—see §178 para. 10 *ante.*

(1899) *Koch* 43—see §178 para. 10 *ante.*

Keegal v. Mohideen (1918) 5 *C.W.R.* 162—see §178 para. 10 *ante.*

Velaiden v. Zoysa (1910) 14 *N.L.R.* 140.—See §178 para. 10 *ante.* *Held further*, "By analogy a breach of the rule derived from the examples (*d*) and (*e*) to §184 of the Criminal Procedure Code, that two accused members of opposing factions of a riot, or two persons accused of giving false evidence in the same proceeding, must be indicted and tried separately, is argued not to be a mere irregularity and not to be cured under §425 . . . It is difficult . . . to say, upon the ruling of the Privy Council (in *R. v. Subramania infra*) that what has occurred here is a mere irregularity curable under §425 . . ." *per* Middleton, J. See the two Full Court cases of *R. v. Appuhamy* and *Weerasinghe v. Sheriff infra.*

Wickremasuriya v. Don Lewis (1915) 1 *C.W.R.* 192.—See §171 para. 6 *ante.* "It is suggested that the accused in the present case are not charged with an '*offence*' within the meaning of §184 (of the Criminal Procedure Code) and that, therefore, the provisions of that section do not apply. I am unable to agree. An 'offence' is defined by §3 to mean any act or omission made punishable by any law for the time being in force, and *R. v. Baronchi* 17 *N.L.R.* 444 shows that such an order as binding over to keep the peace is a 'punishment' within the meaning of the Criminal Procedure Code . . ." *per* Shaw, J.

R. v. Subramania 25 *Mad.* 61, *Privy Council*—see §178 para. 10 *ante.*

Ismail v. Sinno (1908) 3 *A.C.R.* xiii.—§184 of the Code permits of the joinder in one charge of a person accused of keeping a gaming house and of a person charged with gaming therein, if the transaction was the same. *Jayawardene v. Don Thomas infra* not followed.

Jayawardene v. Don Thomas (1895) 1 *N.L.R.* 216—see §178 para. 10 *ante.*

Sandanayaka v. Donchia (1916) 3 *C.W.R.* 368—see §178 para. 10 *ante.*

Goonetilleke v. Allis (1908) 4 *A.C.R.* iv.—see §178 para. 10 *ante.*

Abeykoon v. Philip (1909) 12 *N.L.R.* 145.—A charge of keeping a common gaming place can be joined with a charge of unlawful gaming therein. "I am inclined to take the view . . . that §184 . . . applies, as they were different offences committed in the same transaction . . ." *per* Grenier, J.

Casupathipillai v. Sabapathipillai (1896) 2 *N.L.R.* 152—see §178 para. 10 *ante.*

Murugappah v. Kanapathi (1899) 1 *Tam.* 22, *Koch* 3—see §178 para. 10 *ante.*

R. v. Podisinno (1912) 16 *N.L.R.* 16—see §178 para. 10 *ante.* *Held further*, "It was evidently supposed that if the gelignite removed from the store . . . between February 23 and 27, 1912, was stolen by the two

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§184 accused, then the offences mentioned in the second and third counts would be ramifications of the same transaction, and that the insertion of these two counts in the same indictment would be justified by §184 of the Criminal Procedure Code . . . but it will be seen that even such a view is repelled by the decision of *Abdul Majeed v. Emperor* (*Cal. L.R. Rep. III.*, 412) . . . " *per* Pereira, J. See *Banda v. Siyatu infra.*

Ponnan v. Ukkubanda (1913) 4 *C.A.C.* 42, 5 *B.N.C.* 58.—See §178 para. 10 *ante.*

R. v. Manu 9 *Cal.* 371—see §178 para. 10 *ante.*

Collette v. Podda (1905) *Lem.* 81 (following *Paaris v. Allis* (1896) 2 *N.L.R.* 161).—*Held*, that an accusation charging X and Y with possessing an excisable article amounted to a misjoinder of accused. The *ratio decidendi* being that the offences committed by each accused were distinct and quite unconnected with each other.

Silva v. Lewis (1909) 3 *S.C.D.* 53.—W, X, Y and Z were charged in one proceeding with having driven their carts on the public road after dark without lights. *Held*, that this amounted to a misjoinder of accused. " It is not a case of several persons '*jointly committing the same offence*,' or of '*different offences committed in the same transaction*,' and the case is not within §184 . . . The fact that the carts . . . were on the same road and only a few yards . . . from each other does not make their four acts one act," *per* Hutchinson, C. J.

Podiya v. Baiya (1913) 1 *B.N.C.* 33.—In one and the same proceeding X was charged with committing theft of a cow, and Y with having received a gratification to help to recover the stolen animal—§212 Penal Code. " The offences are distinct, and under §184 . . . the accused could only be tried for them together if they arose out of the same transaction. This I do not think that they can be said to do . . ." *per* Wood Renton, C. J.

R. v. Saibo (1913) 1 *B.N.C.* 35—see §180 para. 6 *ante* and *R. v. Datto infra.*

R. v. Mendis (1913) 16 *N.L.R.* 252—see §178 para. 10 *ante* and the cases cited thereunder.

Banda v. Sada (1914) 17 *N.L.R.* 510.—It is not irregular to try several witnesses *en masse* under §440 *post.* *C.f. Silva v. Jonna* (1899) 4 *N.L.R.* 26 where a contrary opinion was expressed.

Ratnayaka v. Deonis (1916) 2 *C.W.R.* 21.—X and Y abused each other in the course of a mutual quarrel and were charged together. *Held*, " I would draw . . . attention to another point . . . *viz.*, that the words complained of would appear to have been used by the two accused against each other in the course of a mutual quarrel between the two, and, in view of the decision of this Court in *Velaiden v. Zoysa* (*supra*), I direct that the two accused be dealt with separately instead of in one proceeding," *per* de Sampayo, J.

Fernando v. Bhai (1918) 5 *C.W.R.* 184.—" Two persons are charged with committing injuries on various persons. It would be extremely difficult for the persons charged to understand from the charge what are the precise acts they are alleged to have committed. I think they may well have been embarrassed in conducting their defence . . . Two persons may, if the facts warrant it, be charged with committing injuries to separate persons when these injuries result from a combined assault committed with a common intention, even though it is not certain by whose hand the injuries were actually caused; but if the facts do not warrant such an accusation, the charge cannot be framed against two supposed

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offenders in the alternative. Further, the assault upon each of the persons injured must be the subject of a separate charge (*count* ?). Each accused must know what injuries he is charged with being responsible for so that he may frame his defence . . ." *per* Bertram, C. J.

William v. Dinorisa (1919) 6 *C.W.R.* 365.—X was charged with committing theft of a bull and with being found in possession of beef for which he was unable to account. Y and Z were charged along with X on a charge of jointly committing theft of the same bull. *Held*, that this amounted to a misjoinder of accused. " . . . The joinder of the second and third accused, who were not charged with both the offences with which the first accused was charged, is contrary to procedure. On this point I need only to refer to the judgment in *Police Sergeant v. Semijah* (1914) 3 *B.N.C.* 61." See also *Naide v. Packeer* (1920) 22 *N.L.R.* 284, 8 *C.W.R.* 173.

Wijeysekera v. Ratnayake (1919) 6 *C.W.R.* 281.—X was charged with committing an offence under §48(3) of Ordinance No. 1 of 1895, and Y was charged in the same proceeding with having committed an offence under §48(5) of the same ordinance. *Held*, that this amounted to a misjoinder of accused. " The offence which each of the accused was charged with having committed is different in *time*, *place* and *nature*, the one from the other. They were not committed in the same transaction. The joinder, therefore, is not sanctioned by §184, and I doubt that the consent of the accused's proctor cures the irregularity, but as in this particular instance it has not prejudiced the accused in any manner, I do not entertain this objection to the conviction," *per* Schneider, J.

R. v. Careem (1920) 7 *C.W.R.* 300.—*Held*, that §184 authorized the joinder of principals and abettors—see *Ahamadu v. Weerakutty infra.*

R. v. Cornelis (1920) 7 *C.W.R.* 168.—" §184 . . . authorizes more persons than one to be charged with offences committed in the same transaction, but where this is done the persons must be both charged and tried together. The Magistrate has no power to try together two cases in which persons are separately charged, even though those offences were committed in the same transaction . . ." *per* Bertram, C. J. *c.f. R. v. Silva* (1920) 7 *C.W.R.* 180.

R. v. Aman (1920) 21 *N.L.R.* 375, 7 *C.W.R.* 154, 1 *C.L.Rec.* 191 (*Full Court*).—" *Same transaction* " defined—see §180 para. 6 (*a*) *ante.*

7 – 8 *P.C. Chilaw* 443 (*S.C.M.* January 21, 1916).—X was charged with committing insult and criminal intimidation, and Y was charged along with him for assaulting the complainant. *Held*, that there was a misjoinder of accused.

616 *P.C. Chilaw* 7459, 617 *P.C. Chilaw* 7460 (*S.C.M.* September 9, 1919).—In *Case No.* 1 an arrack renter, X, was charged with selling arrack to Y. Y was charged in *Case No.* 2 with transporting the arrack so sold. *Held*, that as the offences were committed in the course of one and the same transaction, the consolidation of the two trials was not irregular—*Sed qu*?

Ahamadu v. Weerakutty (1909) 2 *Leader* 149.—§184 authorizes the joint trial of a principal and an abettor—see *R. v. Careem supra.*

R. v. Moss 16 *Alla.* 88.—Where the charge includes *a conspiracy* involving the directors, manager and accountant of a bank, *held*, that the accused could lawfully be tried together.

Karu v. Charan 28 *Cal.* 10.—The offence of dishonestly receiving stolen property from the thief cannot be regarded as being an offence committed in the same transaction as the theft itself, unless it be a case where, simultaneously with the theft, the offence of receiving was committed.

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§184 *R. v. Kumudini* 28 *Cal.* 104.—A number of currency notes were stolen at one and the same time from a box, and X and Y were jointly put upon their trial. X was convicted under §§394, 396 Penal Code in regard to currency note 1, and under §396 with regard to currency note 2. Y was convicted under §396 with regard to currency note 1, and under §§394, 396 with regard to currency note 3. *Held*, that the two accused might be tried together in respect of currency note 1, but that the other charges as regards notes 2 and 3 could not be joined along with it. The reason for this ruling apparently is that the possession stated to have been acquired by X and Y in respect of notes 2 and 3 was at different times, and it appeared that neither of the latter transactions was in anyway connected with the transaction with regard to note 1—see *R. v. Abdul* 33 *Cal.* 1256.

R. v. Gobind 29 *Cal.* 385.—X having been arrested for some offence against §128 of the Indian Railway Act was, shortly after the arrest, rescued by Y and Z. *Held*, that the offences were not part and parcel of the same transaction.

R. v. Balabhai 6 *Bom. L.R.* 517.—The knowledge of the receiver of stolen goods that the property is stolen connects him with the theft. "That connection is sufficient, in our opinion, to constitute both the theft or the criminal breach of trust and the receipt one transaction, whether the two acts take place simultaneously or not"—see *R. v. Jethalal infra.*

R. v. Kali Das 38 *Cal.* 453.—Where a ticket collector retained two used tickets and handed them over to B in order that B might take them to the station of issue and claim a refund thereon and B tried to do so, *held*, that the breach of trust by the ticket collector and the attempt to cheat by B were offences committed in the course of a single transaction and that the two accused could lawfully be tried together. "*Where one person is accused of committing any offence and another of abetment of or attempt to commit such offence . . .*" *Held*, that these two clauses were not mutually exclusive. Thus, A and B may be tried jointly, A for abetting an attempt by B, and B for the attempt.

R. v. Jethalal 29 *Bom.* 449 (*R. v. Balabhai* distinguished).—"The words of §239 (*local*—§184) are, to say the least of it, ambiguous *if it intended* to include in the same transaction a series of acts, one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction. The *Illustrations* to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction . . ." *per* Russell & Beatty, J. J.; Aston J. dissenting.

R. v. Datto 30 *Bom.* 49.—*Held*, "In this case it has apparently been found by the lower Court that the accused were *jointly* in charge of the trust fund, one of the accused being the *karbhari* and the other cashier. The one could not act without the connivance of the other, and they evidently carried through their object *in concert.* That they carried out their scheme by successive acts done at intervals, *alternately taking the benefits*, does not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last . . . It also suffices, for the purpose of justifying a joint trial, that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of §239 (*local*—§184). It is not necessary that the charge should contain the statement as to the

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transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test . . . "—"*Transaction*" defined. §184

R. v. Ganesh 14 *Bom. L.R.* 972.—Where there was one sustained and continuous plot in order to screen the real offenders of a certain robbery, and in order to attain that object various methods were resorted to, the mere fact that two of the accused gave evidence in support of the plot in one and the same proceeding did not render the application of §239 (*local*—§184) inapplicable. (But see *Illustration* (*e*) to §184, which *Illustration* is not reproduced under the Indian Law).

R. v. Shriniwas 7 *Bom. L.R.* 637.—X was charged with having accepted three illegal gratifications within the space of twelve months, two of them through the agency of Y, and the third through the agency of Z, Y was charged along with X in respect of the abetment of X to receive the two gratifications. *Held*, that the joinder was justified. *Qu.*—In view of the charge against X in regard to the third gratification, could Y be joined, as he had nothing to do with that gratification? Having regard to the amendment of §178 it would seem that §179(1) and §184 applied in combination would justify the joinder.

R. v. Tilukdhari 13 *C.W.N.* 804.—Theft by A followed by rescue and a further theft in the course of the rescue by B and C, *held*, that the original theft must be tried apart, but that the subsequent rescue and theft could be tried together. *C.f. R. v. Lakshari* 13 *C.W.N.* 1113.

R. v. Kadir 9 *Alla.* 452.—"Upon general principles, each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried . . ." *per* Mahood, J.

R. v. Dineshamy (1919) 21 *N.L.R.* 127, 6 *C.W.R.* 277.—See §§81 – 83 para. 6(*f*) *ante*, and also the cases *Samath v. Silva* (1917) 4 *C.W.R.* 238, *R. v. Andrisa* (1890) 9 *S.C.C.* 129 cited thereunder. See also the cases cited in §§81 – 83 para. 3(*b*).

Banda v. Siyathu (1920) 8 *C.W.R.* 309 (considering *R. v. Podisinno* (1912) 16 *N.L.R.* 16, *Fernando v. Fernando* (1913) 17 *N.L.R.* 249, *Gooneratne v. William Sinno* (1916) 2 *C.W.R.* 20, and *R. v. Cornelis* (1911) 5 *S.C.D.* 89).—Where X was charged with having misappropriated A's bull on a certain date, and Y was charged in the same proceeding with having dishonestly retained the bull on a different date, *held*, that the proceedings were irregular. New trial ordered.

Fernando v. Fernando (1913) 17 *N.L.R.* 249, 1 *Crim. App. R.* 30, and referred to in *Banda v. Siyatu* (1920) 8 *C.W.R.* 309.—Where A is accused of the theft of a bull and B of dishonestly receiving the animal from A, a joint trial is illegal unless it is shown that they were acting in concert.

Saibo v. Chellam (1923) 25 *N.L.R.* 251, 1 *T.L.R.* 280.—It is a misjoinder of accused to charge under §9(1)(*a*) of Ordinance No. 4 of 1841 two prostitutes merely because they live in the same house. "Persons could only be charged together if they are accused jointly of committing the same offence or of different offences committed in the same transaction."

R. v. Bywaters & Thompson (1922) Court of Criminal Appeal, (England).—*Per* The Lord Chief Justice of England, Darling & Salter, JJ. "It has been held again and again by this Court—the cases are so numerous that it is not necessary to refer to them—that it is a matter of judicial discretion whether two persons shall or shall not be tried sepa-

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§184 rately. In this case the learned Judge, exercising his discretion, decided that the present appellant and Mrs. Thompson should be tried together. In the opinion of this Court there was no ground at all for unfavourable criticism of that decision. On the contrary, this was clearly a case in which, in the interests of justice, it was desirable that the two persons should be tried together . . . No doubt, if the result of trying two persons together, who might have been tried separately, is what has been called in the cases referred to by Mr. Whiteley (counsel for the appellant) a miscarriage of justice, this Court will interfere. But what is meant by a " miscarriage of justice ?" That means that a person has been improperly found guilty. It is idle to suggest that a miscarriage of justice has taken place if the prisoner, against whom there is ample evidence, suffers, in the opinion of the defence, some incidental disadvantage because a fellow prisoner, who would not otherwise be a witness, does go into the witness-box . . ."

R. v. Browne & Kennedy (1928) *Notable British Trials p.* 41—The two prisoners were jointly charged with murdering police constable Gutteridge. Kennedy had made a damaging confession to the Police, which under the English Law would be admissible at his trial *against himself.* As that confession contained references to the part played by Browne in the offence, counsel for Browne moved that the trial of the two prisoners be held separately. *Held per* Avory, J. "In my opinion no sufficient reason has been shown for making the order which has been asked for in this case, and I refuse the application". In the Court of Criminal Appeal, *held per* the Chief Justice, Salter & Branson JJ.—"The rule is that it is a matter for the discretion of the Judge at the trial whether two people jointly indicted should be tried together or separately. But the Judge must exercise his discretion judicially. If he has done so this Court will not interfere—but that is subject to this qualification. If it appeared to this Court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction"—*Conviction affirmed.*

Abeywardene v. Fernando (1924) 27 *N.L.R.* 97, 3 *T.L.R.* 4.—*Per* Bertram, C.J. "A number of cases has been cited to show that, where persons before the Court are members of opposite factions involving a disturbance, they ought not to be tried together, but should be tried separately. The principle of these cases is now so thoroughly established that it is impossible for a Judge, sitting as I am now sitting, not to follow it. I cannot help myself regretting the establishment of this principle in our Courts." The Chief Justice thought that in cases of affray, duelling, etc., both factions could be dealt with in the same proceeding.

Weerakoon v. Mendis (1925) 27 *N.L.R.* 340, 3 *T.L.R.* 37.—Where A was charged with an offence under §4 of Ordinance No. 4 of 1841 and B was charged with using criminal force to X, a public servant, who was attempting to effect A's arrest as he was escaping, *held*, that A and B could not be jointly charged, as A's offence was complete at the time B used criminal force on X. The offence cannot be said to have been committed in the " same transaction."

James v. Manuel (1926) 7 *C.L.Rec.* 173, 4 *T.L.R.* 97.—*Per* Jayawardene, J.: " I do not think that when two persons get drunk and behave in a disorderly manner they can be said to jointly commit the same offence of disorderly behaviour . . . The act of each is a separate and distinct act . . ."

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R. v. Appuhamy (1928) 9 *C.L.Rec.* 154, 6 *T.L.R.* 18, 30 *N.L.R.* 33. (*Div. Ct.*).—Persons charged with committing an affray under §157 of the Penal Code are persons who, in the words of §184 of this Code, "are accused of jointly committing the same offence," and under that section "may be charged and tried together or separately as the Court thinks fit."—*Abeywardene v. Fernando* (*supra*) distinguished. *Illustration* (*d*) to §184 referred to. See *Weerasinghe v. Sheriff infra.* §185

Bromley v. Ramen (1931) 8 *T.L.R.* 112.—In the absence of evidence proving a conspiracy on their part, several persons cannot be jointly charged in one case with committing an offence under §180 of the Penal Code.

Weerasinghe v. Sheriff (1930) 33 *N.L.R.* 245, 11 *C.L.Rec.* 85.—Members of opposing factions can be charged with affray in the same case (*Div. Ct.*).

R. v. Gunasekera (1931) 32 *N.L.R.* 290—see §180(1).

D. F. Matara v. Carolis (1931) 33 *N.L.R.* 162.—Under §184 two persons may be charged together with having committed several offences in the course of the same transaction, if such offences were committed by them jointly. Where A sent a petition to the Fiscal against a process server, and B sent another petition to the Government Agent counteracting A's petition, and both A and B were jointly charged under §180 of the Penal Code for giving false information, *held*, (1) that both appellants could not be jointly convicted in respect of both petitions unless charges of abetment had been formulated; and (2) that under §184 the offences, though committed in the same transaction, were not (on the facts) committed jointly and that, therefore, the joinder under §184 was bad. Conviction of A affirmed. Conviction of B set aside.

R. v. Perera (1932) 12 *C.L.Rec.* 13.—X and Y, husband and wife, charged jointly (1) X with causing hurt—§315—to Z on 17-10-31, and (2) Y with causing hurt—§314—to Z on 18-10-31. No evidence that the offences were committed in the same transaction. *Held*, this was a misjoinder of accused and of charges.

When conviction on one charge remaining charges may be withdrawn.

185. (1) When more charges than one are made against the same person and when a conviction has been had on one or more of them the officer conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges; or the Court, of its own accord, may stay the inquiry into or trial of such charge or charges.

(2) Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

When more charges than one.—See §§179 – 181 *ante.*

Charges.—See §§155, 158, 187, 204, 219.

Conviction.—See §§305 – 308, 182 – 183, 188, 190, 205, 214, 220, 221, 251, 253.

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§185 **The officer conducting the prosecution.**—*C.f.* "**Prosecutor**" —§156(1), 392, §147 para. 2.

Withdrawal of charges.—*C.f.* §§202, 217(1), (3), 221(2), 388, 393, 195, 196, 290.

Court.—See §3 *ante.*

Inquiry.—See §3 *ante* and *Chapter XVI. ante.*

Trial.—See §§152(3), 166 *ante* and *Chapters XVIII.—XX. post.*

***Autre fois* acquit.**—See §§330, 331 *post.*

Conviction be set aside.—See §§347, 354, 355, 356, 357 *post.*

1. §185 is similar to §240 of the Indian Code, which, however, is not identical in its terms with the local section. §185 is also similar to §214 of the Code of 1883, but is not identical in its terms with that section.

2. **Scope of §185.**—See *Introduction* to *Chapter XVII.* para. 5 *ante.*

§185 applies to cases where the charge or indictment contains several lawful charges against the same accused, and where the trial has resulted in a conviction of the accused upon *some* of the charges only and not upon all. In such cases the section authorizes the prosecuting officer to move the Court for permission to withdraw the remaining charges upon which no conviction has been had, or for the Court, in the exercise of its discretion to order the stay of further proceedings upon such charges. In either of these cases, the withdrawal amounts to an acquittal of the accused on the charges so withdrawn, and, so long as the conviction stands, he may not be placed on his trial upon the withdrawn charges. If, however, the Supreme Court sets the conviction aside, subject to any directions given by the Supreme Court in that behalf, the accused may thereafter be placed upon his trial in respect of the charges withdrawn.

It will be seen, therefore, that §185 only comes into operation after a verdict of conviction has been pronounced. Before conviction, the prosecuting counsel in the District Court and Supreme Court has the right to ask the permission of the Court to withdraw any charge or counts of the charge—§§202, 217(3); and in trials before a Police Court under §§195 – 196. Moreover, the Attorney-General has the right, at any stage of a judicial proceeding, to enter a *nolle prosequi* which has the effect of barring further proceedings in respect of the charges covered by the *nolle prosequi*—§§202, 217(1) 388, 393.

The scope of §185 is best illustrated if its terms are regarded in the light of a few examples. X is charged before the Supreme Court with committing murder by causing the death of A, and, when called upon to plead to the indictment, offers a plea of culpable homicide not amounting to murder and the plea is accepted by the prosecution. Under §221(2) *post*, the trial Judge may accept the plea, whereupon he will be convicted of the lesser offence, and such conviction will operate as an acquittal on the capital charge. This is no more than an application of the rule contained in §183 *ante*. Again, X is charged with murdering A, and with attempting to murder B in the course of the same transaction. It is the duty of the jury to find a verdict upon both charges—§248(1) *post*. If they find the accused guilty of both offences, the Judge will pass sentence on him according to law. If the jury convicts him on one charge and acquits him of the other, no difficulty arises. If, however, the jury convicts the accused of the murder and brings in no verdict on the charge of attempted murder, then §185 comes into operation, and it is open to the prosecution to move that the remaining charge be withdrawn, or for the trial judge himself to direct that the further investigation of that charge should be stayed. Such a withdrawal will operate as a

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bar to a future prosecution of the accused on that charge, so long as the conviction for murder stands against him, even though the sentence is commuted by the Governor for one of imprisonment, or, it is submitted, even if he is pardoned, without the conviction being set aside by the Supreme Court. If the conviction is set aside by the Supreme Court, subject to any directions given by the Court setting aside the conviction, the accused may thereafter be placed upon his trial on the charge which was withdrawn. The foregoing holds good in the case of trials before every Court in the Colony—see §195 *post* and *c.f.* §196 *post.*

§185 only applies to the special circumstances produced in the section itself—*R. v. Appuwa Veda* (1907) 10 *N.L.R. at p.* 200, 2 *A.C.R.* 1.

3. **A conviction has been had on one or more of them.**—These words clearly indicate that §185 can only apply in the case of trials, and not to non-summary investigations under *Chapter XVI.* They also indicate that the section only applies to a case where several charges have been lawfully joined, and where no order of acquittal or conviction has been pronounced in respect of some of the charges, while a verdict of conviction has been recorded on the others. The section cannot apply to cases where (i) a verdict of conviction or acquittal has been pronounced in respect of all the offences, or (ii) where a verdict of conviction has been entered on some of the charges, while a verdict of acquittal has been recorded on the remainder—see *R. v. Appuwa Veda* para. 2 *supra.*

4. **Officer conducting the prosecution.**—See §§201, 216(2) as to "Officers conducting prosecutions" before District Courts and the Supreme Court. *C.f.* §392 *post* as to officers conducting the prosecution in non-summary investigations. *Qu.*—Do these words include private complainants at whose instance prosecutions are carried on in summary trials in the Police Court?—See §189(3) and §§195, 196 *post.*

5. **May.**—§185 is directory and not imperative in its terms. The whole question as to the withdrawal of charges is in the discretion of the trial Judge.

If a verdict of guilty is recorded on some of the charges, and no verdict is recorded as against the remaining charges, and which are not withdrawn, it would appear that there can be no legal objection to proceeding with the inquiry into or trial of such charges thereafter.

6. **Such withdrawal shall have the effect of an acquittal.**—*i.e.*, if the accused is thereafter placed upon his trial on the charges so withdrawn, while the conviction remains in force, he may plead *autre fois acquit* under §§330, 331 *post. C.f.* §§195, 196, 202, 217(1), (3). If X is charged with murdering A and causing grievous hurt to B, and the jury convicts X of murder and finds no verdict on the remaining charge, so long as the conviction for murder remains in force, X cannot be charged with causing grievous hurt to B on the charge which was withdrawn, nor, it is submitted, in respect of any lesser offence, such as causing hurt to B under provocation—§326 Penal Code.

7. **Unless the conviction be set aside.**—See §§347, 354 - 357 *post. C.f.* §39 Courts Ordinance 1889. *Qu.*—If the Supreme Court sets aside a conviction for murder and convicts the accused for committing grievous hurt, may he thereafter be charged afresh on any charges withdrawn at the trial under §185? It is submitted that this may be done in the absence of any directions to the contrary in the order of the Supreme Court setting aside the conviction.

8. **Subject to the order of the Court setting aside the conviction.**—See §§350(2), 360 *post,* 177 *ante.*

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§186 Charges to be brought in name of Attorney-General.

186. (1) All indictments upon which persons are tried before the Supreme Court or a District Court shall be brought in the name of the Attorney-General and be in accordance with the prescribed form and shall be signed by the Attorney-General or the Solicitor-General or a Crown Counsel or by some Advocate generally or specially authorized by the Attorney-General in that behalf, and in the latter case the words " By authority of Her Majesty's Attorney-General " shall be prefixed to the signature.

(2) Every indictment shall contain a list of the witnesses which the prosecution intends to call at the trial and another list of all documents and things intended to be produced at the trial, which documents and things are herein called " productions."

(3) The proceedings shall not abate or determine by reason of the death or removal from office of the Attorney-General.

Indictments.—See Form 11, *Schedule III.*, §§158, 386, 387.

Supreme Court.—See §3 *ante.*

District Court.—See §3 *ante.*

Trials before the Supreme Court and District Courts.—See *Chapters XIX., XX. post.*

Attorney-General.—See §§3, 392, 393 *post*, and Ordinance No. 1 of 1883.

Prescribed.—See §3 *ante*, and §3(14) Ordinance No. 21 of 1901.

Prescribed form.—See Form 11, *Schedule III. post.*

Signed.—See §3(17) Ordinance No. 21 of 1901, and §3(2) *ante.*

Solicitor-General.—See §§3 *ante*, 393 *post*, Ordinance No. 1 of 1883, and *c.f.* §9(3) Ordinance No. 21 of 1901.

Crown Counsel.—See §393 *post*, §4 Ordinance No. 1 of 1883, §9(3) Ordinance No. 21 of 1901.

Advocate.—*C.f.* " **Pleader** "—§3 *ante.*

Advocate generally or specially authorized.—*C.f.* §§199, 201, 216(2), 392 *post.*

Signature.—See " **Signed.**"

List of witnesses, documents and things.—See §§161(4), 165, and *c.f.* §60. Evidence Ordinance.

Death or removal from office of the Attorney-General.—*C.f.* §9(4) Ordinance No. 21 of 1901.

1. §186 has no counterpart either under the Indian Code or under the Code of 1883. The procedure under the Code of 1883 appears to have varied in the case of committals made to the Supreme Court and to the District Court. If the case came up for trial before the Supreme Court, it was the Attorney-General's duty to embody the charge in an indictment—§281. In the case of committals to the District Court, " the charge or charges upon which any accused person is tried in the District Court shall be that or those which has or have been approved of or framed by the Attorney-General, and *shall be embodied by the Secretary of the Court in an indictment* "—§263 and see *R. v. Mendis* para. 5 *infra.*

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2. **Scope of §186.**—See *Introduction to Chapter XVII.* para. 6 *ante.* §186 should more appropriately have been placed in *Chapter XXXV. post,* which deals with "Proceedings by the Attorney-General." It is placed in *Chapter XVII.* on grounds of convenience, so as to have all the provisions relating to charges and indictments grouped together.

§158(2) *ante* declared that, where a committal is directed by the Attorney-General, the indictment, as settled and approved by him, shall be read out and explained to the accused by the committing Magistrate.

Again, §387 *post* enacts that where a Magistrate has forwarded the proceedings in any case to the Attorney-General as required by §157 *ante,* the latter may, if he considers commitment desirable, name the Court of commitment, and shall return the proceedings to the Police Court "with the indictment *duly drawn* and *signed* by the Attorney-General." §186 draws attention to the various requirements a valid indictment must fulfil.

(*a*) Every indictment "shall be brought in the name of the Attorney-General," but see §§203(2), 218(2), 439(1) *post.*

(*b*) It must be in accordance with "the prescribed form."

(*c*) It shall be signed "by the Attorney-General, or the Solicitor-General, or a Crown Counsel, or by some Advocate generally or specially authorized in that behalf, and, in the latter case, the words 'By authority of His Majesty's Attorney-General' shall be prefixed to the signature."

(*d*) Every indictment shall contain a list of the witnesses, which the prosecution intends to call at the trial, and another list of all documents and things intended to be produced at the trial.

In addition to the foregoing, the indictment must conform to the following requirements.

(*e*) Every indictment shall state with reasonable accuracy and precision all the particulars required to be stated in a charge under §§167 – 170 *ante.*

(*f*) The indictment should conform to the rules regulating the joinder of charges and of accused—§§178 – 181, 184 *ante.*

(*g*) If previous convictions are intended to be proved against the accused in order to enhance the punishment on conviction, particulars of such convictions should be stated—§§167(7) *ante,* §253 *post,* and see Ordinance No. 2 of 1926.

As to the rules regulating "**Informations**" when criminal proceedings are based on "informations" exhibited by the Attorney-General—see §§385, 440A. *post.*

As to indictments which are not drafted by the Attorney-General—see para. 4(*a*) *infra.*

3. **The indictment.**—

(*a*) **It shall be brought in the name of the Attorney-General** —see *Form* 11 in *Schedule III. post,* and §§167 – 170 para 3(*b*) *ante.* Under the English procedure the indictment used to be presented by the Grand Jury, and the form was as follows :—

Middlesex to wit :—The jurors for his Majesty the King upon their oath present that XY, on the first day of June in the year of our Lord 1921, did feloniously, wilfully, and of his malice aforethought, kill and murder AB, against the peace of our Lord the King, his Crown and Dignity.

In Ceylon the Attorney-General performs the duties which, in England, were performed by the Grand Jury, such as examining the case for the prosecution before commitment with a view to deciding whether

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§186 the case is one for a committal to a higher Court or not. Moreover, the Attorney-General is the public prosecutor under our law—see §§392, 393 *post*.

(*b*) **The indictment must be in the form prescribed by law**—see *Form* 11 *Schedule III. ante*. See §§167 - 170 para. 3 *ante* for a specimen indictment. See §425 *post* as to how far defects in form will have the effect of avoiding a conviction.

Prescribed—see §3 *ante*, and §3(14) Interpretation Ordinance 1901.

(*c*) **The indictment must be duly signed.**—

Signed—see §3(2) *ante*.

The indictment is brought in the name of the Attorney-General, and it is, therefore, requisite that it should be signed by him, or by some person duly authorized to do so by him. §393 *post* confers upon the Solicitor-General (which term includes the Deputy Solicitor-General) and Crown Counsel the power of signing all indictments on behalf of the Attorney-General, and §186 invites attention to the general authority conferred upon these officers by §393. In practice all indictments are signed by the Crown Counsel who is in charge of the particular circuit within which the non-summary investigation has taken place. On grounds of convenience, the law also allows indictments to be signed by "Advocates generally or specially authorized in that behalf by the Attorney-General." It should be observed that the word used is "Advocate" and not "pleader," and, therefore, no Proctor, not even a Crown Proctor, has authority to sign an indictment on behalf of the Attorney-General. *C.f.* §§199, 201, 216(2), 392(1),(2) *post*. The Crown Advocates of Kandy, Galle and Jaffna are "Advocates generally authorized," by their acts of appointment to sign indictments under §186. No other advocate conducting a prosecution in a District Court or the Supreme Court has power to sign an indictment, unless he has been specially authorized "in that behalf." In cases of indictments signed by Advocates who have been generally or specially authorized to do so, the words "By the authority of His Majesty's Attorney-General" shall be prefixed to the signature. This brings into operation the presumption of regularity in favour of official acts created by §114 *Illustration* (*e*) of the Evidence Ordinance. *C.f.* 91 *Exception* 1, Evidence Ordinance.

The office of the Attorney-General is like a corporation sole, and the death of the officer holding the post, or his removal from office will not cause any official acts done or performed by him to abate or be determined by reason of such death or removal—§186(3), and see §9(4) Interpretation Ordinance 1901.

(*d*) **The indictments shall contain a list of witnesses and productions**—see para. 4 *infra*.

(*e*) **The indictment, being a charge, must state with reasonable accuracy and precision the several particulars required to be stated by §§167 - 170 *ante***—see §171 *ante*.

(*f*) **The indictment must conform to the various rules regulating the joinder of charges and accused**—see §§178 - 181, 184 *ante*.

(*g*) **As to indictments containing previous convictions for the purpose of enhancing sentence after conviction**—see §§167(7) *ante*, §253 *post*, and Ordinance No. 2 of 1926.

As to indictments charging offences which need sanction to prosecute—see §147 para. 3 *ante*.

4. **The list of witnesses and of productions.**—The Crown as a general rule cannot at the trial before the higher Court call witnesses or produce documents or things which have not already been produced

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before the Police Court during the non-summary investigation. If, after committal but before trial, fresh evidence in the shape of new witnesses or productions is discovered, §161 provides the procedure whereby such new evidence can be called or produced before the Police Court, and the indictment amended as requisite. If the new evidence is discovered after the trial commences, it is left to the discretion of the trial judge to allow the amendment of the indictment under §172, and thereafter to allow the trial to proceed, or to order an adjournment, or to direct that the trial should begin afresh—see §§173 – 176 *ante*, and *R. v. Appuwa Veda* (1907) 10 *N.L.R. at p.* 201, 2 *A.C.R.* 1. Moreover, it is open to the Court to call for and examine witnesses, or order the production of documents and things not called or produced by either side—see §§429 *post*, and §165 Evidence Ordinance. §186

In normal cases, however, the Magistrate as a rule leads all the available evidence and forwards the record to the Attorney-General under §157 *ante*. Thereupon, the Attorney-General may direct the committal of the accused, if he considers that the case has been fully investigated, or, if he thinks that further investigation should be made, he will instruct the Magistrate as to the line on which the investigation should proceed—§389 *post* and §158(1)(*c*) *ante*. When the Attorney-General is of opinion that all the available evidence has been produced before the Magistrate, and that the accused should be committed, he will cause the indictment to be drafted, and two lists attached thereto, (i) the list of witnesses "*which the prosecution intends to call at the trial*," and (ii) another list of all documents and things "*intended to be produced at the trial.*" The Crown is under a moral obligation to place on the list the names of all witnesses and productions that have been examined or produced before the Magistrate, even if such evidence tells in favour of the accused, provided (i) that the evidence is trustworthy, and (ii) if the same facts cannot be established by other witnesses whose names are in the list—*R. v. Perera*, *R. v. Franz Muller* para. 5 *infra*. The mere fact that a witness has been examined by the prosecution in the Police Court does not make it compulsory on the Crown to place his name on the indictment, or to call him as a witness for the Crown at the trial. If the Crown omits to add to the list the name of a material witness, the accused cannot compel the Crown to call the witness, and if the defence desires to call the witness he must be called as a witness for the defence. If the Crown omits to place on the list the name of a witness examined in the Police Court and against whom nothing can be urged, a presumption adverse to the prosecution will arise under §114 *Illustration* (*g*). Witnesses not on the list may be called by the Crown in rebuttal—§§212, 237(1) *post*.

On the other hand, the defence has the right to call upon the prosecution to tender for cross-examination every witness whose name appears on the indictment and who has not been called. The law on the subject has been fully dealt with by Wood Renton, C. J., in *R. v. Perera* para. 5 *infra*. The fact that the accused demands that such witnesses should be tendered for cross-examination does not deprive him of the "last word" under §§212, 235, 237(2), 296 *post*. See also *R. v. Iyampulle* para. 5 *infra*.

4A. **Indictments which are drafted by the Court of trial and not by the Attorney-General**—see §§203(2), 218(2), 439(1). It is a question whether Ordinance No. 1 of 1900 has not impliedly repealed §§203(2), (218)2.

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§186 **4B. As to proceedings upon informations exhibited by the Attorney-General**—see §385, 440A and Introduction to *Chapter XX. post.*

5. Case law.—

R. v. Mendis. (1892) 1 *S.C.R.* 249.—In a District Court criminal trial an indictment was presented to the Court, which embodied the charge framed by the Attorney-General in terms of §263 of the Code of 1883. *Held*, that the District Judge had no right to order the Secretary of his Court to present a new indictment charging the accused under another section.

R. v. Perera. (1915) 18 *N.L.R.* 215.—" . . . I desire to say something as to the position of the Crown in regard to the calling of witnesses whose names appear on the back of the indictment. The question was raised before me many years ago in the *Attygalle Murder Case*, and I dealt with it there, both in the form of an incidental ruling and, I think, also in my charge to the jury. So far as I am aware, however, there is no official report* either of the argument or of my decision upon it in that case. By the law of England a prosecutor was never in strictness bound to call every witness whose name was on the back of the indictment (see *R. v. Simmonds* (1823) 1 *C. & P.* 84), but the practice was that all such witnesses should ordinarily be called so as to afford the prisoner's counsel an opportunity for cross-examining them, and if counsel for the prosecution declined to do so, the Judge might call the omitted witness or witnesses himself. Even where it was not the intention of the prosecution to call all the witnesses whose names appeared on the back of the indictment, the prosecutor was expected to have them all in Court, so that they may be called for the defence if they were wanted for that purpose. It is scarcely necessary to add that a witness for the prosecution, if called by counsel for the accused, became his own witness. So as to avoid the obvious inconvenience of this result to accused persons, the practice was for the prosecution, or, on failure of the prosecution, for the Judge to direct that any witness whom the prosecution did not propose to call in support of his own case, and whom the defence desired to be put into the box, should be tendered for cross-examination. These general rules are, however, subject to two qualifications. The Crown is under no obligation to call witnesses, whose evidence it regards as unnecessary in view of evidence which has already been given. Nor, while it has no right to withhold a witness merely because his testimony may help the case for the defence, is it bound to adopt, as its own, witnesses whom it alleges to be dishonest. The latter part of this proposition rests upon clear and sound considerations of policy. If the prosecution were obliged to put forward at a criminal trial, as its own, every witness who may have been examined in the Police Court or whose name appears on the back of the indictment, it would not be difficult for the defence—and the suggestion, I may add, in the *Attygalle Case* was that this had been done—to foist upon the prosecution a witness whose evidence was important, but at the same time was not only false, but demonstrably false. This false evidence would be destroyed by cross-examination at the trial, and would bring down along with it the whole fabric of what was otherwise a perfectly truthful case. These, as I understand them, are the rules in force in England . . . They are also in force in India. It will be sufficient for me in this connection to refer to the cases of *Queen Empress v. Tulla* (1885) 7 *Alla.* 904, and *Queen*

* A report of the trial has been published by the Ceylon "*Morning Leader.*"

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Empress v. Durga (1893) 16 *Alla.* 84. The only express authority bearing upon the question in Ceylon, apart from my unreported decision in the *Attygalle Case*, is that of Sir Joseph Hutchinson in *R. v. Fernando* (1908) 2 *Leader* 81 . . . Sir Joseph Hutchinson in *R. v. Fernando* indicates that he had taken the same course in regard to the tendering of witnesses for cross-examination, and I am inclined to think that the practice, at least in recent years, has been uniform on the same lines. It results from what I have said that in a criminal prosecution the Crown should, as an ordinary rule, call the attention of the Court and of counsel for the accused to the fact that it does not propose to call certain witnesses as its own, should state the reason why this is considered undesirable, and should tender the witnesses in question to the accused for cross-examination. It is equally desirable that counsel for the accused should actively watch the proceedings of the Crown in this matter, and should ask that any witness whom the Crown does not propose to examine should be called, if he requires the evidence of that witness for any purpose. The Courts of first instance also should, I think, enter as a matter of record everything that has taken place in this connection . . ." *per* Wood Renton, C. J. §186

R. v. Iyampillai (1913) 4 *B.N.C.* 14.—" I entirely agree . . . that Courts should act with great caution in dispensing with the evidence of any material witness, and there can be no doubt but that every witness whom the prosecution does not propose to examine as unnecessary should be tendered for cross-examination to the counsel or proctor for the accused . . ." *per* Wood Renton, C. J.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 263, 5 *C.W.R.* 287.—" . . . It is to be borne in mind that in any case the evidence tendered against him at the trial has been previously given at the inquiry in the form of depositions, of which he is cognizant . . ." *per* Bertram, C. J.

R. v. Franz Muller (1864) *Notable British Trials.*—In this case the prisoner was charged with committing the murder of a Mr. Briggs in a railway carriage on the North London Railway. The case against the prisoner depended entirely on circumstantial evidence, such as the possession by the accused of certain articles stolen from the murdered man at the time the murder was committed, and the discovery of the prisoner's hat in the railway carriage after the murder. When the inquest proceedings took place before the Coroner a person called Lee volunteered as a witness and stated that he had travelled by the same train as the deceased, and that, a few minutes before the murder, had seen the deceased in the company of two strange men who did not in anyway resemble the prisoner. The authorities investigated Lee's evidence, and, finding it not to be trustworthy, did not call him at the Magisterial proceedings and did not place his name as a witness for the Crown on the back of the indictment. The defence called Lee as its witness at the trial, and comments were made to the jury by Sergeant Parry, counsel for the defence, on the omission on the part of the Crown to call Lee. The following passages from the official report of the Solicitor-General's reply, and the Judge's summing up on the point in question are instructive. (*p.* 126)—The Solicitor-General (Sir R. P. Collier, Q.C., M.P.) " The first witness whom my learned friend called was Mr. Lee. Mr. Lee was examined before the Coroner, but he was not examined before the Magistrate by my learned friend Mr. Giffard,* who then conducted the case for the Crown. I entirely approve of the conduct of Mr. Giffard in not having called Mr. Lee

* Subsequently the Earl of Halsbury, Lord Chancellor of Great Britain.

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§186 on that occasion, and I did not call Mr. Lee before you because I did not believe his evidence to be of a trustworthy character. *I am bound to submit to the jury all the evidence which, I think, tends to a correct conclusion, be it a conclusion in favour of the Crown or of the prisoner; but I do not deem it my duty to lay before them evidence which I do not deem trustworthy . . .*" Learned counsel then proceeded to comment on the evidence which Mr. Lee had given, and then proceeded as follows :—"Now gentlemen, I think I need not say another word about Mr. Lee. I think you will agree with me that my learned colleagues and myself have taken the right course in not bringing forward such a witness . . ." (*p.* 135)—Lord Chief Baron Pollock in summing up stated "If, indeed, the prosecution had known what Lee had said in examination-in-chief and cross-examination (*i.e.*, at the trial), I am not surprised that they did not call him, and *they did quite right not to call him . . .*"

CHAPTER XVIII.

THE TRIAL OF CASES WHERE A POLICE COURT HAS POWER TO TRY SUMMARILY.

1. *Chapter XVIII.* deals with the procedure to be followed in the course of summary trials before the Police Court.* The Code does not specifically define what is meant by a "Summary Trial." It will be noticed that the heading to *Chapter XVIII.* states that it is concerned with " The *trial* of cases where a Police Court has *power to try summarily.*"

Proceedings before a Police Court are either summary or non-summary. The procedure to be followed in non-summary inquiries is laid down in *Chapter XVI.* the title of which runs as follows: " Of the inquiry into cases which appear *not to be triable summarily by a Police Court*, but triable by a higher Court." A summary trial is, therefore, essentially different in its nature from a non-summary investigation, which is only a preliminary investigation with the object of deciding whether the case should go for trial before a higher Court or not. In a non-summary inquiry the Magistrate does not act as a judge, but as the prosecutor, where the prosecution is not represented by the Attorney-General or some member of his department—§392 (2); and if the Attorney-General or some member of his department appears to conduct the prosecution, the Magistrate acts only as an investigating officer who is vested with certain judicial powers, *e.g.*, the power to discharge the accused if, in his opinion, a *prima facie* case has not been made out against the accused—§157(1)(*a*); but which power the Attorney-General has the right to revise if dissatisfied with the propriety of the order—§391 *post.*

In a summary trial, on the other hand, the Magistrate acts throughout as a Judge, and the proceedings in such a trial terminate with the pronouncement by the Magistrate of a judicial finding of either conviction or acquittal of the accused of the accusation made against him. It is, therefore, in the highest degree necessary not only that the Magistrate

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* As to the constitution of Police Courts see introduction to *Chapter XIX.* para. 1 *post.* See also §83 Courts Ordinance 1889.

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should not in any way be biassed against either side, but that his procedure should be such that no suspicion that he is in any way biassed should exist—see *Dias on the Evidence Ordinance p.* 221 ; *Peris v. Simonis* (1896) 2 *N.L.R.* 62; *Wijeynaike v. Cunji* (1924) 675 *M.C. Col.* (*S.C.M.* 16-12-24); *Nambiyar v. Ranasinghe* (1924) 3 *T.L.R.* 25; *R. v. Silva* (1924) 3 *T.L.R.* 34, 6 *C.L. Rec.* 73; *Appu v. Rajapakse* (1928) 10 *C.L. Rec.* 14. §187

An accused should not be tried by the very person at whose instance he is prosecuted—*Appu v. Rajapakse* (1928) 30 *N.L.R.* 348.

2. **Conditions necessary to be fulfilled before the Magistrate can assume summary jurisdiction under *Chapter XVIII.***—§83 of the Courts Ordinance 1889 provides that " every Police Court shall have and exercise all the powers and authorities and perform all the duties which Police Courts are empowered and required to have, exercise and perform by virtue of the provisions of the Ceylon Penal Code or of the Criminal Procedure Code, or of any other Ordinance for the time being in force in any way empowering or requiring them in that behalf." §9 of this Code *inter alia* enacts that " Every Police Court shall have, as heretofore, and under and subject to the provisions of this Code, full power and authority and is hereby required to hear, try, determine, and dispose of in a summary way all suits or prosecutions for offences committed wholly or in part within its local jurisdiction which offences, by this Code or any law in force in this Colony, are made cognizable by a Police Court."

There are certain requirements which must be fulfilled before it can be said that a Police Court has jurisdiction to try a given offence:—

(*a*) The Magistrate must be vested with lawful capacity to try the charge, *i.e.*, (i) He must be vested with the requisite territorial jurisdiction under §§135-145 *ante*, or some other law in force which vests him with such jurisdiction—see also the Introduction to *Chapter XIV. ante* ; (ii) He must also be vested with the capacity to punish the offender.

Thus, if the offence charged is one under the Penal Code, the second Schedule to this Code would indicate whether the offence is one which can lawfully be punished by a Magistrate—§10 *ante*. If the offence is one not under the Penal Code, then, as a rule, a Magistrate has no power to try the offender summarily if the offence is punishable with " imprisonment for a term which may exceed six months, or a fine which may exceed Rs. 100 "—§11(*b*) *ante*. If the Ordinance creating the offence specifically declares that it shall be summarily triable by a Magistrate, although the offence is punishable with a greater punishment than that specified above, the Police Magistrate will have jurisdiction to try the offender—§11 *ante* and §8A Interpretation Ordinance 1901. Thus offences under the Excise Ordinance are triable summarily by a Magistrate, although the penalty prescribed for such offences is in excess of that indicated by §11(*b*) *ante*. Note also that where the Magistrate acts under §§152(3) or 166 *ante* he may exceed his powers of punishment.

(*b*) The proceedings must have been regularly initiated under §§148-151 *ante*, and the accused must be regularly before him either in person or, in certain exceptional circumstances, through his pleader—see §154.

(*c*) In case the offence is one which needs the sanction of some officer before a prosecution can be entered, the Magistrate cannot entertain the plaint or proceed with the trial until such sanction has been obtained—see §147 *ante*.

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§187 (*d*) **Where one Magistrate commences a summary trial and, before its conclusion, is succeeded by another Magistrate, the trial can proceed before the new Magistrate**—see §292 *post* and §89 Courts Ordinance 1889. In the conduct of the summary trial the Magistrate will have to be guided by the general provisions of this Code relating to trials—*Chapter XXII. post;* and the evidence led during such trial will have to be regulated according to the provisions of the Evidence Ordinance 1895.

2a. **As to the effect of the death of the complainant on the proceedings**—see *Amaratunge v. Perera* (1930) 32 *N.L.R.* 310.

3. **The public, as a general rule, are entitled to attend the Police Court freely during the trial of a summary case**—see §7 *ante* and §86 Courts Ordinance 1889.

4. **Stages of a summary trial from the appearance of the accused before the Court.**—

(*a*) The framing of the charge, or intimating to the accused the nature of the accusation that is made against him—§187. See also §§167–170, 178–184 *ante.*

(*b*) The accused is called upon to plead to the charge—§187(3) and the *proviso* to §187. Before pleading to the charge the accused may take a plea in bar, *e.g.*, (1) that the Court has no jurisdiction to try him, (2) that the charge is defective, or (3) that he has already been convicted or acquitted or pardoned of the offence charged, or that it is statute barred—see generally introduction to *Chapter XIX.* para. 8 (5) *post.*

(*c*) (i) If the accused makes an "*unqualified admission of guilt*" in answer to such plea, there is no need to proceed further with the trial, and he may at once be convicted on his plea—§188(1). (ii) If the accused pleads "*Not Guilty*" or claims to be tried, the Magistrate will proceed as provided in §188(2). (iii) If the accused "*stands mute,*" *i.e.*, does not plead—see §187 para 5 *post.*

It will be observed from the provisions of §§32 and 73 of the Courts Ordinance that the proper time in trials before the Supreme Court or a District Court to take an objection to the jurisdiction of the Court is at the time when the accused is called upon to plead to the indictment. The Courts Ordinance contains no similar or analogous provision with regard to trials before Police Courts. Hence, it would appear that, in a summary trial, it is open to the accused to take an objection to the jurisdiction of the Court at any stage of the proceedings, and even perhaps in appeal.—*Paul v. Sinniah* (1918) 5 *C.W.R.* 143.

(*d*) Before the trial commences the prosecution is entitled to "*open*" its case to the Magistrate—see §189(3) para. 3 *post*, and in particular the case 1084 *P.C. Nuwara Eliya* 5233 there noted. The practice in some Police Courts of allowing the proctor for the accused to make a speech when the case is called on and before the trial begins is highly irregular.

(*e*) The trial proper then begins. If evidence has already been recorded in the absence of the accused under §150 *ante*, the Magistrate will recall those witnesses, read out to the accused the evidence of such witnesses, and tender them for cross-examination by the defence.—§§189(1), (2), 297. Any further evidence which the prosecution desires to lead is next produced, examined-in-chief, cross-examined by the defence and re-examined if necessary—§189(1),(2). If a prosecution witness is recalled, the accused has a further right to cross-examine

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him generally—§189(2).* At the close of the proof for the prosecution and before the defence begins its case, the prosecution may "*close*" its case. Unlike in the case of trials before the Supreme Court or the District Courts, the prosecution, in a summary trial before a Magistrate, never obtains the right to the last word, nor, would it appear, to call evidence in rebuttal. Moreover, even if the accused gives evidence, the prosecuting pleader has no right to comment on the evidence so given—§189(3). In trials before the higher Courts the prosecuting counsel, whether he has a right to the last word or not, addresses *after* the accused has given evidence—*R. v. Joronis* (1921) 22 *N.L.R.* 468. §187

When the case for the prosecution is closed, the Magistrate has next to decide whether he will call upon the accused for his defence or stop the case without so doing. If he disbelieves the evidence or does not think that the *onus* resting upon the prosecution of proving the case beyond reasonable doubt has been discharged by the prosecution, he will acquit the accused—see §190 para. 3(*j*) *xii*. It is also open to the Magistrate, without acquitting the accused, merely to discharge him under §191—see §191 para. 3 *post*.

If the Magistrate decides to call upon the accused for his defence the defending pleader is now entitled to "*open*" his case—§189(3). Thereafter, he will call the accused as a witness, if he thinks this course necessary, or request that the accused be allowed to make an unsworn statement from the dock—*R. v Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287. An accused who gives evidence from the witness-box can be cross-examined by the prosecution. The other witnesses for the defence are called, examined-in-chief, cross-examined, and re-examined. Any defence witness who has been recalled can be cross-examined afresh generally by the prosecution.*

It is desirable to place on record that it has been noticed that a practice exists in some Police Courts of requiring the accused to leave the Court in cases where he is going to be called as a witness to facts as well as other witnesses, the reason being, no doubt, to ensure that the accused may not hear the evidence that is led, and, therefore, give grounds for the inference that the accused, having heard the other witnesses, has shaped his story to fit in with theirs. It is manifest that such a proceeding is not only irregular, but illegal—see §297. The observations of Wood Renton, C. J., in the case of *Peris v. Perera* (1912) 1 *B.N.C.*3 clearly indicates that such a practice is illegal and should not be continued. *C.f. Fernando v. Appu* (1895) 1 *N.L.R.* 90, *R. v. Dinoris Appu* (1918) 5 *C.W.R.* 266.

After the proof for the defence is closed the defending pleader has the right to address the Court. The Court has power to recall any of the witnesses already called, whether by the prosecution or by the defence, including the accused, provided he has already given evidence as a witness.—*Fernando v. Silva* (1933) 35 *N.L.R.* 213.*

If the accused is undefended, and the Magistrate decides to call upon him for his defence, the provisions of §296 *post* must be carefully observed. The Magistrate must inform him that he may do one of three things, *i.e.*, (*i*) give evidence from the witness-box like an ordinary witness, or (*ii*) make an unsworn statement from the dock, or (*iii*) adopt neither course. If the accused elects to give evidence the Magistrate will indicate to him the principal points in the evidence for the prosecu-

* See *Dias on the Evidence Ordinance p.* 270.

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§187 tion which tell against him so that he may have an opportunity of explaining them. A failure to observe the provisions of §296 may have the effect of vitiating the proceedings altogether.

(*f*) If, at the conclusion of the trial, the Magistrate thinks that the prosecution has failed to bring guilt home to the accused beyond reasonable doubt he shall "forthwith record a verdict of acquittal"—§190. On the other hand, if he finds the accused guilty of the offence charged, he shall "forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence." If the Magistrate finds that the accused, on the evidence adduced at the trial, is not guilty of the offence charged, but of some *lesser offence*, he can nevertheless convict the accused of such lesser offence—see §§182-183 *ante*. If the evidence shows that the accused has not committed the offence charged or some lesser offence, but some other offence with which he has not been charged, but which the Magistrate could try summarily, he may, under §193(1), convict the accused of such offence provided he follows the procedure indicated in that sub-section. If the evidence proves that the accused has not committed the offence charged, but some offence non-summarily triable by him, he may either assume summary jurisdiction under §§152(3) or 166 *ante*, or discharge the accused under §191 from the summary proceedings and commence a non-summary inquiry under *Chapter XVI.*—§193(2).

If at the close of the case the Magistrate thinks that, although the accused is guilty of the offence charged, nevertheless it is an offence which "cannot be adequately punished" by him, he will, without convicting the accused, forward the record to the Attorney-General as in the case of a non-summary record—§192(1). The Attorney-General may thereupon either direct the committal of the accused, or refuse to do so. In the latter event, the Magistrate will proceed to convict the accused—§192(2).

(*g*) In cases initiated under §148(1)(*a*) where a *summons* has been issued for the appearance of the accused, the complainant fails to appear "upon the day and hour appointed for the appearance of the accused," the Magistrate will acquit the accused—§194; but it is open to the complainant to appear within a reasonable time and explain his default, and the Magistrate, if satisfied with such explanation, may reopen the order of acquittal and proceed with the trial.

(*h*) It is open to any "complainant", at any time before judgment, to prove to the satisfaction of the Magistrate that there are sufficient grounds for permitting him to withdraw the charge, whereupon the Magistrate may allow the application and acquit the accused—§195; but nothing in §195 is to be taken to extend the powers of a Magistrate to allow the compounding of non-compoundable offences—§290 *post*.

(*i*) In cases initiated under §§148(1)(*b*),(*e*),(*f*) it is open to the Magistrate, with the previous sanction of the Attorney-General, for reasons to be recorded by the Magistrate, to stop the trial of a summary case, without either convicting or acquitting the accused, and merely discharge him.

(*j*) A complainant who institutes a frivolous or vexatious charge is liable to be cast in Crown costs—§253B.

(*k*) §199 draws attention to the various persons who are entitled to appear and conduct prosecutions in summary trials.

(*l*) §§152(3) and 166 enable a Magistrate to try summarily certain offences which ordinarily are only triable by a District Court.

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(*m*) Ordinance No. 2 of 1926 provides that the summary jurisdiction of the Magistrate is ousted in certain cases when it is proved that the offender is a reconvicted criminal.

(*n*) Ordinance No. 9 of 1924 §55—exclusive jurisdiction of a Village Tribunal to try certain offences.

(*o*) Appeal and revision—see §§332-352; 353-354; 356-360 *post.*

(*p*) Witnesses called in summary trials are not paid under §253A *post.*

5. **Miscellaneous provisions applicable to summary trials :—**

(i) **Power to issue process.**—§282 *post.*

(ii) **Right of accused to be defended by pleader**—§287; **and to have the evidence led in his presence**—§297 *post.*

(iii) **Where the accused is unable to make his defence :—**

(*a*) **If deaf, dumb, etc.**—§288 *post.*

(*b*) **If insane**—§367 *et seq. post.*

(iv) **Compounding offences**—§290 *post.*

(v) **The obligation of the Magistrate to stop a summary trial and commence non-summary proceedings in the case of offences committed by *reconvicted criminals***—§291 *post*, §68 Penal Code, and Ordinance No. 2 of 1926.

(vi) **Change of Magistrate during trial**—§292 *post.*

(vii) **Power to direct the detention of witnesses**—§293 *post.*

(viii) **Power to hold trials on Sundays and Public Holidays**—§294 *post.*

(ix) **Duty of Magistrate to explain to an undefended accused his right to give evidence and the principal points against him**—§296(1) *post.*

(x) **Special provisions regarding the recording of evidence.**—§§298-301, 406-407 *post*, 408-409 *post.*

(xi) **Commissions to examine witnesses**—§§401-405 *post.*

(xii) **Orders as to property which is the subject of an offence**—§413-414 *post.*

(xiii) **Transfer of trials**—§422 *post.*

(xiv) **Persons subject to military law to be handed over to military custody**—§435 *post.*

(xv) **Power of Magistrate to punish false witnesses for contempt of Court.**—§440 *post.*

(xvi) **Of the Judgment.**—*Chapter XXIV. post.*

(xvii) **Sentences.**—*Chapter XXV. post.*

(xviii) **Release of offenders on probation.**—*Chapter XXVI. post.*

(xix) **Appeal.**—*Chapters XXIX., XXX. post.*

(xx) **Revision.**—*Chapter XXXI. post.*

(xxi) **Bail.**—*Chapters XXXVI., XXXIX. post.*

(xxii) **Other provisions.**—See *Chapter XLIII. post.*

(xxiii) **Oaths Ordinance 9 of 1895**—see *Mohideen v. Nambirala* 2 *N.L.R.* 147 ; *Mohamadu v. Banda* (1930) 11 *C. L. Rec.* 42.

6. Where, in appeal or revision, the Supreme Court sets aside a conviction and sends the case back for trial *de novo* before another Magistrate, this Magistrate has no right to take into consideration any evidence given at the previous trial, except with the express consent of the accused or of his duly authorized pleader,—*per* Jayawardene, J., in *Silva v. Heyzer* 26 *N.L.R.* 189, 2 *T.L.R.* 212. The charge should also be framed afresh.

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§187 **7. It is irregular for a Magistrate holding an inquiry under *Chapter VII. ante* to convert such inquiry into a summary trial.**—*R. v. Silva* (1924) 3 *T.L.R.* 34, 6 *C. L. Rec.* 73; *Fernando v. Pablis* (1932) 12 *C. L. Rec.* 74.

8. The following are the general instructions issued to Magistrates holding summary trials :—

Summary Cases (Circular No. 4 from the Colonial Secretary's Office dated 17.1.1925.)

10. In summary cases the Police Magistrate is a Judge. He has to be careful to conduct himself impartially, but he is on the side of law and order. He has powers under the Code to call for further evidence, to amend charges, etc., and it is his duty to see that no failure of justice takes place, when such a failure can be avoided by the use of these powers. He is in a position to know the prevailing crimes of the district, and the influence and power of the Court should be exerted to suppress these by adequate sentences.

11. In summary proceedings the first essential to bear in mind is that the proceedings should *be* "summary." "Summary" does not merely mean "without a preliminary inquiry," but "promptly," "expeditiously." The whole object of this form of procedure is vitiated if the Magistrate, by allowing adjournments, interposes an unnecessary delay between the time when the case is brought to his notice and the date when it is heard and determined. Apart from the fact that evidence loses half its value when it becomes stale, the moral effect of punishment is destroyed if it is unnecessarily postponed ; and the result of such postponement is often to penalize by fruitless journeys and expenses the complainant who has invoked the support of the law.

12. The Magistrate should proceed at once with every summary case in which an accused is brought before him and should record the evidence of every person present in Court able to speak to the facts of the case. The accused, or his Proctor, should be required to cross-examine the witnesses as they are called, and, except on special and definite grounds (which should be recorded), applications to postpone cross-examination should not be entertained.

13. The Code assumes that a Police Magistrate sits daily, and the fact that a Magistrate may have civil business to attend to should not be allowed to interfere with his criminal functions. The practice which has been adopted in some Courts of fixing two days a week for summary trials is a bad one. It often results in cases being postponed for a month or more, because the lists for the allotted days appear full. A case should not be postponed for "want of time." If necessary, the Court should sit late in the evening or early next morning, so as to dispose of it. Part-heard cases should be fixed for short dates. The Magistrate should regard it as a serious reflection on his own efficiency if a case, which could have been disposed of within a day or two, is allowed to drag on over a month.

14. The Magistrate should endeavour to infuse into all summary proceedings a summary atmosphere. He should adopt a system calculated to secure expedition. For example, when the accused answers to the charge, he should be required to name his witnesses and should be ordered to take out summons for their appearance at the next possible date. Lists of witnesses (which are not recognized by the Code) should be discouraged.

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15. Attention is specially drawn to the following provisions of the Code :—

(*a*) Section 131(1).—Police to bind over all witnesses to appear when forwarding accused to Court.

(*b*) Section 149(4).—Magistrate *forthwith* to examine all witnesses available when accused produced under Section 148(*d*).

(*c*) Section 188(2), Proviso.—Magistrate empowered to take evidence of witnesses available, even though accused is not ready.

(*d*) Section 289(5).—No postponement for absence of even a material witness, unless reasonable efforts have been made to procure his attendance.

These provisions should be observed not only in the letter, but in the spirit, which is that all evidence available should be heard at the earliest possible opportunity, that postponement should be avoided, and that they should not be granted without definite cause.

16. It is to be feared that one of the causes of long postponements of cases is the laxity in the observance of the provisions of the Code with reference to bail in non-bailable cases—see sections 394 and 395. A Magistrate may, perhaps, be readily disposed to grant a postponement if he can bail the accused, but if he realizes that the accused must be detained in custody, he may receive the suggestion less favourably. Attention is, therefore, drawn to the words of the Code—section 395.

" He (the accused) shall not be so released if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused."*

If there are such reasonable grounds, the Magistrate is precluded from giving bail. He should either try the case at once or remand it for a short date.

Particulars of case to be stated to accused.

187. (1) Where the accused is brought before the court otherwise than on a summons or warrant the Magistrate shall, after the examination directed by section 149 (4), if he does not discharge the accused under section 151(1), frame a charge against the accused.

[§ 4, 24 *of* 1906.]

(2) In cases where the accused appears on summons or warrant it shall not be necessary to frame a charge, but the statement of the particulars of the offence contained in the summons or warrant shall be deemed to be the charge, and the provisions of this Code as to the amendment and alteration of charges shall apply to the same accordingly.

(3) The Magistrate shall read such charge or statement, as the case may be, to the accused and ask him if he has any cause to show why he should not be convicted.

Provided that in all cases in which a prosecution commenced on a written report under section 148(1)(*b*), and such report, amended if necessary by the Magistrate, discloses an offence punishable with not more than three

*§395 has now been amended by §4 of Ordinance No. 19 of 1930.

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§187 months' imprisonment or a fine of fifty rupees, it shall be lawful for the Magistrate to read such report, amended if necessary, as a charge to the accused and ask him if he has any cause to show why he should not be convicted.

Court—see "**Police Court,**" §3 *ante.*

Summons—see Form 1, *Schedule III. post,* and §§44-49, 62-65 *ante,* and §193 *post.*

Warrant—see Forms 3, 4, *Schedule III. post,* and §§50-58, 62-65 *ante,* §193 *post.*

Magistrate—see §3 *ante.*

Discharge—see §§3, 151(1) *ante,* and 191, 196 *post.*

Charge—see §§167-184 *ante,* §193 *post.*

Statement of the particulars of the offence—see §§167-176 *ante,* and see Forms 1, 3, 4, *Schedule III. post.*

This Code—§1 *ante.*

Amendment and alteration of charges—see §§172-176 *ante.*

Offence—§3 *ante.*

Fine—§3 *ante.*

Accused is brought before the Court—see §§148(1)(*d*), 149(4).

1. The history of the rule of procedure embodied in §187 is discussed at length by Bertram, C.J., in *Coore v. James Appu* para. 4 *infra. C.f.* §219 of the Code of 1883.

2. **Scope of §187.**—§187 deals with the first step in every summary trial in the Police Court—188 *P.C. Kandy* 5003. The proceedings must have been regularly initiated under §§148, 149 upon the requisite sanction to prosecute in cases where such sanction was necessary—§147. If at the time proceedings were initiated the accused was not produced before him, the Magistrate has to decide whether he will issue process upon the accused to compel his attendance—§§151, 154. When the accused appears before the Court, *i.e.*, whether produced in custody under §148(1)(*d*)—provided he has not been discharged by the Magistrate under §151(1)—or appears on process, whether a summons or a warrant, or is otherwise lawfully before the Court, *e.g.*, through a pleader under §154, the next thing the Magistrate has to do is to decide whether he is going to deal with the case summarily under *Chapter XVIII.*, or §§152(3), 166, or non-summarily under *Chapter XVI.* It should be remembered that there is nothing to prevent a summary offence from being dealt with non-summarily—see *R. v. Thomis*, §193 para. 6 *post.*

If the Magistrate decides to try the case summarily, the first thing that he has to do is to acquaint the accused with the nature of the accusation that is made against him. This is a fundamental principle of our law of criminal procedure—*Ebert v. Perera.* The general rule contained in §187 is that "where the accused is brought before the Court otherwise than on a summons or warrant," the Magistrate, after the examination directed by §149(4), and provided he does not discharge the accused under §151(1), shall frame a charge against him. This means that the charge must be reduced into writing, and should conform with all the provisions of §§167-184 *ante.* Having framed the charge it is next the duty of the Magistrate to read it out to the accused and have it translated to the accused if he does not understand English and ask him if he has any cause to show why he should not be convicted —§187(3), and see §193(1) *post.* See §193 paras. 2, 5 *post.*

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To this general rule §187 itself creates two *exceptions*:— §187

(*a*) In cases where the accused appears on process, *i.e.*, on a summons or warrant, it is open to the Magistrate, without incurring the trouble involved in writing out a formal charge himself, to read out the particulars of the offence as set out in the summons or warrant itself, whether with or without any amendment—§187(2). The reason for this modification of the rule in cases where the accused appears on summons or warrant is clearly stated by de Sampayo, J., in *Ebert v. Perera*. It will be noticed that the forms of summons and warrants as given in *Forms* 1, 3, 4 of *Schedule III.* contain a statement of particulars of the offence. When the Magistrate acts under §187(2), "the statement of the particulars of the offence contained in the summons or warrant shall be deemed to be the charge." It is, however, the duty of the Magistrate to satisfy himself that such particulars do really conform with the provisions of §§167-176, and that, with regard to the joinder of charges and of offenders, the summons or warrant conforms with the provisions of §§178-184. If necessary the Magistrate has power, under §187(2), to alter or amend the summons or warrant so as to bring it into due form. §187(3) directs the Magistrate to read out such statement of particulars (as amended) to the accused and ask him to show cause why he should not be convicted.

(*b*) In all cases where proceedings have been initiated upon a written report under §148(1)(*b*), and such report, amended if necessary by the Magistrate, discloses an offence punishable with ***not more than three months' imprisonment or a fine of Rs. 50,*** it is open to the Magistrate, without framing a formal charge, to read such report, amended if necessary, as a charge to the accused and ask him if he has any cause to show why he should not be convicted—§187 *proviso*. The reason for this modification of the rule is fully stated in the judgment of de Sampayo, J., in *Ebert v. Perera*. It necessarily follows that such report should conform with the provisions of §§167-176 *ante* with regard to the statement of particulars of the offence charged, and of §§178-184 *ante* with regard to the joinder of counts and of offenders.

The Legislature has sanctioned these two modifications of the general rule regarding the framing of charges with the object of saving the time of the Magistrate, and of the labour of having in each summary case to draft a formal charge. These modifications being in the nature of exceptions to the general rule, it is incumbent upon the Magistrate to satisfy himself that all the legal requirements necessary have been fulfilled in either case, before adopting them in lieu of a framed charge.

The failure to frame a charge, or any substantial defect in the charge as framed, or in the procedure adopted in framing it, has the effect of vitiating all the subsequent proceedings.—See *Ebert v. Perera*, *Goonewardene v. Lebbe*, and *General Order* 891*B*.

The language used in §187 in itself presents no difficulty, but difficulties have arisen in cases where proceedings have been initiated in the absence of the accused, and for whose appearance process has been issued, but before such process is served or otherwise executed, the accused voluntarily appears before or surrenders to the Court. In such cases the question arises whether the accused "has appeared on a summons or warrant" within the meaning of §187(2), so as to justify the Magistrate reading out the charge from the unserved summons or the unexecuted warrant in lieu of framing a charge under §187(1)?—See para. 3 *infra*.

Moreover, difficulties have frequently been caused by the fact that Magistrates do not pay sufficient attention to the clear and un-

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§187 ambiguous terms of the *proviso* to §187, and in reading out charges from reports in cases where the offences alleged are punishable with more than three months' imprisonment or a fine of Rs. 50—see para. 3 *infra*.

3. **The charge in summary trials.**—See *Introduction* to *Chapter XVIII. ante*, §152(3) paras. 2, 5(m) *ante* and the case of *Malhonda v. Ukkubanda* there cited, §166 paras 2, 6 *ante* and the case of *Adonis Appu v. Nicholas* para. 4 *infra*.

See also *Introduction* to *Chapter XVII.*, §§167-171 (*particulars to be stated in charges*); §§172-177 (*amendment and alteration of charges*); §§178-184 (*joinder of counts and of accused*); and *c.f.* §§155, 158(2) as to charges in non-summary inquiries.

There are three essentials necessary to the validity of every summary trial:—(*a*) The Magistrate must have the capacity to try the case (i) by reason of his being vested with the requisite territorial jurisdiction to try the case—§§135-146 *ante*; and (ii) by his being vested with the necessary punitive jurisdiction—§§9, 10, 11*b*, 152(3), 166 *ante*; (*b*) The proceedings must have been regularly initiated, *i.e.*, in cases requiring sanction to prosecute, such sanction must have been previously obtained before the plaint is entertained—§147 and other sections; moreover, in any case, the proceedings must be regularly initiated as provided by §§148, 149 *ante*. (*c*) The accused must be regularly brought before the Court and duly charged according to law.

Without a valid charge no summary trial can lawfully take place. The object of §§187, 188 is to ensure that, before a summary trial takes place and the accused convicted, he is to be clearly informed of the nature of the specific accusation or accusations that are made against him in order to enable him to defend himself. Before commencing a summary trial the first duty of the Magistrate is to frame a charge—§187(1); but the law, with a view of saving time, sanctions two modifications of this general rule by §187(2) and the *proviso* to §187. The charge should be framed before the case for the prosecution is closed. The omission to do so is an irregularity, but will not vitiate the proceedings if no prejudice has been thereby caused to the accused—*R. v. Arseculeratne*. Where a conviction is set aside and a new trial ordered a new charge should be framed—*Silva v. Heyser*. The next duty of the Magistrate is to make the accused acquainted with the substance of the charge—§187(3) and the *proviso* thereto. See 188 *P.C. Kandy* 5003 para. 4 *infra*.

The provisions of §187 may be summarised thus:—The general rule is that in every case, when the accused lawfully "appears" before the Court and the Magistrate decides to try the accused summarily, he "*shall*" frame, *i.e.*, record, a charge against the accused—*Jusay v. Kadirawel*, *Fernando v. Mathes*, *Ally v. Marikkar*, *Goonewardene v. Babun*, *Pakir v. Silva*, *Perera v. Cooray*, and §187(1).

"**Reading the report as a charge**" under the *proviso* to §187 is not the same as "framing a charge" under §187(1)—*Ebert v. Perera*.

The charge so framed must be read out to the accused, and, if necessary, translated to him in a language which he understands, and he must be asked to state whether he has any cause to show why he should not be convicted—§187(3) and the *proviso* to §187, and see 188 *P.C. Kandy* 5003 and §193(1) *post*.

Moreover the charge must conform with the requirements of §§167-170 with regard to the statement of particulars—*Duraya v. Appuhamy*; and it should also be in conformity with the provisions of §§178-184

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with regard to the joinder of counts and of accused. Any substantial defect in the charge in these respects may have the effect of vitiating all the subsequent proceedings—see *Coore v. James Appu*, *Mendis v. Fernando*, *Silva v. Aberan*, *Ally v. Marikkar*, *R. v. Arumogan*, *Goonewardene v. Lebbe*, *R. v. Gurdu*, *R. v. Silva*, *Umma v. Lebbe*, *Venasy v. Velan*, *Goonewardene v. Babun*, *Pakir v. Silva*. If the facts admitted or proved discloses a summary offence other than that specified in the charge, the Magistrate **may** convict the accused of that offence provided he frames a charge against the accused under §187(1)—see §193 *post*. §187

A charge which has been framed, or anything which the law deems to be a charge under §187(2) or the *proviso*, may be altered or amended subject to the provisions of §§172-176—*Ingram v. Mudalihamy*.

With the object of saving time, the law by §187(2) and the *proviso* relaxes the rule in two specified cases, *viz.* :—

(*a*) In cases where the accused appears before the Court upon process, *i.e.*, upon a summons or warrant, "*it shall not be necessary*" for the Magistrate to record a formal charge, but the statement of particulars contained in the summons or warrant, amended if necessary, "shall be deemed to be the charge"—§187(2). The reason for this modification of the general rule is stated in the judgment of de Sampayo, J., in *Ebert v. Perera*. Being in the nature of an exception, it is the duty of the Magistrate to make a full record of the fact that he is acting under §187(2), and satisfy himself that the statement of particulars in the summons or warrant, amended if requisite, are in conformity with the provisions of §§168-170, and that no misjoinder of counts or of accused is disclosed—see §§178-184. The Magistrate has the same powers with regard to amending or altering such a charge as in the case of any ordinary charge—§§172-176, and see *Ingram v. Mudalihamy*. If no such amendment or alteration is practicable or possible, it is the duty of the Magistrate, under §187(1), to record a formal charge in due form —see *Umma v. Lebbe*. When the Magistrate acts under §187(2) he should read out the statement to the accused and have the same translated to him if necessary, and the accused called upon to plead—§187(3).

(*b*) In cases where the proceedings have been initiated under §148(1)(*b*) upon a written report which, after any necessary amendment by the Magistrate, discloses a summary offence punishable with no more than three months' imprisonment or a fine of Rs. 50, the Magistrate ***may*** read such report, amended if necessary, in lieu of framing a charge—*Ingram v. Mudalihamy*; and the accused called upon to plead thereto—§187 *proviso*. But when at the time the charge is framed the Magistrate does not know and cannot know what the punishment for the offence will be, he must frame a charge—109 *P.C. Avisawella* 12636 (1927) 8 *C. L. Rec.* 159, 5 *T.L.R.* 11, 28 *N.L.R.* 479. The observations which have already been made with regard to §187(2) apply with equal force to the *proviso*.

When the Magistrate acts under §187(2) or the *proviso* the *onus* is on the prosecution, if called upon to do so by the Supreme Court, to show that the Magistrate has acted regularly under these exceptions —see *R. v. Babundina* (1907) 10 *N.L.R.* 298*.

If, after trial, the facts admitted or proved disclose an offence not specified in the summons or warrant the Magistrate may convict the accused of that offence, but after formally charging him under §187(1)—see §193(1) *post*.

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* See *Dias on the Evidence Ordinance p.* 143.

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§187 **"Where the accused appears on summons or warrant"**—§187(2).—In cases where a Magistrate has ordered the issue of process to compel the attendance of the accused, but, before the summons has been served or the warrant executed, the accused voluntarily appears before the Court, may the Magistrate act under §187(2) without framing a charge as required by §187(1)? This point has come up before the Supreme Court upon various occasions, and in the case of *Coore v. James Appu*, when Bertram, C.J., reviewed all the authorities. The law, however, cannot be said to be authoritatively settled and a decision of the *Full Court* is awaited. In the following cases it was held that in cases similar to that adverted to above, the reading of the charge from the unserved summons or the unexecuted warrant was justifiable—*Hendrick v. Pelis Appu*, *Assen v. Perera*, *Mudianse v. Appuhamy*, *Boulton v. Sanmugam*, 470 *P.C. Matara* 12012, *Fernando v. Mathes*, *Menon v. Fernando*. In the following cases it was held that in so doing a fatal irregularity had been committed—*Shefford v. Arumogam*, *Sanders v. Tampan*, *James v. Egonis*, *R. v. Elaris*, *Silva v. Pieries*. In *Coore v. James Appu* the majority of the foregoing cases were fully considered, and the learned Chief Justice expressed his view that such a proceeding was at the most an irregularity, **but see** *Ebert v. Perera* (*Full Court*).

The *Proviso* **to §187**—*Qu.*—Does a breach of the terms of the *proviso* vitiate a conviction? In other words, if a Magistrate were to read a charge from a report under §148(1)(*b*) in cases which are punishable with more than three months' imprisonment or a fine of Rs. 50, does this fact vitiate a conviction? This question also was considered in *Coore v. James Appu*, and the learned Judge was of opinion that such an irregularity might be curable. In the following cases it was held that such an irregularity was fatal to a conviction—*Goonewardene v. Babun*, *Deonis v. Charles*, *Dunewille v. Sinno*, *Silva v. Davith*, *Silva v. Kandu*, *Perera v. Cooray*, 1517 *P.C. Chilaw* 43800, 662-666 *P.C. Kalutara* 39898. In the following case it was held that such an irregularity was curable—*Boulton v. Sanmugam*. **In** *Ebert v. Perera* **the** *Full Court* **has finally settled this question.** A breach of the terms of the *proviso* has the effect of vitiating a conviction altogether, and such defect cannot be cured by §425 *post*, but the Supreme Court in appeal may order a new trial—*Soysa v. Sinno* (1927) 8 *C.L.Rec.* 148. In this connection, see *Menon v. Fernando*.

3A. **At what stage should the charge be framed** ?—See *R. v. Arseculeratne*.

4. **Case law.**—

Ebert v. Perera (1922) 23 N.L.R. 362, 4 C.L. Rec. 31 (Full Court) See *Coore v. James Appu*, followed in *Soysa v. Sinno* (1927) 8 *C.L. Rec.* 148, 106 *P.C. Avisawella* 12636 (1927) 8 *C.L. Rec.* 159, 5 *T.L.R.* 11, 28 *N.L.R.* 479, *Jamal v. Samarasinghe* (1927) 8 *C. L. Rec.* 168, *Moomin v. Cooray* (1927) 9 *C.L. Rec. at p.* 24, 5 *T.L.R.* 73, 29 *N.L.R.* 145.—Where the proceedings in a summary case in respect of an offence punishable with more than three months' imprisonment were initiated upon a written report under §148(1)(*b*) *ante*, and the Magistrate purported to read the charge from that report, *held*, that the omission to frame a charge in such circumstances was fatal to a conviction, and that §425 *post* did not cure such defect. *Per* Ennis, J. " . . . The questions for consideration are whether there has been an omission to frame a charge, and, if so, whether it is an irregularity covered by §425 of the Criminal Procedure Code? The cases on the point were summed up in the case

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of *Coore v. James Appu* . . . , but the point was not decided, as it was not necessary to decide it in the circumstances of that case . . . It is to be observed that in the case of a '*charge*' under subsection (1) (*i.e.*, §187 (1)) and in the case of a '*statement*' under subsection (2) (*i.e.*, §187 (2)), the '*charge*' and the '*statement*' are each formulated by the Magistrate, and such formulation takes place after sworn evidence has been taken which discloses a *prima facie* offence except where the case is instituted on a *report* under §148(1)(*b*) when, by §149 (2), it is optional to examine the complainant before issuing process. In the present case the report of the Inspector of Excise is in the form of a charge. It is not a full account of what happened, leaving it to the Magistrate to formulate the offence which the facts in his opinion disclosed ; it is a bare statement that the accused did, at a certain time and place sell arrack without a licence in breach of §17 of the Ordinance No. 8 of 1912. It was argued that the Magistrate had adopted it as his charge, and had so complied with the imperative provision of §187(1) to frame a charge. In my opinion, the existence and terms of the *proviso* to §187 render this argument untenable. The *proviso* says that the Magistrate may "*read the report as the charge*" and may do so only when the offence disclosed is punishable with less than three months' imprisonment or a fine of Rs. 50. If "*reading the report as a charge*" were the same as "*framing a charge*" it could be done in every case, and the *proviso* would be unnecessary. The *proviso* can, in the circumstances, only be regarded as a limitation of the powers of the Magistrate in adopting the work of another. I, therefore, come to the conclusion that in this case no charge has been framed . . . " The learned Judge then proceeded to consider whether the irregularity was cured by §425 *post*, and held that the irregularity was fatal to the conviction. *Per* de Sampayo, J. : " I agree with the judgment of my Brother Ennis on the point referred to this Bench for decision . . . *What is the reason for the distinction made in* §187 . . . *between a summons and a warrant on the one hand, and a report under* §148(1)(*b*) *on the other* ? The reason does not appear to be that, in the one case the process is served on the accused who, therefore, has an opportunity, beforehand, of informing himself accurately of the nature of the charge, whereas he has no knowledge before he comes to Court of what is contained in the report. For a warrant is not served, and the accused does not ordinarily see it. The distinction is, I think, based on the fact that it is the Magistrate himself who states the charge in the summons or warrant, and there is, therefore, no practical object in requiring the Magistrate to record the charge over again. This explains and justifies the decision in *Hendrick v. Pelis Appu* . . . The same strictness is thought not to be necessary in the case of a small offence punishable only with three months' imprisonment or a fine of Rs. 50, and so the Magistrate is allowed in such a case, by the *proviso* to §187, to read the report made to him under §148(1)(*b*) as a charge to the accused, any want of accuracy or particularity in the report being remedied by the Magistrate amending it if necessary. The fundamental principle is that there should be a definite charge which the law imposes on the Magistrate the duty of framing, and, in the exceptional case, of adopting from the report . . . " Schneider, J., concurred in the judgment of Ennis, J.—See also 4 *C. L. Rec. vii.*

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Coore v. James Appu (1920) 22 *N.L.R.* 206, 8 *C.W.R.* 176, and see 2 *C. L. Rec.* xxxviii, 3 *C. L. Rec.* xi.—*Per* Bertram C.J. : " This case raises the question on which there have been conflicting decisions as to whether,

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§187 when a person is brought before a Police Court, neither on a summons nor a warrant, but on a report under sub-section (*b*) of §148 of the Criminal Procedure Code, for an offence punishable with more than three months' imprisonment or a fine of Rs. 50 (see §187(3)), the fact that the Magistrate does not frame a charge as required by §187(1), but reads the charge from the report, is necessarily a fatal defect not curable by §425. The question is part of a wider question—the effect of failure to comply with the requirements of §187 relative to the framing of charges. There are numerous decisions of this Court on the subject. They are not entirely uniform ; but the general effect is to suggest that it is now settled law that any failure to comply with these requirements is a necessarily fatal defect. All of these decisions are decisions of Judges sitting singly. *Some day it will, no doubt, be necessary that the authority of these decisions should be considered by the Full Court* . . . The present case . . . is not appropriate for a reference to the Full Court. As, however, I have investigated the history of the subject and have collected all the authorities I have been able to discover dealing with the point, it would be convenient that I should review the whole question. *This review, and any conclusion I may provisionally express, must be regarded as subject to fuller consideration when the matter is finally discussed.*

The history of the subject is as follows: Our present Code replaces the Code of 1883 ; that Code, like the present one, was modelled upon the Code at the time in force in India . . . Under the Indian system a distinction is drawn between " summons cases " and "warrant cases." A " warrant case " may be considered as a case relating to an offence punishable with imprisonment for a term exceeding six months (§4(*w*)). A "summons case " means a case relating to an offence, and not being a " warrant case " (§4(*v*)). When a Magistrate is dealing summarily with a summons case there is no occasion for him to frame a charge at all (§242). When the accused is brought before him, the particulars of the offence must be stated to the accused, and he must be asked if he has any cause to show why he should not be convicted, but it is not necessary to frame a formal charge. He is tried and either acquitted or convicted without any such formal charge. It is different with a warrant case. Here too there is no formal charge at the beginning. The Magistrate first hears all the evidence for the prosecution (§252) ; if he finds that no case is made out he discharges the accused (§253). If he thinks there is a *prima facie* case of an offence which he is competent to try, then, and then only, is he called upon to frame in writing a charge against the accused . . . *The Ceylon Code of* 1883, *though it followed the general lines of the Indian Code, did not adopt the distinction between summons cases and warrant cases*, but, like the Indian Code, it did not require a charge to be framed at the commencement of the trial . . . *In* 1890 *a change of some importance was made. By Ordinance No.* 22 *of that year an entire new Chapter was substituted for Chapter XIX. of the Code*, in which the provisions above discussed occur. The provisions requiring the Magistrate to frame a formal charge, if he thought that a *prima facie* case was made out, disappears. The only express provision as to the framing of a charge which is retained is §226. This authorizes the Magistrate to convict an accused of any offence which he appears to have committed, whatever may be the nature of the complaint or information, but requires him, before convicting an accused as aforesaid, to frame a charge in writing. It was thought at one time, and was so held in two cases, that this meant that it was only necessary

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to frame a charge when the Magistrate convicted of an offence which did not expressly appear in the complaint. This question was considered in the Full Court case of *Tissera v. Foster* (1891) 9 *S.C.C.* 173. The three Judges, however, though in that case the conviction was set aside, expressed three different views. Burnside, C.J., thought that a charge should be framed in every case. Clarence, J., if I rightly understand him, thought that a charge should be framed in all cases where a failure to frame one would occasion a failure of justice, and in particular in any case where the Magistrate convicts of an offence not included in the complaint. Dias, J., held that a charge need only be framed in that last particular case. Burnside, C.J., in giving judgment, observed: "This Court is invested with the power to excuse the non-framing of a charge where we may be of opinion that no miscarriage of justice has been occasioned thereby." This was the position before our present Code was passed into law. §187

By §187 our present Code provides that before any summary trial takes place a formal charge must be framed. To this there are two exceptions: (*a*) Where the accused appears on summons or warrant, the statement of the particulars of the offence contained in the summons or warrant is deemed to be the charge; (*b*) where the accused appears upon a report under §148(1)(*b*), and where the offence is punishable with not more than three months' imprisonment or a fine of Rs. 50, the report may be treated as the charge. In all cases the charge or its equivalent so authorized must be formally read to the accused. At the same time the old section 493 (*in the Code of* 1883) which declared that the omission to frame a charge should not be fatal to a finding or sentence unless a failure of justice had been occasioned thereby was struck out. The general section curing irregularities remains. (See our present §425.) *An important point to be considered in the final determination of the question now under discussion will be whether in thus striking out the old* §493 *at a time when it expressly required a formal charge to be framed, the Legislature intended to declare that the failure to frame a charge where a charge is required should be a fatal defect, or whether, on the other hand, the Legislature did not consider that the terms of* §425 *were sufficiently wide to cure defects in all such cases.*

I will now proceed to consider the reported authorities. So far as I have been able to collect them, they are sixteen in number. There are also a certain number of unreported cases. They fall under three heads:—

(*a*) *Cases of omission to frame a charge simpliciter.*

(*b*) *Cases where the accused surrendered before the execution of the warrant and consequently did not appear on the warrant, but where the Magistrate, instead of framing a charge, read to him the charge from the warrant.*

(*c*) *Cases in which the Magistrate read the charge from the report notwithstanding the fact that the punishment for the offence was more than three months' imprisonment or a fine of Rs.* 50 . . . "*

[The learned Chief Justice then proceeded to consider the following cases under each of the three heads specified above:

(*a*) *Mendis v. Fernando* (1900) 4 *N.L.R.* 104; *Silva v. Aberan* (1905) *Lem.* 42; *Ally v. Marikkar* (1909) 2 *S.C.D.* 53; *R. v. Arumogam* (1911) 6 *Leader* 24, and *Gunewardene v. Lebbe* (1911) 15 *N.L.R.* 183.

* See the judgment of the *Full Court* in *Ebert v. Perera supra.*

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§187 (*b*) *Shefford v. Arumogam* (1912) 1 *B.N.C.* 1 ; *Sanders v. Tampan* (1914) 1 *Crim. App. R.* 55 ; *Hendrick v. Pelis Appu* (1915) 1 *C.W.R.* 194 ; *James v. Egonis* (1916) 3 *C.W.R.* 363; *R. v. Elaris* (1916) 6 *B.N.C.* 27 ; *Silva v. Pieris* (1919) 6 *C.W.R.* 279 ; *Assen v. Perera* (1919) 6 *C.W.R.* 278 ; *Mudianse v. Appuhamy* (1920) 22 *N.L.R.* 169, 8 *C.W.R.* 5, 2 *C. L. Rec.* 153.

(*c*) *Goonewardene v. Babun* (1908) 1 *S.C.D.* 84, 4 *A.C.R.* 141; *Deonis v. Charles* (1915) 4 *B.N.C.* 53; *Dunuwille v. Sinno* (1915) 3 *B.N.C.* 50 ; *Silva v Davit* (1919) 7 *C.W.R.* 19.]

"This completes the review of the authorities. It is most unfortunate that . . . it is not possible to discover from these authorities on what principles they are based, as they all follow each other without explanation. It is necessary, therefore, to examine afresh the principles applicable to all these groups of cases. I will take first the decisions under head (*a*). The principle of these decisions, though not explained, is not hard to conjecture. They are no doubt based upon the decision of the Privy Council in *Subramania Ayyar v. King Emperor* (1901) 25 *Mad.* 61, where the Committee applied the principle laid down by the House of Lords in the English case of *Smurthwaite v. Hannay* (1894) *App. Cas.* 494, and repudiated the reasoning of Sir Francis Maclean in *In the Matter of Abdul Rahaman* (1900) 27 *Cal.* 839 . . . In *Subramania Ayyar v. King Emperor* the departure from the law was of such a character that it was thought to affect the whole course of the trial and to change its very nature. This is, no doubt, not the only ground on which a defect must be treated as fatal. But it is probable that the series of cases in our own Courts proceeded upon the same basis. The Legislature, deliberately departing from the previous practice, had declared that in every summary trial, when once the Court has decided to undertake it, there shall be from the commencement a definite written charge, which should be read to the accused, specifying precisely what he has to meet. This charge may be the subject of reference at any point in the trial, and must be the basis of any ultimate consideration of the case by the Court of Appeal. Such a provision may well be regarded as of so fundamental and all-pervading a character that its non-observance ought not to be treated as a mere irregularity. No doubt there may be cases in which the facts may be so simple, the issues so plain, and the charge so inevitable that it cannot make the smallest difference to the accused whether a written charge is read to him or not. Nevertheless, it is easy to see that some provisions may, in the intention of the Legislature, be of the very essence of the proceedings, while others may be in the nature of formalities. The existence of a deliberately framed written charge is obviously a condition which may well be so regarded, whatever the circumstances of the particular case. The Indian cases which declare such a defect to be curable are not necessarily relevant : . . . *Even, however, if we regard this as being the principle of the decisions under head (a) above, and as being now settled law, it seems to me that different considerations may well be held to apply to the two special cases specified under heads (b) and (c).** In both these cases there is a deliberately framed written charge in existence and it is read to the accused. In the one case it is contained in the warrant, and in the other in the report. In the first case, but for the accident of the accused presenting himself before the execution of the warrant, the charge would be the basis of the trial. Instead of first copying

* See the judgment of the *Full Court* with regard to (*c*) in *Ebert v. Perera supra.*

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the charge out of his notes and then reading it to the accused, the Magistrate reads it out to the accused direct. The thing is not done precisely as the law directs, but all the essentials which the law requires are there. The use of the charge in the warrant is, no doubt, permitted by way of exception, and the circumstances in which it exists are not within the precise limits of the exception, but they are within its general intention. So also as regards a charge read from a report. The Code allows this in certain cases. When the possible punishment is comparatively slight, it is content that the Court should use a charge formulated by some authority other than itself. When the possible punishment exceeds the prescribed limits, it requires the Court to bring its own mind to bear, and to exercise its own discretion, upon the framing of the charge. In some cases this may be of real importance, but there may be cases in which it is of no importance at all. There may, in the circumstances, be only one possible charge of the simplest nature, and, whatever mental application the Court brought to bear on the subject, it might not be reasonably possible to frame another. The same, no doubt, may be said of the absence of a charge altogether, but I think that every one will realize that a distinction may reasonably be drawn between the two cases. *It is one thing to ignore a rule altogether ; it is another thing to overstep the limits of an exception.* When there is a written charge in existence, which it is open to the Court in its discretion to adopt, and when the circumstances are such that the Court will inevitably adopt it, I am not at present convinced that it is anything more than an irregularity to read this to the accused without writing it down, instead of first writing it down and then reading it . . . "

Mendis v. Fernando (1900) 4 *N.L.R.* 104.—This case must be read in the light of *Coore v. James Appu* (*pp.* 209-210 of the report). It is also to be noted that the head-note of the case is not warranted by the judgment. In this case the accused came before the Court " somehow or other." The Magistrate then made the record " Charge under §315 explained (§187(2)). Accused pleads not guilty." Browne, J., quashed the conviction, but did not hold that the defect was necessarily fatal.

Silva v. Aberan (1905) *Lem.* 42—*Held, per* Pereira, J., that the omission to frame a charge is an irregularity, but not necessarily a fatal defect. It was found that in the record of the proceedings there was something which was in all respects " tantamount to a formal charge," and it was held that §425 cured the irregularity.—See *Coore v. James Appu at p.* 210.

Ally v. Marikkar (1909) 2 *S.C.D.* 53.—Accused appearing before Court without summons or warrant—No charge framed—Entry in the record to the effect that " the charge was explained to the accused " —*Held,* that this was a fatal objection against the conviction.—See *Coore v. James Appu at p.* 210.

R. v. Arumogam (1911) 6 *Leader* 24.—" There are numerous decisions, both Indian and local, which show that the absence of a charge altogether in cases in which the law requires that one should be framed is a fatal irregularity. Those decisions are binding upon me," *per* Wood Renton, J. This *dictum* was considered in *Coore v. James Appu at p.* 210.—See also *Goonewardene v. Babun* (1908) 1 *S.C.D.* 84 *infra.*

Goonewardene v. Lebbe (1911) 15 *N.L.R.* 183.—A formal charge is necessary in all cases in which the Code requires it, and §425 does not cure any irregularity in that respect. A search warrant is not a " warrant " within the meaning of §187(2).—See *Coore v. James Appu at*

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§187 *p.* 210, and 672 *P.C. Colombo* 47815 (*S.C.M.* August 24, 1914), *R. v. Gurdu* (1880) 3 *Alla* 129—considered in *Coore v. James Appu at p.* 210. Absence of charge not a fatal defect.

Sheford v. Arumogam (1912) 1 *B.N.C.* 1.—Warrant issued for arrest of accused—appearance of accused in Court before warrant executed. *Held* " As the accused was not before the Court on the warrant, a formal charge should have been framed as required by §187(1) . . . This was not done, and, on the authority of many cases before the Supreme Court, this alone is fatal to the case . . . " *per* Ennis, J.—See *Coore v. James Appu at p.* 211.

Sanders v. Tampan (1914) 1 *Crim. App. R.* 55 (*Goonewardene v. Lebbe* (*supra*) followed).—*Held* that an accused who had surrendered before a warrant issued for his arrest had been executed, cannot be said to have " appeared on a warrant " within the meaning of §187(2). This ruling was distinguished in *Hendrick v. Pelis Appu* (*infra*), and see *Coore v. James Appu p.* 211.

Hendrick v. Pelis Appu (1915) 1 *C.W.R.* 194 (followed in *Assen v. Perera, Mudianse v. Appuhamy infra*).—*Held*, where an accused for whose arrest a warrant had been issued, appeared in Court before it was executed, and the Magistrate read the charge against him from such warrant, that this was a sufficient compliance with the requirements of §187(1) of the Code—See *Coore v. James Appu* at *p.* 211. See *Ebert v. Perera* where the *Full Court* approved of and explained *Hendrick v. Pelis Appu.*

James v. Egonis (1916) 3 *C.W.R.* 363 (not followed in *Mudianse v. Appuhamy infra*).—Charging an accused from a warrant in cases where the accused appears before the execution of the warrant vitiates a conviction—See *Coore v. James Appu at p.* 211. See also *Abanchy v. Sirimalhamy* (1923) 1 *T.L.R.* 183.

R. v. Elaris (1916) 6 *B.N.C.* 27.—The decision in this case was similar to that in *James v. Egonis.*—See *Coore v. James Appu at p.* 211.

Silva v. Peiries (1919) 6 *C.W.R.* 279.—The decision in this case was similar to that in *James v. Egonis.* This case not followed in *Mudianse v. Appuhamy infra.*—See *Coore v. James Appu at p.* 211.

Assen v. Perera (1919) 6 *C.W.R.* 278.—The decision in this case was similar to that in *Hendrick v. Pelis Appu supra.*—See *Mudianse v. Appuhamy* and *Coore v. James Appu at p.* 211.

Mudianse v. Appuhamy (1920) 22 *N.L.R.* 169, 8 *C.W.R.* 5, 2 *C. L. Rec.* 153 (following *Hendrick v. Pelis Appu, Assen v. Perera* (*supra*); not following *James v. Egonis* and *Silva v. Peiries* (*supra*)). See also 2 *C. L. Rec. XXXVIII.*—Where an accused for whose arrest a warrant has been issued appears before it is executed, the Magistrate explained the charge from the warrant. *Held*, that this was a sufficient compliance with the provisions of §187 of the Code.—See *Coore v. James Appu at p.* 211.

Goonewardene v. Babun (1908) 1 *S.C.D.* 84, 4 *A.C.R.* 141, and *p. v.*—see *R. v. Arumogam supra.*—Case initiated under §148(1)(*b*) *ante*—nothing in the record to show how the accused appeared before the Court—no evidence that he was produced on summons or warrant. *Held*, that a failure to frame a charge against the accused vitiated a conviction. *Mendis v. Fernando supra* approved. *Held further* that a charge framed under §187(1) should be in writing.—See *Coore v. James Appu at p.* 211.

Deonis v. Charles (1915) 4 *B.N.C.* 53.—Charge under §315 Penal Code—case initiated under §148(1)(*b*) *ante*. *Held*, that in view of the sentence which could be imposed under §315 Penal Code, the *proviso*

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in §187(3) did not apply. This case was considered by Bertram, C. J., in *Coore v. James Appu at pp.* 211-212.—See also *de Silva v. Davith* (1919) 7 *C.W.R. at p.* 21.

Dunuwilla v. Sinno (1915) 3 *B.N.C.* 50.—Charge of committing an affray—proceedings initiated under §148(1)(*b*) *ante*. *Held*, that in view of the sentence which could be imposed for such an offence, the case did not fall within the *proviso* to §187(3).—See *Coore v. James Appu at p.* 212.

Duraya v. Appuhamy (1920) 21 *N.L.R.* 413, 7 *C.W.R.* 170.—See *R. v. Fernando* (1919) 6 *C.W.R.* 296, *Miskin v. Babun Appu* (1920) 21 *N.L.R.* 492, *Abeyasuriya v. Jayasekera* (1921) 22 *N.L.R.* 380.—A charge should give sufficient particulars as to the manner of the commission of the alleged offence.—See §§167–170 *ante*.

R. v. Silva (1915) 5 *B.N.C. at p* 55" . . . There is another irregularity . . . The Privy Council has determined that where a statute peremptorily requires a thing to be done, the omission of the Court to do it is a fatal flaw in the whole proceedings. The framing of charges in the cases which it indicates is peremptorily required by the . . . Code . . . " *per* Wood Renton, C. J. See the remarks of Bertram, C. J., in *Coore v. James Appu at p.* 212.

Pakir v. Silva (1915) 4 *B.N.C.* 63.—In framing a charge the Magistrate recorded " I frame and explain charge to the accused." He then proceeded to frame a charge which satisfied the requirements of the law. " The objection could not have been sustained if the words 'I explain the charge to the accused' had followed the statement of it, instead of being incorporated immediately after the words expressing the fact that the charge had been framed. The mere incorporation of those words at the beginning instead of at the end of the entry does not seem to me to be irregular, and it has certainly caused no prejudice to the accused," *per* Wood Renton, C. J.

Umma v. Lebbe (1914) 3 *B.N.C.* 59.—Accused produced on a warrant —no charge framed or read from the warrant. *Held*, that a conviction under such circumstances could not stand.

Ingram v. Mudalihamy (1913) 1 *B.N.C.* 24.—Alteration of charge during trial—New charge should be read and explained to accused. —See §§172-176 *ante*.

Silva v. Kandu (1912) 7 *S.C.D.* 19.—Case initiated under §148(1)(*b*) *ante*—Offence punishable with more than three months' imprisonment or a fine of Rs. 50. *Held*, " The Supreme Court has held again and again that the failure to frame such a charge is an irregularity which cannot be cured under §425 of the Criminal Procedure Code. See *Ally v. Marikkar*, *Gunewardena v. Lebbe* (*supra*) . . . " *per* Wood Renton, J.

Venasy v. Velan (1895) 1 *N.L.R.* 124 distinguishing *Tissera v. Foster infra*, and see *Government Agent v. Podisinno* (1914) 18 *N.L.R.* 28.—The necessity for framing a charge by a Magistrate under §226 of the Code of 1883 does not exist in the case of a simple complaint which contained the words of a formal charge and which were read and explained to the accused at the commencement of the trial. " It is said that §226 of the Procedure Code requires him to write that out again, and that there is a decision of this Court—*Tissera v. Foster*—which renders such a course necessary, but in that case it will be seen that the complaint was not a simple complaint like the one in the present case, but a complaint embodying charges under three different enactments . . . " *per* Bonser, C. J.

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§187 *Boulton v. Sanmugam* (1915) 3 *B.N.C.* 46.—Case initiated under §148(1)(*b*) *ante*—Offence punishable with more than three months' imprisonment or a fine of Rs. 50.—*Held*, "The record, however, shows that the accused appeared in the Police Court in answer to a summons, and, therefore, under §187(2) of the Criminal Procedure Code, it was competent to the Police Magistrate to explain the nature of the charge to him from the summons itself. This, the Police Magistrate did not do. He explained the charge from the plaint, and so an irregularity has been committed. But the plaint and the summons are equally precise as to the particulars of the alleged offence, and, in the absence of any authority constraining me to do so, I am not prepared to hold that this irregularity is fatal to the conviction. It is clear from the evidence that the accused, who was defended by a Proctor, was fully aware of what the charge against him was, and there is nothing to show that he has suffered any prejudice from the fact that it was explained to him from the plaint instead of from the summons," *per* Wood Renton, C.J.

188 *P.C. Kandy* 5003 (1906) *Lem. & A.* 44.—It is the duty of a Magistrate in commencing a summary trial to call upon the accused to show cause why he should not be convicted. *C.f. Siyadoris v. Gunewardena* (1895) 2 *N.L.R.* 65.

Adonis Appu v. Nicholas (1902) 6 *N.L.R.* 87, 3 *Br.* 144.—Trial with consent under §166 *ante*.—*Held*, "Now, at that time the Magistrate had framed no charge, nor did he read the report as a charge. So he undoubtedly did not observe the terms of §166(3) and of §187(3) of the Criminal Procedure Code. At a later period of the case he did frame a charge, and the case proceeded summarily . . . Undoubtedly the Magistrate was wrong, but to my mind the question in this case is whether any harm has been done. It cannot be said that the accused were ignorant of what they were charged, or what they were going to be charged with, because there is the complaint on the information given to the Court . . . That being so, I am not willing to set aside the conviction in a case in which substantial justice has been done, and in which the irregularities complained of had no injurious results . . ." *per* Moncreiff, C.J.

Perera v. Cooray (1912) 7 *S.C.D.* 20.—The accused were charged with causing hurt under §§314 and 315 of the Penal Code. The proceedings were initiated under §148(1)(*b*) *ante*, and the accused appeared before the Court without any summons or warrant. When the trial commenced the Magistrate framed no charge, but only recorded "charge under §§314, 315 explained to accused." *Held*, that the mere explanation of the charge without framing it was fatal to a conviction.—*Gunewardena v. Babun*, *Ally v. Marikkar* (*supra*) followed.

Tissera v. Foster (1891) 9 *S.C.C.* 173.—Considered in *Coore v. James Appu supra*. See also *Saram v. Weera* (1895) 1 *N.L.R.* 96; *Charles v. Charles* (1896) 2 *N.L.R.* 137, and *Venasy v. Velan supra*.

Jusey v. Kadirawel (1923) 5 *C. L. Rec.* 52, 1 *T.L.R.* 230.—A Magistrate having commenced non-summary proceedings decided to try the case summarily under §152(3) *ante*. *Held*, that it was his duty to have framed a charge, and not having done so §425 *post* did not cure the defect. Set aside and sent back.

Fernando v. Mathes (1923) 1 *T.L.R.* 226.—Accused charged with offence punishable with imprisonment exceeding three months or a fine exceeding Rs. 50. Accused present in Court, but summons which had

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been issued had not been served. *Held*, that the failure of the Magistrate to frame a charge or read the charge from the summons vitiated the conviction of the accused. Set aside and sent back.

R. v. Arseculeratne (1924) 26 *N.L.R.* 67, 5 *C. L. Rec.* 201, 2 *T.L.R.* 144.—" It was urged on appeal that the provisions of §187 . . . had not been complied with, and that the accused were not charged before the case for the prosecution was closed. In this connection two cases were cited—*Deonis v. Charles* (1915) 4 *B.N.C.* 53 and *R. v. Silva* (1915) 5 *B.N.C.* 53. In both these cases attention was drawn to the fact that a failure to frame a charge would vitiate the proceedings. This case is not on all fours with either of these cases, for in this case a charge was framed. Moreover, the accused cross-examined the witnesses and himself led evidence after having pleaded to the charge. The fact that the evidence for the prosecution was closed before the charge was framed was no doubt an irregularity, but it does not vitiate the proceedings, as the accused was in no way prejudiced . . . " *per* Ennis, J.

Silva v. Heyzer (1924) 2 *T.L.R.* 212, 26 *N.L.R.* 189.—Where a conviction is set aside and a new trial is ordered to be held before a new Magistrate, it is desirable that the accused's plea should be taken afresh. This is essential where the accused is undefended.

106 *P.C. Avisawella* 12636 (1927) 28 *N.L.R.* 479, 8 *C. L. Rec.* 159, 5 *T.L.R.* 11.—Where a person is charged with an offence which is punishable in certain circumstances with a fine not exceeding Rs. 100, it is not competent to a Magistrate in lieu of framing a charge to read the report under §148(1)(*b*) as a charge.

Menon v. Fernando (1927) 29 *N.L.R.* 371.—Proceedings initiated under §148(1)(*b*) *ante*. Offences punishable with more than three months' imprisonment or a fine of Rs. 50. Summons issued on accused. The summons accurately set out the charges and all requisite particulars. Accused on appearance were charged from the plaint. *Held*, *per* Drieberg, J.: "The Police Magistrate did read and explain to the accused the statement of the offence contained in the summons, though he read it, not from the summons but from the report, where it appeared in the same words. This is a sufficient compliance with the provision of §187 ; and the course adopted was not attended with the least possibility of prejudice to the accused ; what he heard from the Police Magistrate was exactly what appeared in the summons he received . . . " *Held also*, that this view did not conflict with the *ratio decidendi* in *Ebert v. Perera* (1922) 23 *N.L.R.* 362. *Boulton v. Sanmugam* (1915) 3 *B.N.C.* 46 approved.

Henaya v. Bandia (1929) 6 *T.L.R.* 94, 30 *N.L.R.* 353.—Charge of criminal trespass—intention not clearly specified in summons—charge read from summons. *Held*, that the conviction was bad.—See 3 *C.W.R.* 42; 292.

1517 *P.C. Chilaw* 43800 (*S.C.M.* September 30, 1915).—Charge preferred under §43(*h*) of the Excise Ordinance 1912. Accused produced without warrant or summons, and the Magistrate purported to read the charge from the plaint filed under §148(1)(*b*). *Held*, " Objection is taken to these proceedings on the ground that the Magistrate should have framed a charge against the accused, and that, in the circumstances of this case, the report does not satisfy the requirements of §187 of the Criminal Procedure Code. I think the objection is well founded, because the *proviso* to that section authorizes the charge to be read from the report only when the offence is one punishable with no more than three months' imprisonment or a fine of Rs. 50 . . . Objections of this sort have been frequently held to be fatal to the conviction and I am bound

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§187 to set aside the conviction and quash the proceedings and send the case to be tried in due course after a proper charge has been framed," *per* de Sampayo, J.

662-666 *P.C. Kalutara* 39898 (*S.C.M.* July 26, 1916).—Charge under the Forest Ordinance 1907. *Held*, "It appears from the record that, when the accused were brought before the Court . . . the charge was read under §187 of the Criminal Procedure Code from the report filed. Thereupon the accused were asked what they had to say, and made their statements. On a subsequent day evidence was gone into, and at the conclusion of the evidence another formal charge was drawn up by the Magistrate. It does not appear whether the accused were asked to plead to the charge, or that anything was done with regard to it beyond it being put into writing by the Judge before he delivered his judgment. It appears to me that the procedure prescribed by the Code has not been complied with. Under §187 it is necessary that, when the accused is brought before the Court otherwise than on a summons or warrant, the Magistrate shall, after the examination directed by §149(4), frame a charge against the accused. He must then read the charge to the accused, and ask him if he has cause to show why he should not be convicted. There is an exception to this in the *proviso* to §187 in cases of a prosecution commenced on a written report under §148(1)(*b*), but that only applies where the offence is punishable with not more than three months' imprisonment or a fine of Rs. 50, which is not the case in a prosecution under the Forest Ordinance such as we are dealing with. I do not think that the accused has been substantially prejudiced in this case, and the objection taken is a purely technical one, but, in view of the express provisions of the Code and the numerous cases which have been decided under it, the conviction cannot stand in its present form . . . " *per* Shaw, J.

470 *P.C. Matara* 12012 (*S.C.M.* May 29, 1916).—"It is contended . . . that the accused was brought before the Court neither on summons nor on warrant, and although a summons against him was issued, it was not served, and that there is nothing in the record to show how he came to be produced in Court at all, and that the Police Magistrate was, therefore, not entitled to read to him the charge from a form of process which had never been executed. The decision . . . in *Hendrick v. Pelis Appu* shows that the mere reading of the charge from a summons or other process of this description is not an irregularity, and no authority was cited to me which establishes the conclusion that the irregularity as to the non-service of process, where the accused has actually been brought before the Court, in the event, is one that cannot be cured under §425 . . . " *per* Wood Renton, C.J.

Admission of offence by accused.

188. (1) If the accused, upon being asked if he has any cause to show why he should not be convicted, makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him ; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.

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(2) If the accused does not make such statement, the Magistrate shall ask him if he is ready for trial and, (*a*) if the accused replies that he is ready for trial, shall proceed to try the case in manner hereinafter provided, but (*b*) if the accused replies that he is not ready for trial by reason of the absence of witnesses or otherwise, the Magistrate shall, subject to the provisions of sub-section (5) of section 289, either postpone the trial to a day to be then fixed or proceed forthwith to try the case in manner hereinafter provided. §188

But nothing herein contained shall prevent the Magistrate from taking, in manner hereinafter provided, the evidence for the prosecution and of such of the witnesses for the defence as may be present, and then, subject to the provisions of sub-section (5) of section 289, for reasons to be recorded by him in writing, adjourning the trial for a day to be fixed by him.

Accused . . . being asked if he has any cause to show.—See §§187(3) and *proviso* thereto.

Unqualified admission of guilt.—See §335(1)(*c*). *C.f.* "**Facts admitted**" in §193 *post.*

Statements by accused.—*C.f.* §§155, 205, 206, 220, 221, 295, 302.

Magistrate.—See §3 *ante.*

Record a verdict of guilty.—See §§190, 205, 220, 306 - 307.

Pass sentence upon him according to law.—See §§190, 306 (2), 307 and *Chapter XXV.*

Record such sentence.—See §190, §306 post.

Postponement of summary trials.—See §289 *post*, and *c.f.* §§194, 195 *post.*

Summoning witnesses.—See §282 *post.*

1. §188(1) should be contrasted with §243 of the Indian Code, while §188(2) should be contrasted with §244(1) of the Indian Code. *C.f.* §§216, 220, 221 of the Code of 1883.

2. **Scope of §188.**—§187 dealt with the procedure for intimating to the accused the nature of the accusation which he is called upon to meet during the trial of a summary case. §188 deals with the law relating to the plea tendered by the accused upon being formally charged under §187. As to **pleas in bar** of the trial see Introduction to *Chapter XVIII.* para. 4(*b*) *ante.*

(i) If the accused, upon being charged, makes a statement which amounts to "an unqualified admission that he is guilty of the offence of which he is accused," it is the duty of the Magistrate to record such statement "as nearly as possible in the words used by him." Thereafter, the Magistrate is to record a formal verdict of guilt against the accused and pass sentence upon him according to law, and shall record such sentence—§188(1). See *General Order* 891c, and *c.f.* §302(1) *post.* §193 shows that, where the accused makes an unqualified admission of guilt of an offence summarily triable by the Magistrate "*other than that specified in the charge, summons, or warrant,*" it is lawful for the Magistrate to convict the accused in respect of such offence,

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§188 provided he frames a charge against him in due form under §187(1). On the other hand, if the admission discloses an offence not summarily triable, the Magistrate, acting under §193(2), will take non-summary proceedings against him.

(ii) **"If the accused does not make such statement," or pleads not guilty it is next the duty of the Magistrate to ask him if he is ready for trial.** An omission to do this may have the effect of vitiating all subsequent proceedings—*Malhonda v. Ukkubanda* §189 para. 9 *post*; and, (*a*) if the answer is that he is ready for trial, the Magistrate shall proceed to try the case, but (*b*) if the accused replies that he is not ready for trial, whether by reason of the absence of his witnesses or "*otherwise*," the Magistrate shall, subject to the provisions of §289(5) *post*, either postpone the case for a stated day, or proceed to try the case in due form—§188(2).

Nothing stated in §188 is to prevent a Magistrate from recording the evidence for the prosecution and of such witnesses for the defence who may be present in Court, and thereafter postpone the trial, subject to the provisions of §289(5), for a stated day "*for reasons to be recorded by him in writing.*"

3. **Accused . . . makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused.**—Where an accused makes an unqualified admission of guilt and is sentenced, no appeal lies therefrom—§335(1)(*c*) *post*. It is because of this serious consequence which arises from such an admission that §188(1) requires the Magistrate to record the statement made by the accused "*as nearly as possible in the words used by him.*" It should be clear from the record that the "unqualified admission of guilt" by the accused is his own unvarnished plea, and not what the Magistrate thinks is the effect of the statement of the accused—*R. v. Bhadu.*

A plea of "guilty" pure and simple may or may not amount to an unqualified admission of guilt. The whole point is that the judge must be satisfied that the accused intended to make an admission of guilt—*Attapattu v. Anthonypillai.* Whether it does or does not amount to such an admission depends upon the circumstances of each case—*Rasiah v. Sittambaranpillai*, and *c.f. Obeyesekera v. Thegis.* The following cases indicate what do not amount to unqualified admissions of guilt: *Aliar v. Rahiman.*—"I did not steal the bull. I saw it straying and caught it and tied it to my cart." *Fernando v. Fonseka.*—"I broke down the fence. I claim to have a right of way. I pulled down the fence which was on my land. The fence was put partly over the road. My hackery broke that part of the fence when passing along the road." —See also *Perera v. Fernando, Katchy v. Cooray, Banda v. Ranasamy, Mikalau v. Anthonia, Ratnaike v. Banda, Ellapola v. Nadar*, 944 *P.C Matugama* 2565, *Perera v. Dingirimahatmaya.*

It should be noted that a plea of guilty may, in certain circumstances, be tendered by an accused through his pleader.—See §154 *ante*, and the cases of *Saram v. Marikar* (para. 9 *infra*) and the cases cited thereunder, *Punchihewa v. Nicholas, Leema v. Van Rooyen.* Where a plea of guilt is tendered by a pleader in the absence of the accused, it is the duty of the Court to satisfy itself that the accused really intends to admit his guilt and his liability to punishment—*Ram v. Simla Municipal Council.*

An unqualified admission of guilt can be retracted by the accused during the trial—*Fernando v. Costa*; similarly a plea of Not Guilty may be retracted and an unqualified admission of guilt submitted in its stead —*Punchihewa v. Nicholas.*

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Qu.—Where an accused makes an unqualified admission of guilt, is it proper to record evidence thereafter ?—*Saheed v. Silva.*

4. **His statement shall be recorded as nearly as possible in the words used by him.**—See para. 3 *supra* for the reason for this requirement of the law. *C.f.* §302(1) *post* as to statements made by accused in the course of non-summary investigations.

When an accused makes an unqualified admission of guilt, such statement should be recorded at once, and not subsequently from memory or from notes made by the Magistrate.

In the following cases it was held that the failure on the part of the Magistrate to record the statement of the accused in the words used by him had the effect of vitiating the proceedings altogether—*Aratchy v. Arumugan, Jansen v. Arnolis, Dawson v. Perera,* 338 *P.C. Kalutara* 7270, *Haniffa v. Mala, Obeyesekera v. Thegis.* See also *General Order* 891c. In the following cases it was held that such an omission was not a fatal irregularity—*Aratchy v. Nicholas,* 1033 *P.C. Panadura* 54346, *Rasiah v. Sittambaranpillai.*

5. **If the accused does not make such statement.—**

Such statement—this means "*an unqualified admission of guilt*" as described in §188(1)—see para. 3 *supra* and *Ratnaike v. Banda.*

Qu.—What is the procedure where the accused, in a summary case, *stands mute*, whether of malice or by visitation of God ? It will be observed that no special provision is made for such a contingency in *Chapter XVIII.—C.f.* §§205, 221 *post.*

An accused may "*stand mute*" either because he contumaciously refuses to plead—"**Mute of malice**" or he may be unable to plead, either because he is insane, deaf, or dumb, &c.—"**Mute by visitation of God.**"

The case of an accused who, owing to *insanity*, is unable to make his defence is dealt with in §§367, 369 *et seq.* of this Code. If the accused, though not insane, "*cannot be made to understand the proceedings*", §288 *post* authorizes the Court to proceed with the trial, even though the accused has not pleaded to the charge, and if the case ends in a conviction, the trial Judge is directed to report the case to the Supreme Court for consideration. What is to happen where an accused contumaciously refuses to plead to the charge is not specifically provided for, but in such a case the Magistrate would be justified in making a record of the circumstances, and in entering a formal plea of Not Guilty on behalf of the accused, and thereafter proceeding with the trial.

6. **Procedure where the accused pleads that he is Not Guilty.**—The Magistrate must enquire from the accused whether he is ready for trial, and, (*a*) if the reply is that he is ready, the Magistrate will proceed to try him in due form, but (*b*) if the answer is that he is not ready for trial, whether by reason of the absence of defence witnesses "*or otherwise*," the Magistrate shall, "subject to the provisions of §289(5), either postpone the trial to a day to be then fixed, or proceed to try the case" in due form. The omission on the part of a Magistrate to ask the accused whether he is ready for trial may have the effect of vitiating all the subsequent proceedings.—*Malhonda v. Ukkubanda* §189 para. 9 *post.*

7. **Postponement of the trial.**—No trial in a Police Court is to be postponed or adjourned on the ground of the absence of a witness, unless the Magistrate has first satisfied himself that the evidence of the absent witness is material to the trial, and that reasonable efforts have been made to secure his attendance, and has recorded the name of such

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§188 witness and the nature of the evidence he is expected to give—§289(5) *post* and §282 *post*. In the case of *R. v. Appuhamy* the view was expressed that in summary cases postponements could be ordered only when the accused is not ready for trial, but in the case of *Narayanan v. Vengadasalam* the same learned Judge appears to have taken the view that, in a summary case, a postponement might lawfully be allowed because the prosecution is not ready. See also 175 *P.C. Panadura* 54931 as to the duty of " complainants " in summary cases with regard to the presence of their witnesses at the trial.—See §289 para. 3 *post*.

It should be noted that §188(2) is dealing with the stage of a summary trial immediately after the accused has pleaded to the charge. If the accused says he is not ready for trial, the Magistrate has the discretion vested in him of either allowing an adjournment or of proceeding with the trial. It is, of course, to be understood that no Magistrate would be justified in proceeding with a case when the accused shows some legitimate ground justifying the postponement of the trial. It is, therefore, the duty of the Magistrate, particularly in cases where he decides to proceed with the case in spite of an application for a postponement, to enter as a matter of record everything that has taken place in that connection and fully state the reasons for his decision to proceed with the case. This will enable the Supreme Court to review the Magistrate's order if called upon to do so. *C.f. Farquharson v. Pitchie.*

The third paragraph of §188 enables the Magistrate to adopt a third course in cases where an accused states that he is not ready for trial. He may proceed with the trial as far as possible, *i.e.*, by examining such of the witnesses on both sides who may be present in Court and then adjourning the trial.

Not only should the Magistrate accede to any reasonable request of the accused for a postponement, but he should also see that process is issued to compel their attendance in Court.—*Sampanther v. Hinniappu* §190 para. 3(*d*) *post*. See §282 para. 2 *post*.

Or otherwise.—*e.g.*, on the ground that the accused has been arrested and immediately produced before the Magistrate, and, therefore, has been unable to retain a pleader or ascertain his witnesses, etc.

See also §194 para. 5 *post*.

8. **Shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.**—See §188(1).

Record a verdict of guilty.—See §§190, 205, 220, 304, 306 - 307 *post*.

Sentence.—See §§190, 306 - 307, *Chapters XXIV.* and *XXV. post*.

Where an accused pleads guilty and there is nothing to show that the plea was not an unreserved and voluntary one, the accused must be convicted. It is irregular merely to " *warn and discharge* " the accused.—*Akbar v. James Appu, R. v. Babbappu, Udesinhe v. Marsal, Chelliah v. Samman.* An accused, who pleads Not Guilty and claims to be tried, must not be placed in a worse position than an accused who pleads guilty. Thus, in *Seyatu v. Appuwa* (1896) 2 *N.L.R.* 212 certain persons were jointly charged with committing an offence. One accused pleaded guilty and was sentenced to pay a fine. The other accused pleaded not guilty and claimed to be tried. After trial the accused was convicted and sentenced to imprisonment. It was held that this was highly irregular. See *R. v. Babun* (1923) 25 *N.L.R.* 156, *R. v. William* (1928) 9 *C.L.Rec.* 116.

8A. **As to appeal.**—See §335 *post*.

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9. **Case law.**—*Ellapola v. Nadar* (1919) 6 *C.W.R.* 255, 1 *C.L.Rec.* 67.—See §335 para. 13 *post.*

944 *P.C. Matugama* 2565 (*S.C.M.* December 3, 1920).—See §335 para. 13 *post.*

Aliar v. Rahiman (1892) 7 *Tam.* 2.—"I did not steal the bull. I saw it straying and caught it and tied it to my cart," is not an unqualified admission of guilt.

Aratchy v. Nicholas (1908) 2 *Leader* 169.—Under certain circumstances the Supreme Court would be justified in refusing to quash a conviction solely on the ground that the Magistrate has not recorded the exact words of the accused's admission of guilt.

Aratchy v. Arumugam (1911) 6 *Leader* 24.—Where a Magistrate failed to record an admission of guilt by an accused in his own words, *held*, that the irregularity was fatal to a conviction.—See (1899) *Koch* 33, 61.

1033 *P.C. Panadura* 54346 (*S.C.M.* October 31, 1916).—An omission by a Magistrate to follow the procedure indicated in §188 is not necessarily fatal to a conviction.

175 *P.C. Panadura* 54931 (*S.C.M.* February 23, 1917).—Where, in a summary case, the Magistrate erroneously recorded that the witnesses for the prosecution were not present and discharged the accused, and subsequently found that the witnesses had been duly summoned and two of them were actually present, the Supreme Court *held* that it was the complainant's duty to see that the witnesses were present and to move for warrants or a postponement if they were absent.—See also *Sampanther v. Hinni Appu* (1916) 2 *C.W.R.* 109, and *Narayanan v. Vengadasalam infra* and §194 para. 11 *post.*

1084 *P.C. Nuwara Eliya* 5233 (*S.C.M.* December 15, 1921).—"I must draw the attention of the Magistrate to an irregularity in his proceedings. His method of inquiry has been as follows:—The case is commenced by the calling of a Police Sergeant, who describes the course of the investigation of the case and tells the Magistrate beforehand all that the principal witnesses are expected to say. The Magistrate then proceeded with the trial on the basis of this preliminary police evidence. It is a very convenient method of procedure, and it doubtless has its advantages, but it is not the method of procedure authorised by our law. Statements made by witnesses to a Police officer, if admissible at all, are only admissible in corroboration of the evidence of these witnesses, and should only be given in evidence after those witnesses are called. Sometimes by consent of counsel for the defence the corroborative evidence is given first, but this is a departure from the strict rule, and should not be done . . . unless the consent is recorded . . ." *per* Bertram, C. J. It is submitted that these observations are applicable equally to non-summary as well as to summary proceedings and have formed the subject of a circular to Magistrates.

Jansen v. Arnolis (1895) 1 *N.L.R.* 274.—It is irregular to record that "the accused pleaded guilty to the charge," but the exact words used by him should be set out.

Dawson v. Perera (1895) 1 *N.L.R.* 194.—"Particulars of the offence explained to the accused. He pleads guilty. I accept the admission of the accused. He is fined Rs. 5·00." *Held*, that the above record was irregular. The admission by the accused should be recorded as nearly as possible in the words used by him.—See *Obeyesekere v. Thegis infra.*

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§188 338 *P.C. Kalutara* 7270 (1899) *Koch* 33.—An unqualified admission of guilt by an accused should be recorded in the very words used by him. —See (1899) *Koch* 61.

Malhonda v. Ukkubanda (1920) 2 *C.L. Rec.* 150.—See §189 para 9 *post.*

Udesinhe v. Marsal (1920) 8 *C.W.R.* 145.—See §190 para. 6 *post.*

Chelliah v. Samman (1921) 3 *C.L.Rec.* 37.—See §190 para. 6 *post.*

Perera v. Fernando (1900) 1 *Br.* 147.—The accused were charged with committing the offence of unlawful gaming. When called upon to plead they admitted that they were playing cards for money. *Held*, that this was not an unqualified admission of guilt. *C.f. P.C. Anuradhapura* 20219 (1899) *Koch* 61.

Fernando v. Fonseka (1900) 1 *Br.* 172.—On a charge of mischief by breaking down a fence the accused pleaded " I broke down the fence. I claim to have a right of way. I pulled down the fence which was on my land. The fence was put partly over the road. My hackery broke that part of the fence when passing along the road." *Held*, that this was not an unqualified admission of guilt.

Saram v. Marikar (1900) 4 *N.L.R.* 154.—A conviction resting upon an admission of the charge by the accused's Proctor is irregular except as provided by §297 *post.*—See *R. v. Meerasa* (1913) 1 *Crim. App. R.* 6, *Fonseka v. Appuhamy* (1918) 5 *C.W.R.* 222, *La Brooy v. Ismail* (1906) 4 *Bal.* 120, *R. v. Silva* (1914) 1 *Crim. App. R.* 73, *Punchihewa v. Nicholas infra* and *Leema v. Van Rooyen* (1927) 8 *C.L.Rec.* 171.

Haniffa v. Mala (1908) 1 *S.C.D.* 35.—" The other objection is that the Magistrate has not complied with §188 . . . He should record the statement of the accused ' as nearly as possible in the words used by them.' This is always important, and especially where, as in this case, they are not defended. It often happens that words which the interpreter says means a plea of guilty, appear, when translated at length, not to be an unqualified plea of guilty . . ." *per* Hutchinson, C. J.

Katchy v. Cooray (1909) 1 *Curr. L.R.* 47.—The charge against the accused was that he had removed timber without a permit from the proper authority under the Forest Ordinance. 1907. The accused pleaded guilty to not " having a permit." " That, in my opinion, is scarcely an unqualified admission of guilt, which must involve a statement that he had admitted removing the timber without a permit in the locality where such act is an offence . . ." *per* Middleton, J.

Akbar v. James Appu (1910) 5 *S.C.D.* 38.—Where the accused pleaded guilty to the offence charged, and thereupon the Magistrate recorded "Warned and discharged," *held*, that in effect this order amounted to an acquittal; that under §188 of the Code the Magistrate was bound to " record a verdict of guilty and pass such sentence according to law." *C.f. R. v. Babappu infra.*

R. v. Appuhamy (1912) 16 *N.L.R.* 39.—Legality of lengthy and unreasonable postponements of criminal cases discussed.—See §289 *post.* " This section (*i.e.*, §188), by reiteration of some of the provisions of §289, *viz.*, that the postponement is to be for reasons recorded in writing and to a fixed date, seems to lay particular stress on these parts of §289. The section, moreover, seems to indicate that, in a summary trial, a postponement can be ordered only when the accused is not ready for trial . . ." *per* Ennis, J. *C.f. Narayanan v. Vengadasalam infra*, and *Gomis v. Agoris* §190 para. 6 *post.*

Banda v. Ramasamy (1908) 4 *A.C.R.* ii.—The accused, on being charged with committing theft of certain galvanised sheets, made the following statement :—" When the late District Medical Officer was

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leaving, these galvanised sheets were on the ground. I went to his lady and asked if I might have them. She said I might, so I took them. They came from a cattle-shed used by the District Medical Officer. It was put up by Dr. P, and improved by the late District Medical Officer. When he left he pulled it down." On a subsequent date the Magistrate made the following record : " Accused is unable to prove his statement that the District Medical Officer's wife gave him leave to take the sheets. He has taken no steps to summon her. In any case she had no authority to give them, and I do not believe she gave any such leave." The accused was convicted. *Held*, that the statement of the accused was in no sense " an unqualified admission of guilt " within the meaning of §188. §188

Obeyesekera v. Thegis (1916) 2 *C.W.R.* 135 (following *Dawson v. Perera supra*).—" The record shows that, when the accused appeared to answer the charge, he was asked whether he had any cause to show why he should not be convicted, and that he stated " Guilty." Thereupon the Magistrate recorded a verdict of guilty and sentenced him . . . It appears, from the petition of appeal and an affidavit submitted to this Court, that all that the accused meant to tell the Court was that he did in fact cut the complainant with a katty, but that he had a defence to make, in that he used the katty in self-defence . . . In this case, I cannot consider that he used the only word " Guilty " when he was asked to show cause. He must have made a statement in more words . . ." *per* de Sampayo, J. Conviction quashed and case sent back for trial in due course. *C.f. Rasiah v. Sittambaranpillai infra.*

Narayanan v. Vengadasalam (1916) 2 *C.W.R.* 234.—A warrant having been issued for the arrest of the accused in a case, it was found that on the day fixed for the return of the warrant that the complainant was not ready for trial with his witnesses, whereupon the Magistrate acquitted the accused. In appeal it was urged that it was never the practice of the Court for the complainant to bring his witnesses and be ready for trial on the date the warrant was returnable. *Held*, that there being something to be said in favour of the practice, the Magistrate might well have regarded the absence of witnesses as a reasonable ground for postponing the case as provided by §289 *post.* " §188 of the Code, which provides that, when an accused is brought before the Court and is ready for trial, the Court *shall* proceed to try the case as in the Code afterwards provided does not do away with the right of the Court, under §289 to postpone a case for a reasonable cause . . ." *per* Ennis, J. *C.f.* the *dictum* of Ennis, J., in the case of *R. v. Appuhamy* and 175 *P.C. Panadura* 54931 *supra.*

R. v. Babappu (1916) 2 *C.W.R.* 317.—Where an accused pleads guilty to the charge in plain and unambiguous language a formal conviction should follow. *C.f. Akbar v. James Appu supra.*

Mikalau v. Anthonia (1916) 3 *C.W.R.* 65.—The accused, on being called upon to plead to a charge of criminal trespass, stated "that she still thought that she had a claim to the land and that it was true that she was on the land," *held*, that this did not amount to an admission of guilt.

Fernando v. Costa (1918) 5 *C.W.R.* 224.—Where an unqualified admission of guilt is subsequently withdrawn by the accused, the plea of guilty must be treated as never having been made, and the case must be decided apart from that plea.

Rasiah v. Sittambaranpillai (1920) 8 *C.W.R. at p.* 117.—" The second point is that the Magistrate has not observed the provisions of §188 . . . The Magistrate's procedure on the face of it appears to be not

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§188 necessarily defective. The record reads :— 'He pleads "Guilty"' . . . It may be that the word 'Guilty' was the only word the accused uttered. I am not convinced myself that we have here a fatal irregularity. At the same time Mr. Pereira is correct in drawing attention to the circumstances that it is a point which the Code emphasises elsewhere. In §335 a distinction is drawn between a plea of Guilty before the District Court in paragraph (*b*), and an unqualified admission of guilt in paragraph (*c*). Whether or not, therefore, it is ever held on further consideration that this is an irregularity which may be cured, Magistrates would do well . . . punctiliously to observe the provisions of the Code . . ." *C.f. Obeyesekere v. Thegis supra.*

Seyatu v. Appuwa (1896) 2 *N.L.R.* 212.—An accused, who does not plead guilty, but claims to be tried, ought not to be placed in a worse position than one who pleads guilty. Where X, Y and Z were charged and X and Y pleaded guilty and were fined Rs. 5·00 each, and Z claimed to be tried, and thereafter was convicted and sentenced to undergo imprisonment, the Supreme Court reduced this sentence to a fine of Rs. 5·00.

Sampanther v. Hinniappu (1916) 2 *C.W.R.* 109.—See §190 para. 6 *post.*

Punchihewa v. Nicholas (1920) 8 *C.W.R.* 247.—On a charge under §13(*b*) of Ordinance No. 19 of 1915 the accused first pleaded not guilty, but subsequently, through his pleader, tendered a plea of guilty. *Held*, "I would regard this second plea as one tendered by the accused under §188 of the Criminal Procedure Code . . ." *per* Schneider, J.—See *Saram v. Marikar supra* and §297 *post.*

R. v. Bhadu 19 *Alla.* 119.—"We are not clear whether the word 'Guilty' in the plea was Bhadu's, or was the interpretation of the Judge of the meaning of Bhadu's plea . . ."

Ram v. Simla Municipal Council 2 *P.R.* 1890.—Before an accused person is convicted upon a statement by his pleader the Court should be careful to satisfy itself, so far as is possible, that the accused himself intends to admit his guilt and liability to punishment, and for that purpose, when he is present, should record, as accurately as may be, his own statement so as to exclude all room for doubt and subsequent dispute.

R. v. Erugadu (1891) 15 *Mad.* 83.—The plea of an accused should be recorded at the time it is made. It is irregular for the Magistrate to record it subsequently either from memory or from notes.

Ratnaike v. Banda (1921) 23 *N.L.R.* 256.—"I plead guilty. If Appavu states I took part, I can only plead guilty." Appavu was not called as a witness, and the accused was convicted on the above statement. *Held*, that the above did not amount to an unqualified admission of guilt.

Farquharson v. Pitchie (1922) 24 *N.L.R.* 160.—Accused not given an opportunity of calling witnesses to prove his defence. Accused put on his trial shortly after his arrest.—See also *Rasiah v. Sittambaranpillai* (1920) 8 *C.W.R.* 116.

Leema v. Van Rooyen (1927) 8 *C.L.Rec.* 171.—If a conviction is to be based upon an admission of guilt, that admission should proceed from the lips of the accused.

Perera v. Dingirimahatmaya (1929) 6 *T.L.R.* 150.—"I am guilty. I did not notice the brand marks, and I branded over them. I thought the buffalo was mine" is not an unqualified admission of guilt.

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Saheed v. Silva (1929) 10 *C.L.Rec.* 117.—Accused on being charged stated: "I am guilty. S got my brother assaulted and I questioned him. He struck me and I committed the offence with which I am charged." Evidence for the prosecution was then led and accused was convicted without calling on him for his defence. *Held*, that this procedure was irregular. *Qu.*—Where an accused makes an unqualified admission of guilt is it proper to lead evidence thereafter? §189

Attapattu v. Anthonypulle (1932) 10 *T.L.R.* 14.—"I am guilty" is not necessarily an unqualified admission of guilt. The Judge must be satisfied that the accused knew the consequences of his plea.

Procedure on trial.

189. (1) When the Magistrate proceeds to try the accused he shall read over to him the evidence (if any) recorded under section 150 and take, in manner hereinafter provided, all such further evidence as may be produced for the prosecution or defence, respectively.

(2) The accused shall be permitted to cross-examine any person whose evidence has been recorded under section 150 and all witnesses called for the prosecution and called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused.

Magistrate.—See §3 *ante*.

Try.—*Chapter XVIII.*, §§152(3), 166.

He shall read over to him.—*C.f.* §156(1) *ante*.

Evidence.—See §3 Evidence Ordinance, 1895.

Cross-examination of witnesses.—*C.f.* §156(5) *ante*, and *c.f.* §§138 – 140, 145 – 149, 151 – 155 Evidence Ordinance.

Witnesses called or recalled by the Magistrate.—See §§190, 429 *post*, *c.f.* §176 *ante* and §138 Evidence Ordinance.

Complainant.—*C.f.* "**Complaint**" §3 *ante*, and §§194, 195, 196, 199, 253B, 290.

Pleader.—See §3 *ante*, and see §§7, 199, 287, 297.

Right of reply by prosecution.—*C.f.* §§212, 237(2), 296.

Opening case.—See §§208, 232 *post*.

1. The terms of §189 should be contrasted on the one hand with §244 of the Indian Code, and on the other with §221 of the Code of 1883.

2. **Scope of §189.**—After the accused has formally pleaded not guilty to the charge, the trial proceeds either at once or after an adjournment.—See §188 *ante*. If any evidence has been regularly recorded in the absence of the accused—see *Pampatham v. Kandiah* §§149(1), (2), (4), 150, 151, 407—the first thing the Magistrate has to do is to read over to the accused such evidence, duly translated if necessary—§189(1), and tender such witnesses to the accused for cross-examination—§189(2). The usual practice is to recall each witness examined in the absence of

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§189 the accused into the witness-box, read out the evidence already recorded, and then tender him for cross-examination. *C.f.* §156(1), (5) para. 2 *ante*. Moreover, if evidence has been recorded under §407 *post* by reason of the fact that the accused was absconding, and if the witness has died or left the Colony before the arrest of the accused, the deposition of such witness would be admissible against the accused, although the witness himself has not been called into the witness-box as required by §189.—See §297 para. 7 *post*.

The trial now proceeds in the normal way. The witnesses for the prosecution are called, examined-in-chief, cross-examined,* and re-examined. At the end of the proof for the prosecution there is nothing to prevent the pleader for the prosecution from "closing" his case. There is certainly no express prohibition in the Code against such a course. Thereafter the Magistrate must decide whether he is going to call upon the accused for his defence, or forward the case to the Attorney-General under §192, or take non-summary proceedings under §193(2), or acquit the accused without calling upon him for his defence. If the accused is called upon for his defence, his pleader (just as the pleader for the prosecution is entitled to do at the commencement of the prosecution), may "open" the case for the defence—189(3), and thereafter call the witnesses for the defence, who are similarly examined-in-chief, cross-examined, and re-examined.

If the accused is undefended the Magistrate must explain to him his rights under §296 *post*, and also of his right, if so advised, to make an *unsworn statement* from the dock.—See *R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.

At the close of the proof for the defence the pleader for the prosecution is not "entitled to make any observations in reply upon the evidence given by or on behalf of the accused."—§189(3).

3. **The complainant and accused or their pleaders shall be entitled to open their respective cases.**—The "*opening*" of a case is the statement in chronological order by the party or his pleader of the facts on which that party relies in support of his case. No fact should be "*opened*" which cannot be supported by the evidence. The opening speech for the defence may refer to the evidence led for the prosecution.—*Rowel v. Perera*. The Magistrate has no power to curtail the duration of the opening speech.—*Rowel v. Perera*. As a rule the opening speech should be pitched in a less combative and less confident tone than in the case of the final reply (where such exists), and this is so for a variety of reasons, the foremost being that there is always a possibility of witnesses not coming up to the proof expected of them.—See §§208 – 212 para. 2(1) *post*, and §§232 – 237 para. 2(1) *post*.

It is to be regretted that in Police Courts, whether in summary trials or non-summary investigations, cases are not "*opened*" by the pleaders and other persons who are entrusted with the duty of presenting the case to the Court. Instead of this one finds the evidence led in a haphazard manner and with no kind of order, and the effect produced upon anybody reading the record is most confusing. It is suggested that Magistrates ought to make it a rule of practice to have each case formally "*opened*" to them before recording evidence, and thereafter insist that the evidence is led in some definite order, so far as circumstances

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* See *Rowel v. Perera* (1922) 1 *T.L.R.* 43.

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permit of this being done. In this connection reference should be made to the valuable observations contained in a judgment of Bertram, C. J., in the case of 1084 *P.C. Nuwara Eliya* 5233 (*S.C.M.* December 15, 1921): "I must draw the attention of the Magistrate to an irregularity in his proceedings. His method of inquiry has been as follows:—The case is commenced by the calling of a Police Sergeant, who describes the course of the investigation of the case and tells the Magistrate beforehand all that the principal witnesses are *expected* to say. The Magistrate then proceeded with the trial on the basis of this preliminary Police evidence. It is a very convenient method of procedure, and it doubtless has its advantages, but it is not the method of procedure authorized by by our law . . ."

The right of an accused to be defended.—See §287 *post.*

The Magistrate may not decline to hear a competent and compellable witness simply because such person was in Court or near the Court and heard the evidence. This fact may affect his credibility, but not the admissibility of his evidence.—*Van Rooyen v. Perera.* It is also not open to the Court to refuse to hear the defence.—*R. v. Hussain.*

4. **The right of reply in summary trials.**—See §296 para. 2 *post.*

Unlike in the case of trials before the Supreme Court and District Courts, the prosecution in summary trials has in no case the opportunity of replying to the case for the defence—§189(3). In trials before the Supreme Court and District Courts the prosecution does not obtain the right to "the last word," where the sole evidence for the defence consists of that of the accused—§296(2). Subject to this modification, if the defence calls any other evidence, even by producing a document, the prosecution has the right to "the last word"—§§237(2), 212 *post.* If the accused or the spouse of the accused has not given evidence, this omission cannot form the subject of adverse comment by the prosecution in its reply—§296(3) *post.* If the accused makes an unsworn statement from the dock the prosecution is entitled to comment on such statement.

In summary trials, however, the prosecution in no case has the last word. It is submitted that the provisions of §189(3), however, do not debar the prosecution from "*closing*" its case before the defence opens its case, *i.e.*, the pleader appearing for the prosecution may sum up his evidence and deal with any legal points involved in the case before the case for the defence opens. It should also be noted that even after the case for the defence is concluded and defending counsel has closed his case, it is open to the Magistrate to allow prosecuting counsel to address the Court as *amicus curiae.* For example, a point of law may have been raised by the defence at the last moment, and there may be authorities available in support of the case for the prosecution which have not been cited or relied upon by the defence. In such cases it is always open to the Magistrate, whether with or without an application by the prosecution, to permit prosecuting counsel to address the Court as *amicus curiae.*

Where a pleader for the prosecution replies on the case for the prosecution in violation of the terms of §189(3), such an irregularity does not vitiate a conviction.—*R. v. Martin.*

5. May the prosecution call witnesses in rebuttal in summary cases?—In trials before the Supreme Court and District Courts this may be done.—See §§212, 237(1) *post.* The Code is silent with regard to the calling of evidence in rebuttal in summary trials in the Police Courts. In cases where the prosecution is taken by surprise by the

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§189 defence, or new witnesses are discovered after the case for the prosecution is closed, it is clear, from the provisions of §§189(2), 190, 429 *post*, *that the Magistrate can call such witnesses himself.*

6. **Recalling witnesses.**—

(i) Every witness examined in the absence of the accused, whether such examination took place under §150 *ante*, or §407 *post*, must formally be recalled, their previous evidence read, and the accused "permitted" to cross-examine them—§189(1),(2). If such witnesses have died or left the Island in the interval between their giving evidence and the appearance of the accused, the depositions of such witnesses *may* be admissible against the accused by reason of §33 of the Evidence Ordinance, §96 Merchant Shipping Ordinance 1863, §2A Ordinance No. 7 of 1889, as amended by §3 Ordinance No. 21 of 1919, and §407 *post*.

From the wording of §189(2) it would appear that the accused is at perfect liberty to waive his privilege of cross-examining the witnesses if so advised.

(ii) The Magistrate is at liberty to recall any witnesses who have been already examined—§§190, 429 *post*; or call new witnesses either *ex mero motu*, or upon application by the parties—§§189(2), 429 *post*.—*Daniel v. Soysa*, *Jonklaas v. Silva*, §190 para. 6 *post*.*

It is further submitted that an accused who has voluntarily entered the witness-box and given evidence may lawfully be recalled by the Court.† It has now been so held in *Fernando v. Silva* (1933) 35 *N.L.R.* 213.

(iii) The parties themselves may, with the sanction of the Magistrate, recall a witness either for further examination-in-chief or further cross-examination, and in such a case the parties have the right of further cross-examination and re-examination respectively—§138 Evidence Ordinance.

§189(2) draws attention to the general right of cross-examination possessed by the accused with regard to witnesses who have been recalled.‡

The accused is entitled to have the witnesses before him, and to see them giving evidence. The mere reading of the witness' statement made in another case, or in any other part of the same proceeding, is not sufficient.—*Dingirala v. Podisinno.* It is requisite, therefore, that the record should show clearly that the witnesses were in fact placed in the witness-box in the regular way.

A failure to read over to an accused the evidence recorded in his absence as laid down by §189(1) may, if such omission occasioned a failure of justice, vitiate a conviction.—*Malhonda v. Ukkubanda.* It is highly irregular to import into a case the evidence recorded in another except by proper proof thereof. Thus, evidence was recorded in a certain case against A, which disclosed an offence on the part of B who was not present. The evidence recorded against A cannot be used against B upon his arrest by reading over to him and the witnesses the evidence already recorded in the former proceeding and examining them further and allowing B an opportunity for cross-examining them. The correct procedure is to record the evidence afresh.—*Cornelis v. Uluwitike*, and *c.f. Dingirala v. Podisinno.* So, when there are counter cases between the same parties, it is the duty of the Judge to hear each case fully and

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* See *Dias on the Evidence Ordinance p.* 322.

† See *Dias on the Evidence Ordinance p.* 270.

‡ See the cases cited at *p.* 323 in *Dias on the Evidence Ordinance.*

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give judgment upon the evidence called in such cases. It would be irregular for him to import into one case any extraneous knowledge he may have obtained from another case.—*R. v. Pianeris* §190 para. 6 *post.*

7. **Complainant.**—*C. f.* **"Complaint"**—§3 *ante.* See also §§194–195, 199, 253B *post.* The "*complainant*" has a right to appear by pleader.—*Juakino v. Fernando.* See also §§7, 199, 287, 297.

8. **An omission to follow the terms of §189 will have the effect of vitiating a conviction, if such omission has caused prejudice to the accused.**—*Malhonda v. Ukkubanda, Dingirala v. Podisinno Cornelis v. Uluwitike,* but if no prejudice has been caused the conviction will not be vitiated.—*R. v. Martin.*

9. **Case law.**—

Malhonda v. Ukkubanda (1920) 2 *C.L.Rec.* 150.—In the case of offences triable summarily the Magistrate should follow the procedure laid down in *Chapter XVIII.* of the Code, and a failure to ask an accused whether he is ready for trial, or to read over to him evidence recorded during his absence under §189(1) may, if such failure has prejudiced him, vitiate a conviction.

1084 *P.C. Nuwara Eliya* 5233 (*S.C.M.* December 15, 1921).—See §188 para. 9 *ante.*

R. v. Martin (1915) 2 *Crim. App. R.* 38.—Where the pleader appearing for the prosecution replies upon the case for the prosecution in violation of the terms of §189(3), such irregularity may be cured by §425 *post.*

Dingirala v. Podisinno (1916) 2 *C.W.R.* 136.—"An accused person is entitled to have the witnesses against him give their evidence in his presence and in his hearing, so that he may know exactly what course to adopt in his defence. A mere reading of a witness' statement made in another case, or in any other part of the same proceedings will not enable an accused person to conduct properly his defence . . . " *per* de Sampayo, J. See *Cornelis v. Uluwitike infra.*

Juakino v. Fernando (1910) 3 *S.C.D.* 91.—The Magistrate refused a proctor to appear for the complainant. On the acquittal of the accused the complainant appealed against the order of the Magistrate. *Held,* "As stated in the petition of appeal, §199 of the Criminal Procedure Code expressly gives a complainant the right to appear by a proctor and a recognition of the same right is contained in §189(3)," *per* Grenier, J.

Cornelis v. Uluwitike (1895) 1 *N.L.R.* 248.—Evidence recorded in a proceeding against A, which disclosed an offence on the part of B, who was not present, cannot be utilised against B on a subsequent day when he is arrested and produced, by reading over to the witnesses, in the presence of B, the evidence already recorded in the former proceeding, and examining them further and allowing B an opportunity of cross-examining such witnesses. In such a case the proper course is to record the evidence afresh.—See *Dingirala v. Podisinno supra.*

Rowel v. Perera (1922) 24 *N.L.R.* 456, 4 *C.L.Rec.* 131, 1 *T.L.R.* 43.—Opening speech for the defence—The Magistrate has no power to impose a time limit on its duration. The defending pleader in opening the case for the defence comments upon the evidence for the prosecution.—See §§211, 235 *post.*

Pampatham v. Kandiah (1928) 30 *N.L.R.* 140.—Where a Magistrate, for the purpose of issuing process, examined a witness, who charged the accused with assaulting her. That evidence was not recorded in the

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§189 manner provided by §§149 and 150. When the accused appeared before the Court, the witness retracted her former statement. *Held*, that the earlier statement could not be regarded as being evidence under §189.

Van Rooyen v. Perera (1933) 35 *N.L.R.* 186.—A Magistrate cannot decline to hear a witness (otherwise competent and compellable) because he was close to the Court and heard the evidence. This may affect his credibility, but not the admissibility of his testimony.

R. v. Hussain (1934) 13 *C.L.Rec.* 191.—"It is much better that a Police Magistrate should occasionally waste his time in fully enquiring into such allegations made by the defence, rather than stop the undoubted right of an accused to put his whole defence (*forward* ?) fearlessly." *per* Akbar, J.

Verdict.

190. If the Magistrate, after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced, finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.

Magistrate.—See §3 *ante*.

Evidence for the prosecution and defence.—See §189 *ante*.

Evidence called by the Magistrate.—See §§189, 429 *ante* and §138 Evidence Ordinance.

Record a verdict of acquittal.—*C.f.* §§188(1) and *Chapter XXIV. post*, §§194, 195.

Record a verdict of guilty.—*C.f.* §§189(1) and *Chapter XIV. post.*

Pass sentence.—*C.f.* §188(1) and *Chapter XXV.*

Record such sentence.—*C.f.* §188(1), *Chapter XXV.*

Discharge.—See §§3, 151(1), 191, 196.

1. §190 should be compared with §245 of the Indian Code and with §223 of the Code of 1883.

2. **Scope of §190.**—§190 contemplates that stage of a summary trial after the proof has been closed and the accused's pleader has addressed the Court. If the Magistrate finds the accused not guilty, *i.e.*, not guilty of the offence charged, or of any other offence in respect of which he may either under §§182 – 183 *ante*, or under §193(1) *post* convict him on the charge before him, it is his duty to record a verdict of acquittal in favour of the accused. If, on the other hand, he finds the accused guilty of the offence charged, or of some other offence in respect of which the Magistrate, under §§182 – 183 *ante*, or §193(1) *post*, could lawfully find him guilty on the charge before him, it is his duty to record a verdict of guilty, and "pass sentence upon him according to law," and to record such sentence.—See *Joseph v. Punchirala*. After recording his verdict he must either acquit or pass sentence on the accused.—*Samsudeen v. Seethoris*.

§191 *post* draws attention to the power vested in a Magistrate, at any stage earlier than the conclusion of the trial, of "discharging" the accused—see *Seneratne v. Lenohamy* §191 para. 6 *post*. The legal difference between an "acquittal" and a "discharge" should be noted—see para. 3 (xii) *infra*, the judgment of the *Full Court* in *Seneratne v. Lenohamy* §191 para. 6 *post*, also §§151(1) *ante*, 196 *post*.

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§190 is an important provision of the law, and non-compliance with its terms might result in convictions being quashed on the ground of irregularity.—338 *P.C. Kalutara* 7270, but see *Samsudeen v. Seethoris.* §190

The judgment pronounced by the Court, whether in acquitting or convicting the accused, must conform with the provisions of *Chapter XXIV. post.* The procedure regulating sentences which may be imposed by the Court is regulated by *Chapters XXV., XXVI. post.*

See *Chapter XXVI. post* for special power given to deal with offenders without convicting them.

3. **The trial of a summary charge.**—Generally see Introduction to *Chapter XVIII. ante.*

(*a*) The plaint is filed under §148 *ante.* If the offence charged is one needing " sanction to prosecute " such sanction must first be obtained before the plaint can be accepted—§147 *ante.*

(*b*) The Magistrate thereafter acts under §§149, 150, and then either (i) discharges the accused under §151(1), or (ii) remands him into custody pending the appearance of the witnesses, &c.—see §289 *post*; or admits him to bail, or (iii) issues process in order to secure the attendance of the accused before the Court.—§151(2).

(*c*) When the accused is before the Court the first thing to be done is to frame a charge against him—§187 *ante.* This charge is then notified to the accused, and his plea recorded—§188. As to objections to jurisdiction see Introduction to *Chapter XVIII.* para. 4(*c*) (iii).

(*d*) It is the duty of the Magistrate to give effect to any reasonable request of the accused for an adjournment—§188(2); and it is his duty to see that process is issued upon the witnesses required by the defence. —*Sampanther v. Hinniappu,* and see §282. The prosecution, too, is entitled to any reasonable adjournments asked for.—See §188 para. 7 *ante* and §282 *post.*

(*e*) The accused is entitled to be defended by a pleader—see §287 *post*; and so is the " complainant " in a summary case.—See §189 para. 7 *ante.*

(*f*) §290 *post* entitles the parties in the case of certain specified offences to " compound," such offences at their will and pleasure, while in certain other cases, they may be " compounded " by the parties with the consent of the Attorney-General. It should be noted that §195 *post* is not to be utilised so as to extend the powers of a Magistrate to allow the compounding of cases under §290.—See §195 para. 2 *post.*

(*g*) If the accused charged is a reconvicted criminal and the offence charged, although summarily triable is a " crime " within the meaning of Ordinance No. 2 of 1926, the summary jurisdiction of the Magistrate is ousted, and he must take non-summary proceedings.

(*h*) A change of Magistrates during the continuance of a summary trial is provided for by §292 *post.* See *Jonklaas v. Silva.* A judgment delivered by a Magistrate when he is *functus officio* is void.—*Joseph v. Punchirala.*

(*i*) No proceedings shall be deemed to be void by reason of their having been held on a Sunday or on a public holiday—§294.

(*j*) The trial.—

(i) The accused must be present throughout—§297 *post, Peris v. Perera* (1912) 1 *B.N.C.* 3.

(ii) The proceedings must be in English, and recorded as indicated in §298. The accused is entitled to have the same interpreted to him, if he does not understand English—§§300, 301 *post.*

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§190 (iii) The prosecution is entitled to "open" its case, and should as a rule do so.—See §189(3) para. 3 *ante*.

(iv) The witnesses for the prosecution are then called, examined-in-chief, cross-examined, and re-examined.

(v) At the end of the proof for the prosecution, and before the defence opens its case, the prosecution in summary trials may "close" its case. —See §189 para. 4 *ante*.

(vi) If the Magistrate does not think that the prosecution has brought guilt home to the accused beyond reasonable doubt, or if he does not think that the accused should be called upon for his defence, he can "discharge" the accused under §191 *post*. On the other hand, if he is of opinion that the prosecution has established a case, which the accused should meet, he will call upon the accused for his defence.

(vii) If the accused is undefended, it is the duty of the Magistrate to inform him of his right to give evidence on oath or affirmation from the witness-box, and if he elects to give evidence, to inform him of the chief points in the case against him, which he should meet—§296(1) *post*. It is also the duty of the Magistrate to inform the accused that he may, if so advised, instead of entering the witness-box make an unsworn statement from the dock.—See *R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.

If the accused is defended, the pleader for the defence is now entitled to "open" his case—§189(3).

(viii) The evidence for the defence is then led, and the witnesses examined-in-chief, cross-examined, and re-examined. The cross-examination of the accused as to character must be conducted subject to the provisions of §§53 - 54 of the Evidence Ordinance.* The accused is entitled to call any competent and compellable witness he desires to have examined.—*Palihawadene v. Silva*, *R. v. Dinoris Appu*, *R. v. Hinniappu* §§232 - 237 para. 6 *post*. See also *Kandy Municipal Council v. Ali*.

(ix) At the close of the proof for the defence, the defending pleader is entitled to address the Court. The prosecution in no case has the right to the last word in a summary case—§189(3) para. 4 *ante*.

(x) The Magistrate has the right at any stage to call witnesses of his own accord, and see *Gomis v. Agoris* §289 para. 9 *post*, or to recall any witnesses, who have already given evidence.—See §§189(2), 190, 429, and §138 Evidence Ordinance. It follows that if the accused has entered the witness-box as a witness, he can be recalled.—See §189 para. 5 *ante*, and *Jonklaas v. Silva*, *Daniel v. Soysa* para. 6 *infra*.

(xi) As in the case of any other Judge, the Magistrate can hear any counsel or proctor as *amicus curiae* during the trial of a case.—See §189 para. 4 *ante*.

(xii) At the close of the proof, the Magistrate has to give his decision in the case. If he finds that the accused is not guilty of the offence with which he is charged, or of any offence in respect of which he might have been convicted on the charge before the Court, he will "forthwith" record a verdict of acquittal.—*Samsudeen v. Seethoris*. On the other hand, if he finds the accused guilty of the offence charged or of any other offence in respect of which he could lawfully be found guilty on the charge before the Court, the Magistrate will record a verdict of guilty, and forthwith pass sentence upon him according to law, and shall record such sentence.—*Samsudeen v. Seethoris* §190. See §304 *post* and *Chapter XXVI. post*.

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* See *Dias on the Evidence Ordinance p.* 217.

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§190

If the Magistrate entertains any reasonable doubt as to the guilt of the accused, this proves that the prosecution has failed to prove the charge, and the accused is entitled to claim an acquittal.—*Avuneris v. Romanis, Babunhamy v. Silva.* The finding whether of acquittal or of conviction must be based upon evidence led at the trial. It is highly irregular and improper for the Magistrate to import into the case matters, which have not been formally proved, unless he is entitled by law to take judicial notice of them.—*R. v. Pianeris* para. 6 *infra* and *Cornelis v. Uluwitike* §189 para. 9 *ante.**

Acquittal v. Discharge.—See *Weerasinghe v. Wijeysinghe, Seneratne v. Lenohamy.*—Where an accused has been *acquitted* such an order acts as a bar to any future prosecution for that offence—§§330 - 331 *post.* On the other hand, an order of "*discharge*" under §§191, 196, 151(1) does not operate as a bar to a future prosecution. It must, however, be noted that where a Magistrate "*discharges*" an accused, he cannot himself re-open his order, but it is open to the prosecution to file a fresh plaint and proceed anew against the accused, or the Supreme Court can set the order aside and direct a new trial. See *Seneratne v. Lenohamy* §191 para. 6 *post.* An acquittal connotes the fact that the Magistrate has heard evidence and decides to acquit the accused holding that the evidence for the prosecution does not establish guilt.—See *Sittambaram v. Sinnapillai, Eliatamby v. Sinnatamby, Abrew v. Siyatu.* Orders under §§190, 194, 195 are orders of acquittal; orders under §§151(1), 191, 196 are orders of discharge.

As to the legal distinction between an "acquittal"—§190, and a discharge—§191—see *Dyson v. Khan, Gabriel v. Soysa* and §191 para. 3 *post.*

Where the Magistrate decides to convict the accused, a formal sentence must follow; it is irregular to "*warn and discharge*" him.—*Udesinhe v. Marsal, Chelliah v. Samman, Akbar v. James Appu, R. v. Babappu.* An accused who pleads Not Guilty and claims to be tried must not be placed in a worse position than a co-accused who pleads Guilty.—*Siyatu v. Appuwa* §188 para. 9 *ante.* In order to enable the Magistrate to impose a punishment befitting the crime, it is open to him after conviction to inquire into the antecedents of the accused.—*R. v. Kandiah, Nikapota v. Gunesekera.*

(xiii) If the Magistrate thinks that the accused although guilty cannot adequately be punished by a Police Court, he may act under §192 *post.*

(xiv) If the facts admitted by the accused under §188, or proved at the trial, disclose an offence not forming the basis of the charge, then, if the offence disclosed is one specified in §§182 - 183 *ante,* the Magistrate can convict the accused of such offence. On the other hand, if the offence disclosed is not caught up under §§182 - 183, the Magistrate acting under §193(1) can convict the accused provided he frames a charge as required by law.

If the facts admitted or proved disclose an offence non-summarily triable by the Magistrate, and if he does not proceed either under §152(3) or §166 *ante,* he will discharge the accused under §191, and commence non-summary proceedings against him—§193(2).

3A. **Execution of the sentence.**—See *Chapter XXV. post.*

3B. **The Magistrate has no power to override the provisions of §330 *post* by reserving to the prosecution the right to institute**

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* As to cases where the Magistrate was held to have been biased.—See *p.* 52 *ante* and *Dias on the Evidence Ordinance p.* 221.

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§190 **fresh proceedings in respect of an offence falling under §§181, 182 where the accused has been acquitted by the Magistrate.**—*Canagasingam v. Bawa* (1931) 9 *T.L.R.* 29.

4. **Appeal.**—See §335(1)(*a*),(*c*),(*f*),(*g*), 337, 338 *post.*

As to the date from which the appealable time runs in the case of acquittals.—See *Kershaw v. Rodrigo.* As to the date from which the appealable time runs from a *conviction.*—See *R. v. Silva* (1916) 3 *C.W.R.* 235.

4A. **Release of offenders on probation.**—See *Chapter XXVI. post.*

5. **Forthwith.**—*Samsudeen v. Seethoris.*—" Forthwith " as used in §190 apparently means " forthwith after the verdict " and not " forthwith after the evidence has been recorded."

R. v. Podisinno.—" *Forthwith* " in §190 means " *immediately.*" —See *Avuneris v. Romanis, Rodrigo v. Fernando, P.C. Panadura* 9292, *Gomis v. Agoris, Mohamadu v. Punchibanda.*

Fernando v. Nikulan Appu.—" *Forthwith* " means " *within a reasonable time.*"

Soysa v. Anglo-Ceylon & General Estates Co.—" *Forthwith* " means " *without any delay that can possibly be avoided.*"

The Magistrate after taking the evidence . . . he shall forthwith . . .—This means the whole evidence relied upon—*Mohamadu v. Punchibanda.*

A failure to record a verdict " forthwith " is not a fatal irregularity.—See *Peris v. Silva, Peter v. Perera, Hamid v. Bamadu,* but see *Joseph v. Punchirala, Samsudeen v. Seethoris, Seneviratne v. Bodia.*

See §214 para. 3 *post,* §304 para. 3 *post.*

5A. **See §253B para. 5(*a*) *post.***

5B. **It would seem that a Magistrate may postpone a summary case after the proof has been closed in order to deliver his verdict.**—*Samsudeen v. Seethoris.*

6. **Case law.**—

Sittambaram v. Sinnapillai (1889) 8 *S.C.C.* 195.—Upon a complaint of robbery against the accused (which at this date was a non-summary offence), the Magistrate, after hearing the evidence, framed a charge of theft and of voluntarily causing hurt to the complainant and after trial discharged the accused. *Held,* that the appropriate order on the Magistrate's finding would have been an order of acquittal. Note, however, that in this case the Magistrate split up the offence of robbery into its component parts of theft and hurt in order to give himself jurisdiction to try the case. This is irregular.—See *Nagamma v. Themis Sinno* (1911) 1 *C.A.C.* 56 (*Two Judges*).

R. v. Pianeris (1894) 3 *N.L.R.* 45.—Where there are counter cases between the same parties, it is the duty of the Judge to hear each case in full and give judgment upon the evidence called therein for the prosecution and the defence. It would be irregular to import into one case the knowledge which he may have obtained in another case.—See *Venasy v. Velan* (1895) 1 *N.L.R.* 124.

Avuneris v. Romanis (1898) 3 *N.L.R.* 301.—Where the Magistrate heard the evidence for the prosecution and defence and did not proceed to deliver judgment, but recorded that he was not satisfied with the evidence taken and that further evidence should be taken, and that his successor in office should give judgment after hearing more witnesses,

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held, that this was a miscarriage of justice. The proper course would have been for the Magistrate to acquit the accused if he had any reasonable doubt as to his guilt. *C. f.* §429 *post*, and *Daniel v. Soysa infra.* §190

Gomis v. Agoris (1896) 2 *N.L.R.* 180 (dissented from in *Reid v. Kiriwanti* (1903) 7 *N.L.R.* 383, and see *R. v. Appuhamy* §188 para. 9 *ante*).—*Held*, that a Magistrate had no power *under the old law* to adjourn a summary trial in order to enable the complainant to make further inquiry and obtain further evidence against the accused. So, where a Magistrate, having found that the evidence adduced for the prosecution was insufficient to justify the conviction of the accused, adjourned the trial for further evidence, and, after hearing the same, convicted the accused, it was held that the conviction was bad.—See §188 *ante* and §289 *post*, and *Jonklaas v. Silva*, *Daniel v. Soysa infra.*

Rodrigo v. Fernando (1899) 4 *N.L.R.* 176, *Koch* 22.—It is important that a Magistrate should observe the requirements of §190 as to the duty of recording his verdict of acquittal or of guilty " forthwith " after hearing the evidence for the prosecution and the defence.

R. v. Podisinno (1914) 18 *N.L.R.* 28.—Where a Magistrate delivered his judgment and recorded his verdict more than six months after the close of the trial of the case, *held*, that, in view of §190 of the Code, the delay could not be regarded as a mere inocuous irregularity—*Venasy v. Velan* (1895) 1 *N.L.R.* 124, *Rodrigo v. Fernando* (*supra*), *R. v. Fernando* considered. " *Forthwith* " in §190 means "*immediately*", *per* Pereira, J. See also *Silva v. Silva* (1929) 10 *C.L.Rec. at p.* 108.

P.C. Panadura 9292 (1901) 5 *N.L.R.* 140.—Where a Magistrate, after hearing the case for the prosecution, deferred judgment as the parties desired one month's time to settle their differences out of Court, and, no such settlement having been arrived at, convicted and sentenced the accused, *held*, that such order was bad, in that §190 of the Code required that the verdict and sentence should be recorded " forthwith " after evidence taken.—See *R. v. Podisinno supra.*

Jonklaas v. Silva (1904) 7 *N.L.R.* 181.—Where one Magistrate of a Court commenced a trial, and, being disqualified by interest, another Magistrate, having joint powers along with him, recalled the witnesses already examined, read the evidence recorded, after which the witnesses were cross-examined, *held*, that the procedure was not irregular. *Held further*, that §190 authorizes a Magistrate to call a witness himself.—*Gomis v. Agoris* (*supra*) distinguished, see §429 *post*, and *Daniel v. Soysa infra.*

Peris v. Silva (1905) 3 *Bal.* 165.—" I am not prepared to hold that the mere fact of a Police Magistrate's judgment not having been pronounced " forthwith," as required by §190 of the Criminal Procedure Code, is fatal to its validity. It is at the most an irregularity of procedure which, if it has occasioned a failure of justice and not otherwise, may be a ground for reversing or altering the judgment of a competent Court. In the present instance I am not conviced that the error has occasioned a failure of justice . . ." *per* Wendt, J.

Eliatamby v. Sinnatamby (1905) 2 *Bal.* 20.—Where, in a summary case, a Magistrate, after trial, makes order " discharging " the accused because he disbelieves the evidence, such order is tantamount to an " acquittal " under §190 of the Code.—See §191 *post.*

338 *P.C. Kalutara* 7270 (1899) *Koch* 33.—§190 of the Code is an important provision of the law; non-compliance with its terms might result in convictions being quashed on the ground of irregularity.—See *Koch* 22.

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§190 *Peter v. Perera* (1908) 3 *A.C.R.* xiv.—The provisions of §190 of the Code requiring a Magistrate to record a verdict "forthwith" is only directory, and a non-compliance with it is an irregularity which does not necessarily make a conviction void.

Daniel v. Soysa (1908) 3 *A.C.R.* 50.—After the evidence for the prosecution and the defence had been led, counsel, in the course of his address, quoted a decision of the Supreme Court in a certain case from the same Police Court. The Magistrate was of opinion that those proceedings disclosed evidence which was material to the case then before him, and *ex mero motu* ordered a summons to be issued upon a witness and examined him. *Held*, that the Magistrate had power to do this, both under §§190 and 429 of the Code.—*Gomis v. Agoris* considered and not applied. *C.f. Tennekoon v. Dingiribanda* (1916) 3 *C.W.R.* 364, and *Avuneris v. Romanis supra.*

Abrew v. Siyatu (1915) 4 *B.N.C. at p.* 48.—Summary trial—Discharge of accused with liberty to the prosecutor to institute a fresh case before another Judge. *Held*, that such order amounted to an acquittal under §190 of the Code.

Babunhamy v. Silva (1915) 3 *B.N.C.* 29.—"The only serious point that is made against the case for the prosecution is that there is a 'possibility,' or perhaps a 'remote possibility' that the charge at least against one accused was false. Courts of law, in criminal as well as in civil matters, have to act, not on remote possibilities, but on the overwhelming balance of probabilities . . ."

Mohamadu v. Punchibanda (1915) 1 *C.W.R.* 196.—"§190 of the . . . Code provides that the Magistrate shall record his verdict 'forthwith' after taking the evidence for the prosecution and the defence and such further evidence, if any, as he may of his own motion cause to be produced. This means the whole evidence called for the defence . . ." *per* Shaw, J. Therefore, where thirteen accused were jointly charged with robbery and tried summarily and, at the close of the case for the prosecution, each accused was called upon in turn for his defence, and thereafter either convicted or acquitted without the evidence subsequently given on behalf of the other accused being heard, *held*, that the proceedings were irregular. "The accused who have been convicted are entitled to the benefit of the impression which might be made upon the mind of the Magistrate by the evidence called on the part of the other accused . . ." See *Don Charles v. William* (1915) 1 *C.W.R.* 23, *Karunaratne v. Appuhamy* (1918) 5 *C.W.R. at p.* 208.

R. v. Kandiah (1911) 14 *N.L.R.* 211.—It is competent for Courts of first instance to inquire, after the conviction of the accused persons before them, into the character and antecedents of the persons so convicted. Such inquiries should be held on oath.—See *Nikapota v. Gunesekera* (*infra*), *Daniel v. Othoman* (1916) 2 *C.W.R. at p.* 312, and *c.f. Corea v. Grigoris Appu* (1908) 11 *N.L.R.* 331.

Nikapota v. Gunesekera (1911) 14 *N.L.R.* 213 (*Two Judges*).—Evidence of the antecedent bad character of the accused, or a previous conviction, may be proved before Courts of first instance after conviction for the purpose of enabling the Court to regulate the punishment to be awarded to the accused.—See also Ordinance No. 2 of 1926, *R. v. Kandiah* (*supra*) and *R. v. Clementu Appu* (1916) 2 *C.W.R.* 1.

R. v. Sittambaram (1918) 20 *N.L.R. at p.* 266, 5 *C.W.R.* 287 (*Full Court*).—An accused, if he prefers it, may make an unsworn statement from the dock without giving evidence from the witness-box upon oath or affirmation.

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§190

Fernando v. Nikulan Appu (1920) 22 *N.L.R.* 1, 8 *C.W.R.* 65, 2 *C.L.Rec.* 135.—"*Forthwith*" defined to mean "*within a reasonable time.*" What is "*reasonable*" must depend upon the circumstances of each case.

Soysa v. Anglo-Ceylon & General Estates Co. (1916) 19 *N.L.R.* 374, 3 *C.W.R.* 281.—"*Forthwith*" means "*without any delay that can possibly be avoided.*"—See *R. v. Podisinno supra.*

Udesinhe v. Marsal (1920) 8 *C.W.R.* 145.—Acquittal of accused with the record "They are warned not to break the fence again." *Held*, that the law gave the Magistrate no power to make such an order.—See *Akbar v. James Appu*, *R. v. Babappu* §188 para. 9 *ante.*

Chelliah v. Samman (1921) 3 *C.L.Rec.* 37.—Conviction of accused.—Record stated that "The accused were warned and discharged." *Held*, that the Magistrate's duty after convicting the accused was to impose punishment according to law.

Sampanther v. Hinniappu (1916) 2 *C.W.R.* 109.—It is the duty of the Magistrate to have warrants issued to compel the attendance at the trial of the witnesses for the defence, and to adjourn the case for that purpose if necessary.—See §282 *post.*

Kershaw v. Rodrigo (1916) 3 *C.W.R.* 44.—On May 2, 1916, the Magistrate recorded "I acquit all the accused," but although he then stated orally, that he would give his reasons later, and in fact wrote his judgment, it was never delivered. *Held*, that the accused were "*acquitted*" on May 2. In the case of a "*conviction*" the "*judgment*" must necessarily follow the conviction in a separate pronouncement.—See *R. v. Silva* (1916) 3 *C.W.R.* 235.

Seyatu v. Appuwa (1896) 2 *N.L.R.* 212.—See §188 para. 9 *ante.*

Senaratne v. Lenohamy (1917) 20 *N.L.R.* 44, 4 *C.W.R.* 293.—See §191 para. 6 *post.*

Joseph v. Punchirala (1922) 4 *C.L.Rec.* 39. In a summary trial after the evidence had been taken, the Magistrate recorded "Guilty, I shall give my judgment later." The next day he delivered a judgment, but he had ceased to hold the office of Magistrate that day. *Held*, that the sentence passed was a nullity. *Held*, also that the Supreme Court had no power to impose sentence in such circumstances. Proceedings quashed with power to complainant to proceed afresh.

Kandy Municipal Council v. Ali (1923) 25 *N.L.R. at pp.* 87 – 88. —Where the trial of a summary case had been concluded, the accused being called upon for his defence and not having called any evidence, was acquitted, the Supreme Court in appeal set aside the acquittal and sent the case back to be dealt with as the Magistrate may deem fit. *Held*, that a conviction by the Magistrate without giving the accused a fresh opportunity for calling evidence was not illegal.

Hamid v. Bamadu (1926) 4 *T.L.R.* 145.—Police Court trial—interval of three days between termination of trial and pronouncement of verdict. *Held*, that the irregularity was not fatal to a conviction.

Samsudeen v. Seethoris (1927) 8 *C.L.Rec.* 146, 29 *N.L.R.* 10, —(*Rodrigo v. Fernando* 4 *N.L.R.* 176, *P.C. Panadura* 9292, 5 *N.L.R.* 140, *Peris v. Silva* 3 *Bal.* 165 criticised).—*Held, per* Dalton, J., that §190 does not enact that the verdict shall be recorded *forthwith* after taking the evidence. "For myself, reading §190, I have the greatest difficulty in following those decisions, as regards what that section enacts. It seems to me that the condition precedent to the recording of the verdict is the finding of the verdict, and not the taking of evidence. The taking

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§190 of the evidence may be well said to be a condition precedent to finding the verdict in a case in which evidence is led. I am, however, unable to agree that this section enacts that the verdict shall be recorded *forthwith* (*Qu.*—Does this mean "immediately after ?") after taking the evidence . . . The language of §190 seems to me to be so plain, that it does not require any reference to §214 to assist one to interpret it. On that interpretation of §190 as there has been in the case now before me, a recording of the verdict forthwith after the finding of the verdict, and without any time elapsing between the two, a point of law must fail. In any case I should also point out that no failure of justice has been occasioned." In this case the evidence was led on 11-2-27 and judgment was postponed until 12-2-27. On 12-2-27, the Police Magistrate again postponed the case until 14-2-27 on which day he pronounced his verdict of guilty and sentenced the accused.

Weerasinghe v. Wijeysinghe (1927) 29 *N.L.R.* 208, 8 *C.L.Rec.* 207.—May a Magistrate "acquit" an accused in a summary case before the case for the prosecution is closed ? "I am not prepared to assent to the contention that an order of acquittal made in such circumstances may be ignored and a fresh prosecution entered upon the same facts . . ." Where a Judge says "I acquit and discharge" an accused he must be taken to mean what he says . . . *per* Garvin, J. This case must be carefully distinguished from *Senaratne v. Lenohamy* (1917) 20 *N.L.R.* 44, 4 *C.W.R.* 293.

Dyson v. Khan (1929) 10 *C.L.Rec.* 128.—See §191 para. 6 *post.*

Gabriel v. Soysa (1930) 31 *N.L.R.* 314.—Summary case.—Accused "acquitted" by Police Magistrate after the examination of the complainant. *Held*, that this was an acquittal under §190 and not a discharge under §191, and that, therefore, the Attorney-General's sanction was necessary for an appeal. This case was followed in *Rao v. Kanagasundram* (1934) 11 *T.L.R.* 129.

Seneviratne v. Bodia (1933) 11 *T.L.R.* 48, 13 *C.L.Rec.* xli.—Delay in delivering judgment. Conviction quashed. New trial ordered.

Power to Magistrate to discharge accused at any time.

191. Nothing hereinbefore contained shall be deemed to prevent a Police Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so.

Police Magistrate.—§3 *ante.*

Discharge of accused.—See §§3, 151(1), 157, 196.

Record his reasons for so doing.—*c.f.* §§195, 196.

1. §191 should be compared with §209(2), 253(2) of the Indian Code, and §224 of the Code of 1883. Note that under the old law the word used is "*acquitting*" and not "*discharging*" as in §191.

2. **Scope of §191.**—See also §190 para. 3 (*j*) (vi) (xii) *ante.* §191 draws attention to the fact that a Magistrate need not wait until the termination of the case for the prosecution and the defence before bringing the proceedings to a close, where in his opinion the case for the prosecution has failed to bring guilt home to the accused. What §191 means is that nothing stated in §190 or any of the other sections in this Chapter is to be deemed to prevent a Magistrate from stopping a summary trial at any stage before judgment, if in his opinion the prosecu-

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tion has failed to establish guilt beyond reasonable doubt. If the Magistrate, without recording a verdict of acquittal or of conviction, and without adjudicating on the truth or falsity of the charge decides to stop the case, he acts under §191. Such an order is called a "discharge." §191 is meant to relieve the Magistrate from the necessity of going on with the trial when he is reasonably convinced that the charge cannot be sustained. The word "discharge" is defined by §3 *ante* to mean "the discontinuance of criminal proceedings against an accused, but does not include an acquittal." §191

The discharge under §191 must be distinguished from the order of "*discharge*" the Magistrate may pronounce under §151(1) *ante*, §196 *post*. Under the last section, in certain specified cases, the Magistrate may with the sanction of the Attorney-General stop the case without pronouncing any verdict. On the other hand §191 must also be distinguished from orders of acquittal pronounced under §§190, 194 and 195.—*Rosairo v. Silva*. When a Judge says that he acquits and discharges an accused, he must be taken to mean what he says.—*Weerasinghe v. Wijeysinghe*, *Senaratne v. Lenohamy*.

Orders of acquittal lawfully pronounced under §§190, 194, 195 operate as a bar to the future prosecution of the accused in respect of the identical offence for which he was acquitted, so long as such acquittal remains in force.—See §§330, 331 *post*. Orders of discharge under §§191, 196 on the other hand do not operate as acquittals—see §3 *ante*. Hence, such orders cannot be pleaded as a bar to the future prosecution of the offender in respect of the same offence. It must be noted, however, that where a Magistrate "*discharges*" an accused, whether under §151(1), 191 or 196, so long as such order remains in force, he cannot himself reopen his order—see para: 3 *infra*. It is, however, open to the prosecution to present a fresh plaint against the accused in a fresh proceeding, or for the Supreme Court in appeal or revision to set aside the Magistrate's order, and direct that he should proceed with the case.

The mere fact that a Magistrate describes his order as being one of "discharge" does not prove conclusively that it is an order of "*discharge*" and not an "*acquittal*." In *Senaratne v. Lenohamy* the *Full Court* has construed the words "*at any previous stage of the case*" to mean "*before the whole body of evidence for the prosecution has been led.*" It follows, therefore, that where a Magistrate "*discharges*" an accused after the case for the prosecution is closed, but before the case for the defence is opened on the ground that he disbelieves the evidence, such an order might amount to an acquittal, although the Magistrate has thought fit to call it a "*discharge*"—see *Eliatamby v. Sinnatamby*, *R. v. Appuwa Veda*, *Dyson v. Khan*, *Gabriel v. Soysa*. Where a Magistrate refers the complainant to a civil remedy and discharges the accused, the order would be one made under §191—*Suppiah v. Lokubanda*, *Schokman v. John*; but a Magistrate who desires a complainant to go before the Village Tribunal ought to act under the Village Communities Ordinance No. 9 of 1924 and not act under §191—*R. v. William*.

3. **Discharge v. Acquittal.**—See §§3, 151(1), 190; 194, 195, 196, 330-331. An order of "*discharge*" does not operate as an "*acquittal*" and give rise to a plea of "*autre fois acquit*."—See 204 *P. C. Panadura* 55210, *In re Vellavarayam*, *R. v. Podisinno*, *Davidson v. Appuhamy*, *Suppiah v. Lokubanda*, *Schokman v. John*, *Senaratne v. Lenohamy*, (*Full Court*), *Daniel v. Pillai*.

The mere fact that the Magistrate has described his order as being a "*discharge*" does not prove that the order, is a "*discharge*" under

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§191 §§151(1), 191 or 196 and not an "*acquittal.*" Thus, if the order is made because the Magistrate disbelieves the case for the prosecution it would amount to an acquittal, although he may call it a "discharge"—*Eliatamby v. Sinnatamby.* Similarly, if the order is made after the case for the prosecution is closed, the order may amount to an "*acquittal*" under §190—see *Senaratne v. Lenohamy.* See also the cases cited under §§151, 190, 194-196 and *Dyson v. Khan.*

An order of "*discharge*" binds the Magistrate, who may not himself reopen his order, so long as it stands—204 *P.C. Panadura* 55210, *Weerasinghe v. Wijeysinghe, In re Vellavarayam, Eliatamby v. Sinnatamby, Davidson v. Appuhamy, Suppiah v. Lokubanda, Mourant v. Seera, Daniel v. Pillai,* (§194 para. 10 *post*). The Attorney-General has no power to order the Magistrate to reopen a summary proceeding as in the case of a "discharge" in a non-summary inquiry—see §§390, 391 *post*—*In re Vellavarayam, Eliatamby v. Sinnatamby, Davidson v. Appuhamy.* It is open, however, to the prosecution to initiate fresh proceedings in a new case based upon a new plaint—see 204 *P.C. Panadura* 55210, (1899)1 *Tam.* 59, and the decision of the *Full Court* in *Senaratne v. Lenohamy.* Alternatively, the prosecution may appeal to the Supreme Court, which may set aside the Magistrate's order, and direct him to proceed with the trial—*Guneratne v. Barnado.* The sanction of the Attorney-General is not necessary—*Silva v. Rahim.*

See also §190 para. 3 *ante* and §§283-286 paras. 2 and 4 *post.*

4. **He shall record his reasons for so doing.**—This provision is of importance as it enables the Supreme Court and the parties to ascertain whether the Magistrate in effect meant to acquit the accused, or merely to discharge him. *C.f.* §§195, 196 *post,* and see *Senaratne v. Lenohamy.*

5. **Compounding offences and "discharges."**—See 114 *P.C. Colombo* 6149 and §195 *post.*

5a. See §253B para. 5(*b*) *post.*

6. **Case law.**—

204 *P.C. Panadura* 55210 (*S.C.M.* March 16, 1917).—The accused was charged with committing an offence under the Forest Ordinance upon a plaint presented under §148(1)(*b*) *ante.* On the trial date the complainant was absent, and the Magistrate recorded "Complainant absent—accused discharged." Later the Magistrate reinstated the case, but it was discovered that in accordance with the ruling in *Davidson v. Appuhamy* (*infra*) that the Magistrate had no power to reopen his order. Thereafter the prosecution presented a fresh plaint against the accused, but another Magistrate of the same Court refused to entertain it on the ground that the first order amounted to an acquittal of the accused of the charge. *Held,* that this was not so. The proceedings having been initiated under §148(1)(*b*) the discharge could only have been lawfully pronounced under §191 and not under §194 *post,* and accordingly, such order of discharge did not amount to an acquittal, and that it was the duty of the Magistrate to entertain the plaint and try the case.

In re Vellavarayam (1903) 7 *N.L.R.* 116, followed in *Eliatamby v. Sinnatamby,* referred to in *R. v. Podisinno, R. v. Appuwa Veda, Davidson v. Appuhamy, Senaratne v. Lenohamy infra.*—The discharge of an accused under §191 in a summary case is final, and so long as such order stands it will prevent the Magistrate himself reopening the proceedings. Such an order of discharge, however, does not amount to an acquittal,

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so as to bar a new prosecution for the same offence. The Attorney-General cannot order a Magistrate to reopen a case in which the accused has been discharged under §191—*per* Wendt & Middleton, JJ. §191

Guneratne v. Barnado (1904) 2 *Bal.* 32, referred to in *Senaratne v. Lenohamy infra.*—An appeal lies against an order of discharge under §191. *C.f.* (1899) *Koch* 3, 64.

Eliatamby v. Sinnatamby (1905) 2 *Bal.* 20, following *In re Vellavarayam supra* —" . . . It has been suggested that the " discharge " in the present case is an order under §191 . . . That section does not give the power to a Magistrate to discharge an accused capriciously, especially after the trial has once commenced. The discharge under it must, in my opinion, be a discharge authorized by law, *e.g.*, a discharge in the circumstances mentioned in §196, or in §151(1), or a discharge consequent on an acquittal in the circumstances mentioned in §194 or in §195. The present discharge is manifestly not an order under any one of these sections. It can only be read as an acquittal under §190. No doubt, that section speaks of an acquittal after the taking of evidence for the prosecution and the defence ; but clearly an order of acquittal where the Magistrate disbelieves the evidence for the prosecution and thinks it unnecessary to call upon the accused for his defence would be equally an order of acquittal under that section . . . What I have said thus far as to the effect of an order of discharge in the present case is not to be taken as a binding decision, but as a mere expression of opinion . . . In the case of *Vellavarayam* . . . this Court held in unmistakable terms that the discharge of an accused under §191 . . . by a Police Magistrate in a case summarily triable by him is final, and so long as it stands, it would prevent the Magistrate from reopening the case, even at the instance of the Attorney-General. Whether, therefore the order of discharge in the present case . . . is an order under §191 . . . or, as I think it is, an order that is tantamount to an order of acquittal under §190, the present proceedings cannot stand . . . " *per* Pereira, J. See *R. v. William infra.*

R. v. Podisinno (1907) 3 *Bal.* 206, 3 *A.C.R. ii,* referred to in *Davidson v. Appuhamy infra.*—A discharge under §191 is not an acquittal, and is no bar to a further prosecution for the same offence.

R. v. William (1911) 14 *N.L.R.* 345.—A Magistrate who desires to refer a case to a Village Tribunal should act under §34 of the Village Committees Ordinance 1889. He should not discharge the accused under §191.

R. v. Appuwa Veda (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1.—" A discharge under §191 may, as Pereira, J. holds in *Eliatamby v. Sinnatamby* (*supra*) operate under §§151(1), 194 and 195 . . . " *per* Middleton, J.

Davidson v. Appuhamy (1916) 19 *N.L.R.* 57, 2 *C.W.R.* 144, referred to in *Senaratne v. Lenohamy infra.*—A discharge under §191 does not operate as an acquittal. Although such order cannot be availed of in support of a plea of *autre fois acquit* in the event of a fresh prosecution, it is final, and determines the prosecution in which it was made, and the Magistrate cannot reopen the proceedings in the same case. *In re Vellavarayam, R. v. Podisinno* (*supra*) considered.

Suppiah v. Lokubanda (1916) 3 *C.W.R.* 127, referred to in *Schokman v. John* (*infra*) and *Jinasena v. Rodrigo* (1920) 2 *C. L. Rec.* 99.—Where the Magistrate referred the complainant to his civil remedy and discharged the accused, *held*, that such order did not amount to an acquittal. " The order at the most is one made under §191 of the . . . Code. It

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§191 is clear that an order of discharge made under that section does not amount to an acquittal, though it is a final order with regard to the proceedings . . . " *per* de Sampayo, J.

Schokman v. John (1917) 4 *C.W.R.* 93.—An order referring a complainant to his civil remedy coupled with the discharge of the accused is not an acquittal. *Suppiah v. Lokubanda* referred to.

Mourant v. Seera (1917) 4 *C.W.R.* 172—see §194, para. 11 *post.*

Senaratne v. Lenohamy (1917) 20 *N.L.R.* 44, 4 *C.W.R.* 293, referring to *Guneratne v. Barnado, Davidson v, Appuhamy, In re Vellavarayam R. v. Podisinno supra. Full Court. Held, per* Wood Renton, C.J. and de Sampayo, J., Ennis, J. *dissenting,* that the discharge of an accused under §191 of the Code is no bar to the institution of fresh proceedings in the same case. " The Solicitor-General appeals against this order contending that a discharge of an accused person without trial under §191 . . . is not an ' acquittal,' and is therefore, no bar to the institution of fresh proceedings in the same case. The question referred . . . for consideration by a Bench of three Judges is whether or not that contention is correct. In my opinion it is. In §3(1) of the . . . Code, ' discharge ' is defined as meaning ' a discontinuance of criminal proceedings against an accused,' but as not including an ' acquittal.' §§190 and 191 indicate the course to be followed by a Police Magistrate in summary cases. He has to hear the evidence on both sides, and such further evidence, if any, as he may think fit of his own motion to cause to be produced, and thereafter either acquit or convict the accused (§190). But express power is given him ' at any previous stage of the case ' to ' discharge ' the accused on recording his reasons for doing so . . . I cannot think that the meaning of §§190 and 191 is really obscure. The term ' discharge ' in the latter section has to be interpreted in the light of the definition in §3(1). It imports a final discontinuance of the proceedings from which the accused is discharged, but ' does not include an acquittal,' and is no bar to the institution of fresh proceedings if this should be considered advisable . . . " *per* Wood Renton, C.J. " I think that *R. v. Podisinno* was rightly decided and that for the reasons stated in that decision a discharge under §191 of the . . . Code will not prevent the accused person from being legally charged again for the same offence in fresh proceedings. The mere use of the word " discharge," however, will not necessarily amount to an order under that section. Where, for instance, the proceedings are such as to require the Magistrate to record a verdict of acquittal under §190, an order purporting to be a discharge will in effect be a verdict of acquittal, and will bar further prosecution for the same offence. It will be noticed that §191 provides that the Magistrate shall record his reasons for discharging the accused, and this, I take it means that the Magistrate should give his reasons for not deciding on the evidence and arriving at a definite verdict. The words " at any previous stage of the case " to my mind import that all the evidence for the prosecution, as contemplated in §190, have not been taken. But if the prosecutor has put before the Court all the evidence which is available to him, or which he is allowed a reasonable opportunity to produce, the accused will be entitled to demand a verdict at the hands of the Magistrate instead of an inconclusive order of discharge, so that he may not be vexed again . . . " *per* de Sampayo, J. Note the dissentient judgment of Ennis, J. This case must be carefully distinguished from *Weerasinghe v. Wijeysinghe infra.*

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§192

(1899) 1 *Tam.* 59.—If a prosecution is discontinued by the discharge of the accused, it can be renewed; for the discharge does not put an end to the prosecution. The prosecution being renewable as to the whole of the charge or charges from which the accused may have been discharged, it follows that the prosecution can be renewed as to a part of such charge or charges, *e.g.*, on a charge of robbery in which the accused has been discharged, the prosecution may be renewed on the charge of theft alone, or of hurt alone.

114 *P.C. Colombo* 6149 (*S.C.M.* February 2, 1917).—The police charged the accused with committing theft, which is a non-compoundable offence. The Magistrate discharged the accused holding that the "complainant, *i.e.*, the aggrieved party moves to withdraw the case." *Held,* that the conplainant was the prosecuting public officer, and that the order of discharge was irregular. See also §§195, 290 *post.*

Silva v. Rahim (1925) 26 *N.L.R.* 462—An order under §191 is appealable without the sanction of the Attorney-General. *C.f. Rajapakse v. Wansa* (1926) 8 *C. L. Rec.* 26 ; 4 *T.L.R.* 95.

Weerasinghe v. Wijeysinghe (1927) 29 *N.L.R.* 208 ; 8 *C. L. Rec.* 207—See §190 para. 6 *ante.* This case must be carefully distinguished from *Senaratne v. Lenohamy supra.*

Dyson v. Khan (1929) 10 *C. L. Rec.* 128.—The difference between §190 and §191 adverted to. "It was argued . . . that a Magistrate was entitled to make an order under §191 if no evidence was called for the defence. I am unable to accept that contention. I am of opinion that an accused is entitled to an order of acquittal if at the close of the case for the prosecution the Magistrate is of opinion that the accused is not guilty of the offence with which he is charged. It would be grossly unfair to an accused to place him in jeopardy of being tried again just because a Magistrate considers the evidence for the prosecution so unreliable that he does not call upon the accused for his defence." *Eliyatamby v. Sinnatamby* (1905) 2 *Bal.* 20 ; *Senaratne v. Lenohamy* (1917) 20 *N.L.R.* 44, applied.

Gabriel v. Soysa (1930) 31 *N.L.R.* 314 followed by *Rao v. Kanagasundram* (1934) 11 *T.L.R.* 129.—See §190 para. 6.

Daniel v. Pillai (1930) 8 *T.L.R.* 36.—The Magistrate discharged the accused of an offence. Another Magistrate recharged the accused for the same offence in the same case and after trial convicted him. *Held,* that this was irregular. The proper procedure was to file a fresh plaint and try the accused in another case.

Rosairo v. Silva (1933) 34 *N.L.R.* 365.—Plaint filed under §148(1)(*b*) Complainant absent on trial date. The Magistrate discharged the accused. *Held,* this was an order under §191 and not one under §194, and that the order could not be vacated. (Obviously complainant's remedy was to file a new plaint in a new case and proceed *de novo*).

Commitment for trial before higher court.

192. (1) If the Magistrate after taking the evidence adduced for the prosecution and the defence is of opinion that the accused is guilty of an offence which cannot be adequately punished by a Police Court, he shall not convict the accused but shall forward the record to the Attorney-General, remanding the accused to custody or admitting him to bail, as he thinks proper.

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§192 (2) The Attorney-General may on receipt of the record exercise any of the powers vested in him by Section 158 (1) or may send the record back to the Police Court with directions to the Magistrate to proceed with the trial, and the case shall thereafter be dealt with accordingly.

Magistrate.—§3 *ante.*

Evidence.—See §3 Evidence Ordinance 1895.

Evidence adduced for the prosecution and the defence.—See §§189-190 *ante.*

Offence.—§3 *ante.*

Police Court.—§3 *ante.*

Adequately punished by a Police Court.—See §§15, 16, 17, 152(3), 166 *ante.*

Convict the accused.—See §188(1), 190 *ante.*

Attorney-General.—§3 *ante.*

Forward the record to the Attorney-General.—See §§157, 158 *ante* and §§388 *et seq. post.*

Remanding the accused to custody.—See §289 *post.*

Bail.—See *Chapter XXXVI. post.*

1. §192 should be compared with §349 of the Indian Code, and with §§225, 237, 247 of the Code of 1883.—See *R. v. Mathes.*

2. **Scope of §192.**—See §190 para. 3(*j*) (*xiii*) *ante* and §193 para. 2 *post.* Under §152(3) *ante* a Magistrate who is also a District Judge is empowered to try summarily offences which ordinarily would be triable by a District Court. Moreover §166 *ante* further empowers a Magistrate summarily to try a District Court offence with the consent of the accused. It will be observed that both those sections refer to the *summary* trial of *non-summary* offences. §192 *deals with summary trials only.* It contemplates a case where at the end of a summary trial, it is found that the offence is one which needs a heavier punishment than it is lawful for the Magistrate to impose, owing to the aggravated nature of the offence, &c. In such a case the Magistrate does not convict the accused, but forwards the record to the Attorney-General as in a non-summary case—see §157(1) *ante.* He will at the same time make order that the accused is to be remanded until the record is returned, or will admit him to bail. On receipt of the record, the Attorney-General has the power to treat the case as if it were a non-summary one sent up for "instructions," and he may act under §158(1) *ante.* If the Attorney-General is of opinion that the case is one which should be dealt with by the Magistrate himself, and not committed to a higher Court, he will return the record and direct the Magistrate accordingly, and thereafter, the Magistrate will convict the accused.

The case of *Andris v. Appuhamy* makes clear the distinction which must be drawn between §192 on the one hand, and §§152(3) and 166 on the other. See also *R. v. Dias Sinno.*

When a Magistrate acts under *Chapter XVIII.* of this Code, *i.e.*, when he tries cases summarily, as a general rule nobody, except the Supreme Court, has any right to interfere with the course of his proceedings during the trial—(1899) *Koch* 41. Thus, §390 *post* empowers the Attorney-General at any stage of any case before a Magistrate whether summary or non-summary to require the Magistrate to transmit the record of the case to him. The use of the words "*inquiry or trial*" in §390(1) should be contrasted with the word "*inquiry*" used in §390(2).

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Whereas the Attorney-General can call for the record in any summary case from the Magistrate, he may not issue instructions under §390(2) in the case of an offence triable summarily. §192

Under §192 and §193(2) the Magistrate is made the sole judge (subject of course to review by the Supreme Court) of deciding whether an offence triable summarily should be dealt with non-summarily.

It should be noted that under Ordinance No. 2 of 1926 certain summary offences might become non-summarily triable by reason of the fact that the accused has previous convictions against him.—See §193(2) para. 2 *post.*

In *Jainadeen v. Geomonis* (1919) 21 *N.L.R.* 95 it was held that it was irregular for a Magistrate to arrogate to himself summary jurisdiction under §152(3) *ante* after dealing with a case non-summarily, especially after the record had been submitted to the Attorney-General for "instructions." It will be seen that under §192 the Magistrate can lawfully "proceed with the trial" and deal with the case, after the Attorney-General has refused to exercise his powers under §158(1). The difference that exists between the rule formulated in *Jainadeen v. Geomonis* and the rule in §192 is plain. In the case of §192 the Magistrate has concluded the trial and "*is of opinion that the accused is guilty,*" hence, the submission of the case to the Attorney-General cannot prejudice the accused in any way. If the Attorney-General refuses to commit the case to a higher Court, all that is left for the Magistrate to do is to convict the accused. In the case of *Jainadeen v. Geomonis* the position is essentially different. The case has been dealt with by the Magistrate not as a Judge, but as an investigating officer. The record has been submitted to the Attorney-General for directions as to the conduct of the non-summary inquiry, and the Magistrate's mind may in the course of the investigation have been brought to bear on a great many collateral facts prejudicial to the accused. In such circumstances it would be manifestly unfair to permit the Magistrate to discard his rôle of investigating officer, and assume the rôle of Judge after the Attorney-General has refused to commit the case for trial.

3. **Powers of the Attorney-General.—**

(*a*) Powers under §158(1) :—

i. The accused may be ordered to be discharged.

ii. The accused may be ordered to be committed for trial.

iii. The Magistrate may be directed to record further evidence. *C.f.* §387 *et seq. post.*

(*b*) If the Attorney-General refuses to exercise any of the above mentioned powers, but returns the record to the Magistrate with directions to proceed with the case, the Magistrate will give effect to such directions—§192(2).

Qu.—May the Attorney-General under §192(2) direct a Magistrate to take non-summary proceedings in a case needing his sanction without forwarding a sanction to prosecute along with his direction under §192(2) ? It is submitted that the Attorney-General's direction under §192(2) is equivalent to a sanction, and that no further sanction is required.

4. **Case law.—**

Andris v. Appuhamy (1900) 1 *Br.* 42.—Where a Magistrate in the course of trying a *summary* offence formed the opinion that the case was one which could not adequately be punished summarily, and thereupon arrogated to himself the powers created by §152(3) *ante*, *held,* "It is only where an offence appears to be one triable by a District

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§192 Court, and not summarily by a Police Court, that the powers mentioned in §152(3) of the . . . Code come into play. What the Magistrate ought to have done was, to have turned to §192, which is intended to meet a case like this, and provides that if the Magistrate after taking the evidence adduced for the prosecution and the defence, is of opinion that the accused is guilty of an offence which cannot adequately be punished by a Police Court, he shall not convict the accused, but shall forward the record to the Attorney-General. The conviction must be quashed and the record forwarded to the Attorney-General" *per* Bonser, C. J.

R. v. Mathes (1889) 8 *S.C.C.* 199—§§225, 237, 247 of the Code of 1883 considered. *C.f. Wickremasooriya v. Appusinno* (1895) 1 *N.L.R.* 298.

(1899) *Koch* 41—" . . . Our Code of Criminal Procedure requires a Magistrate to inquire into a (summary) charge when it is presented to him and to bring it to a conclusion without reference to anyone except the Attorney-General, and then only in the circumstances indicated in §192 of the . . . Code . . . " *per* Withers, J.

R. v. Dias Sinno (1908) 11 *N.L.R. at p.* 194—§192 considered.

What to be done when different offence disclosed in course of proceedings.

193. (1) If from the facts admitted or proved it appears that the accused has committed an offence within the jurisdiction of the Magistrate to try other than that specified in the charge, summons, or warrant, the Magistrate may convict the accused of such offence, but before he so convicts he shall frame a charge and shall read and explain it to the accused, and such of the provisions of Chapter XVII. as relate to altered charges shall apply to the charge framed under this section.

(2) If from the facts admitted or proved it appears at any stage of the proceedings that the accused has committed an offence not within the jurisdiction of the Magistrate to try, the Magistrate shall not convict but shall stay further proceedings under this chapter and commence the proceedings afresh under Chapter XVI.

Facts.—See §3 Evidence Ordinance 1895.

Facts admitted.—See §188(1) *ante* and §335(1)(c).

Facts proved.—See §§189-190 *ante.*

Proved.—See §3 Evidence Ordinance 1895.

Offence.—§3 *ante.*

Within the jurisdiction of the Magistrate to try.—See §§9,10, 11 *ante*, §§135 *et seq.*, §§152(3), 166 *ante.*

Magistrate.—§3 *ante.*

Charge.—See §§167-185 *ante*, §187 *ante*, and *c.f.* "**Complaint**" §3 *ante.*

Summons.—See *Form* 1 *Schedule III. post*, and §§44-49, 62-65 *ante* and §187 *ante.*

Warrant.—See *Forms* 3, 4 *Schedule III. post* and §§50-58, 62-65, 187 *ante.*

Conviction of accused.—See §§188(1), 190, 192 and *Chapters XXIV., XXV., XXVI. post.*

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Framing charge.—See §187 *ante.*

Reading and explaining charge to accused.—§187 *ante.*

Alteration and amendment of charges.—§§172-177 *ante.*

Non-summary procedure.—*Chapter XVI. ante.*

1. §193(1) should be contrasted with §226 of the Code of 1883,* while §193(2) should be compared with §238 of that Code.

2. **Scope of §193.**—§§182-183 *ante*, entitle a trial Judge to convict an accused of an offence which has not been charged and which the facts proved before him at the trial show that the accused has committed, without the necessity of framing a fresh charge, or drafting a fresh indictment. Thus a man charged with robbery under §380 of the Penal Code, may be convicted of causing hurt under §314 of the Penal Code.

§193 deals with a different state of facts. The distinction which exists between §§182-183 on the one hand, and §193 on the other, is adverted to in *Marley v. Appuhamy.* If during a summary trial the Magistrate finds that although the charge made against the accused cannot be sustained on the facts admitted or proved, but nevertheless, that he is guilty of an offence for which he may lawfully be convicted under §§182-183, it is open to the Magistrate to convict the accused accordingly. On the other hand, if from any facts admitted by the accused when charged under §188(1), or proved at the trial, the Magistrate finds that the charge made cannot be sustained, but that the accused, nevertheless, has committed some other offence for which he should be convicted, but which is not the subject of the charge before him or within the purview of §§182-183, in such a case, §193(1) empowers the Magistrate to convict the accused of such offence, provided he "frames a charge" and "reads and explains" it to the accused before he convicts him. To take an example. X is charged with committing theft. At the conclusion of the trial, the Magistrate finds that the evidence does not justify a conviction for theft, because the accused acted under a *bona fide* colour of right; but, nevertheless, the Magistrate finds on the proved facts that the accused at that time and place caused hurt to Y. Under §§182-183, it is not open to the Magistrate to acquit X on the charge of theft and convict him of causing hurt. He may, however, act under §193(1). He can frame a formal charge as laid down by §187(1) *ante*, read and explain it to the accused, and call upon him to plead. The accused has the right to ask for an adjournment in order to enable him to meet this new charge—see §§172-177, and to demand that the witnesses should be tendered to him for further cross-examination, &c.—See *Fernando v. Fernando.* It should be remembered that the powers under §193(1) can only be used in the case of offences which the Magistrate may lawfully try summarily. The keynote of the sub-section is that no prejudice can possibly be caused to the accused by a conviction, under §193(1) if the procedure has been followed, and moreover, it saves the necessity of having two trials. It should also be noted that when the Magistrate proceeds to act under §193(1) he must "*frame*" a charge, *i.e.*, he must write out a formal charge under §187(1) in due form. When a Magistrate acts under §193(1) he has no alternative method of framing the charge as is provided in §187(2) or the *proviso* to §187.

See also §190 paras. 2, 3(*j*)(*xiv*) *ante.*

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*See *Saram v. Weera* (1895) 1 *N.L.R.* 95.

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§193 When in the course of a summary trial, whether from the facts admitted by the accused under §188(1) or duly proved, the Magistrate finds as in *Weerasinghe v. Ismail* that the accused has committed an offence which it is beyond his power to try summarily (§§152(3), 166 included), the accused cannot be convicted, but the Magistrate must stay further proceedings under *Chapter XVIII.*, and commence non-summary proceedings under *Chapter XVI. ante.*—§193(2)—*Perera v. Babuchiya.* See §190, para. 3(*j*)(*xiv*), and the Introduction to *Chapter XVI.* para. 3(B) *ante* and *Aratchy v. Siddappu.*

The provisions of §193(2) should be contrasted with §192 *ante.* The latter section deals with summary offences which the Magistrate thinks cannot adequately be punished by him. Accordingly he submits the record to the Attorney-General, who, if so advised, has the power either to direct the committal of the accused—*R. v. Thomis*; or that the case be tried to a conclusion by the Magistrate. §193(2) deals with the case where a non-summary offence is disclosed in the course of a summary trial.

It is improper for the Magistrate to split up an offence into its component parts so as to vest himself with summary jurisdiction.—See *Nagamma v. Themis Sinno, Nadan v. Assari, Samaranayaka v. Thabrew Sirineris v. James, Baiya v. Nikulas, Abilinu v. Fernando, Ariapody v. Seenitamby, Silva v. Andris, Gaffoor v. Carolis,* 1489 *P.C. Galle* 842.

In this connection, it should be remembered that §6 of the repealed Habitual Criminals Ordinance No. 32 of 1914 provided that where an accused is charged with committing a "crime," and previous convictions are proved against him, the Magistrate is to stay summary proceedings and to take non-summary proceedings. The Supreme Court has held that in such cases the Magistrate has no jurisdiction to act even under §§152(3) or 166 *ante,* but that his duty is to commence non-summary proceedings at once.

If in the course of a non-summary inquiry the evidence discloses that the offence committed by the accused is one summarily triable by him, it is lawful for the Magistrate to discharge the accused from the non-summary proceedings, and thereafter to try him summarily—*Sirineris v. James, Sinniah v. Sinniah.*

The question was raised in *Rajah v. Gopalan* (1930) 32 *N.L.R.* 115 whether under the Reconvicted Criminals Ordinance No. 2 of 1926 it was open to a Magistrate who was also a District Judge and acting under §152(3) of this Code to try a reconvicted criminal summarily and award the enhanced punishments provided by Ordinance No. 2 of 1926.

3. **Facts admitted or proved.**—"*Facts admitted,*" *i.e.*, by the accused under §188(1), when called upon to plead to the charge. *C.f.* §335(1)(*c*) *post.*

"*Facts proved,*" *i.e.*, proved during the trial. A fact is said to be "*proved*" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists—§3 Evidence Ordinance 1895.

4. **Within the jurisdiction of the Magistrate to try.**—A Magistrate's summary jurisdiction—§§9-11, 135 *et seq. ante.* A Magistrate's jurisdiction to try summarily offences which ordinarily are non-summarily triable—§152(3), 166 *ante.*

5. **Frame a charge.**—See §187 paras. 2, 3 *ante.*

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6. **Case law.—** §193

Nagamma v. Themis Sinno (1911) 1 *C.A.C.* 56 (*Two Judges*)—referring to *Christian v. Pedris Appu* (1893) 2 *C.L.R.* 197, *Saram v. Weera* (1895) 1 *N.L.R.* 95, *Wickremasooriya v. Appusinno* (1895) 1 *N.L.R.* 298, *Siyadoris v. Gunawardene* (1895) 2 *N.L.R.* 65, *Sirineris v. James* (1901) 5 *N.L.R.* 93, *Baiya v. Nikulas* (1906) 1 *A.C.R.* 49, *Silva v. Andris* (1907) 10 *N.L.R.* 203, *Ariapody v. Seenitamby* (1907) 10 *N.L.R.* 205, *Abilinu v. Fernando* (1907) 2 *A.C.R. xiii*, *Sinniah v. Sinniah* (1906) 1 *S.C.D.* 39—" . . . The accused were charged under §§380, 382 of the Penal Code, and the facts alleged in the complaint if true, would have supported a conviction under the graver of those charges. The Magistrate, however, proceeded under §380, dealt with the case summarily, and sentenced the accused . . . It is now argued, that he was wrong in so doing, and that if he had disbelieved the facts which would have supported a conviction under §382, he should have discharged the accused under that section before he proceeded to try them summarily under §380 . . . If the matter had been *res integra*, it would have taken a great deal to have persuaded me, that it was my duty to set the conviction aside, and to order the accused to be tried non-summarily for the offence under §382, but the authorities are too strong for me. There is a long series of cases—some of them are decisions of a Bench of two Judges—in which this Court in similar circumstances has considered that it was its duty to set the conviction aside, and remit the case for a non-summary trial. I feel myself bound to follow these decisions. I do so with considerable reluctance, especially as I believe appeals of this character are not always in the interests of the appellant, and sometimes results in the unfortunate appellants receiving a more severe sentence than was originally awarded . . . " *per* Lascelles, C. J. " I entirely agree. I referred the case to two Judges in the hope that some means might be found perhaps, for putting a position of this kind on a more reasonable footing. Owing, however, to the weight of authority against us, I agree that we must bow to it, set the conviction aside, and send the case back for non-summary proceedings, and the result may be even more disastrous to the unfortunate appellants than it has been at present " *per* Middleton, J. See *Gunawardene v. Samarakoon* (1920) 21 *N.L.R.* 411, 7 *C.W.R.* 169. *Appuhamy v. Siddappu* (1923) 24 *N.L.R.* 394. *Samarasinghe v. Arumugam* (1923) 2 *T.L.R.* 52.

Nadan v. Assari (1916) 2 *C.W.R.* 104, 4 *C.A.C.* 75.—Where a person is dishonestly induced to deliver property as the result of cheating, the offence falls under §403 of the Penal Code, and not under §400. Accordingly such offence cannot be dealt with summarily by a Magistrate. *Nagamma v. Themis Sinno* followed. " There is some inconvenience in the application of the law . . . but I do not feel justified in not following these cases, although some day it may be advisable that they should be reconsidered by a fuller Court . . . " *per* Shaw, J.

Samaranayaka v. Thabrew (1917) 4 *C.W.R.* 331.—The charge against the accused was that he had used criminal force upon a public servant while in the execution of his duty (§344 *P.C.*). It was contended in appeal that the offence disclosed was one of hurt under §323 of the Penal Code, and that accordingly it was not open to the Magistrate to choose the lesser offence and try it summarily when the evidence disclosed a non-summary offence. *Held*, " I have come with great reluctance to the conclusion that the . . . objection must prevail . . . There is clear authority for the proposition that the lesser offence

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§193 under §344 cannot be selected for trial, while the graver one under §323 is still outstanding—see *Nagamma v. Themis Sinno* (*supra*). I entirely share the regret expressed by . . . Lascelles, C. J. in the . . . case cited that it is the duty of this Court in such circumstances to interfere. Preliminary objections of this character are very seldom in the interests of the accused, but they are unfortunately entitled to prevail in law . . . " *per* Wood Renton, C. J.

Sirineris v. James (1901) 5 *N.L.R.* 93.—A lesser offence cannot be selected for trial, while the evidence discloses a graver one. If on a complaint charging a non-summary offence, the Magistrate disbelieves part of the case, it is not open to him to try the accused summarily for any minor offence which is left. The proper course is to discharge the accused, and thereafter take summary proceedings.—*per* Moncreiff, J.

Baiya v. Nikulas (1906) 1 *A.C.R.* 49.—In the course of a summary trial if the evidence discloses a graver offence which is non-summarily triable, it is not competent for the Magistrate to select the lesser offence for trial. *Sirineris v. James* (*supra*) followed, and see *Banda v. Hamy* (1907) 3 *Bal.* 256.

Abilinu v. Fernando (1907) 2 *A.C.R. xiii.*—Where the Magistrate finds that two of the accused committed theft of a bull, and all of them slaughtered it, *held*, that the jurisdiction of the Magistrate to try the offenders was ousted, in accordance with the ruling in *Baiya v. Nikulas* (*supra*).

Ariapody v. Seenitamby (1907) 10 *N.L.R.* 205, following *Baiya v. Nikulas* (*supra*), *Silva v. Andris* (*infra*).—A charge of mischief by shooting a buffalo is punishable under §412 of the Penal Code and cannot be dealt with summarily under §411.

Silva v. Andris (1907) 10 *N.L.R.* 203.—The offence of killing a cow is punishable under §412, and is not triable summarily.

Sinniah v. Sinniah (1906) 1 *S.C.D.* 39.—Non-summary proceedings.—Power of Magistrate to discharge accused from such proceedings and to take summary proceedings—Procedure. See *Vally v. Santia* (1911) 6 *S.C.D.* 46, *Saram v. Weera* (1895) 1 *N.L.R.* 95.

Marley v. Appuhamy (1912) 6 *S.C.D.* 88.—See §§181-183 para. 7 *ante*.

Gaffoor v. Carolis (1900) 1 *Br.* 108.—Where the evidence shows that the offence of robbery (§380 *P.C.*) has been committed, it is wrong for the Magistrate to split it up into two charges, *viz.*, of theft and of hurt, or assault. *C.f.* (1899) *Koch* 53, 64.

1489 *P.C. Galle* 842 (*S.C.M.* September 30, 1915).—The accused were charged with unlawful assembly (§140), theft and causing hurt. *Held*, that the Magistrate could not split up the offence of rioting which the evidence disclosed into the offences under §§140, 314 *P.C.* in order to give himself jurisdiction to try the case summarily. *C.f. Siyadoris v. Gunawardene* (1895) 2 *N.L.R.* 65, (1906) *Lem. & A* 44, *Paaris v. Allis* (1896) 2 *N.L.R.* 161, *Wickremasooriya v. Appusinno* (1895) 1 *N.L.R.* 298, *Christian v. Pedris* (1893) 2 *C.L.R.* 197, *Sittambaram v. Sinnapillai* (1889) 8 *S.C.C.* 195.

Fernando v. Fernando (1911) 6 *S.C.D.* 33.—A summons was issued against the accused to appear and answer a charge under §283 *P.C.* When the accused appeared the Magistrate charged her under §282 and convicted her under §287. " Now §193 of the . . . Code enacts that ' if from the facts admitted or proved, it appears that the accused has committed an offence within the jurisdiction of the Magistrate to

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try other than that specified in the charge, summons, or warrant, the Magistrate may convict the accused of such offence, but before he convicts, he shall frame a charge and shall read and explain it to the accused.' Now here the summons did not in effect make the charge against the accused of which she was convicted, and the Magistrate should, if he intended to have convicted this woman under §287, have framed a charge under that section before he found her guilty . . . I would quash the conviction in this case on the ground of irregularity which is not apparently curable under §425 "—*per* Middleton, J. §194

R. v. Thomis (1900) 1 *Br.* 19.—A summary offence may lawfully be dealt with non-summarily. See *R. v. Don Davith* (1900) 1 *Br.* 400, *R. v. Mathes* (1889) 8 *S.C.C.* 199.

Aratchy v. Siddappu (1922) 1 *T.L.R.* 86.—Where a complaint discloses a *prima facie* case of a higher offence (*i.e.*, an offence triable non-summarily), it is not right for a Magistrate to take proceedings for a lesser offence.

Perera v. Babuchia (1923) 1 *T.L.R.* 288—" An offence under §208 (of the Penal Code) is non-summary, and, if he (the Magistrate) thought that the accused ought to have been charged under that section he should have proceeded to take non-summary proceedings under §193(2) of the Criminal Procedure Code, instead of acquitting him . . . " *per* Jayawardene, J.

Weerasinghe v. Ismail (1932) 33 *N.L.R. at p.* 249—§193(2) requires that the Magistrate's attention must be drawn to the fact that the offence is beyond his jurisdiction, or this fact must leap to the eye from what has been proved in the case (*obiter*).

Accused may be acquitted in the absence of complainant.

194. If the summons has been issued on complaint under section 148(1)(*a*) and upon the day and hour appointed for the appearance of the accused or at any time to which the hearing may be adjourned the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other hour or day, and may in addition make an order for payment by the complainant of Crown costs as hereinafter provided. Provided that, if the complainant appears in reasonable time and satisfies the Magistrate that his absence was due to sickness, accident, or some other cause over which he had no control, then the Magistrate shall cancel any order made under this section.

Summons.—See *Form* 1 *Schedule III. post* and §§44 - 49, 62 - 65 *ante* and §187 *ante.*

Complaint.—See §3 *ante.*

Adjournment of trial.—See §§289(5) *post* and §§188, 195.

Complainant.—*C. f.* §§195, 253B *post.*

Magistrate.—See §3 *ante.*

Acquit.—See §§188, 190, 195, 330-331, *Chapter XXIV.*

Crown costs.—See §§253B, C, D, E *post* and *c. f.* §§352, 354 *post.*

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§194

1. §194 should be contrasted with §247 of the Indian Code and with §228 of the Code of 1883—see *Umma v. Kanny*, *Somasunderam v. Kathirevelu* and *Hope v. Muttusamy*.

2. **Scope of §194.**—See §190 para. 2 *ante*, §191 paras. 2, 3 *ante*.

§194 applies only to cases where proceedings have been initiated, under §148(1) (*a*) *ante*, *i.e.*, upon complaint made by a private individual —204 *P.C. Panadura* 55210. In cases where the prosecution is initiated, not by a private prosecutor, but by some public officer representing the Government (§§148(1) (*b*)–(*f*)), the accused cannot claim an acquittal owing to the absence of the "complainant," for the prosecutor is the King, who is always presumed to be present in Court. §194 only applies where a *summons*, and not a warrant, has been issued by the Magistrate under §151(2) in order to compel the attendance of the accused.—*Soysa v. Juliana*. The summons issued will direct the accused to appear before the Court on a given date and at a stated time—see *Form* 1 *Schedule III. post*. If upon the day and hour so appointed, "or at any time to which, the hearing may be adjourned," the complainant, *i.e.*, the private prosecutor who initiated proceedings, does not "appear," it is the duty of the Magistrate to acquit the accused "notwithstanding anything hereinbefore contained," unless he thinks it proper to adjourn the trial to some other hour or day, making an order for the payment of "Crown costs" by the complainant if necessary "as hereinafter provided"—see §253B *post*.

If the Magistrate has acquitted the accused by reason of the non-appearance of the complainant, it is open to the latter to appear before the Magistrate within a "reasonable time," and prove to his satisfaction "that his absence was due to sickness, accident, or some other cause over which he had no control." If the Magistrate is satisfied with the explanation given, he has power to cancel the order of acquittal already pronounced.

Can the Magistrate acquit an accused under §194 before he has appeared in Court? It will be seen that §194 itself is silent on this point. In *Ibrahim v. Kumarapodi*, it was held, that an order under §194 *before process was issued* on the accused was bad. Assume, however, that process has been issued on the accused requiring him to attend Court on a stated day and time. On such day it is proved that the summons has not been served upon the accused, but the Magistrate acquits him owing to the absence of the complainant. Is such an order valid? —see *In re Paddaya*.

Where a complaint has been made against two persons, X and Y, and X alone has appeared before the Court, does the acquittal of X under §194 avail Y, when he is subsequently produced before the Court?—see *Panchu v. Umor*.

An order of acquittal properly made under §194 entitles the accused to raise a plea of *autre fois acquit*, and will so long as such acquittal remains in force act as a bar to a future prosecution against the same accused in respect of the same offence. An incorrect order made under §194 will only operate as a "discharge" under §191 *ante*.—See 204 *P.C. Panadura* 55210.

3. **If the summons has been issued . . . under section 148(1)(*a*).**—The procedure under §194 can only be invoked in cases which have been initiated under §148(1)(*a*). In cases initiated under §§148(1) (*b*)–(*f*) no order under §194 can be pronounced.—*Rosairo v. Silva*. If a Magistrate in any of the latter sub-sections purports to acquit an

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accused under §194, such order would at the most only amount to a "discharge" under §191 *ante*.—204 *P.C. Panadura* 55210. It follows that the Magistrate cannot himself re-open such an improper order of discharge, but it is open to the prosecution to file a fresh plaint, or to move the Supreme Court to have the incorrect order revised—see §191 para. 3 *ante*.

4. **If . . . upon the day and hour appointed for the appearance of the accused . . . the complainant does not appear.—**

Complainant.—*i.e.*, the person, who initiated the proceedings under §148(1)(*a*), in other words the private prosecutor. *C.f.* §199 *post* and the definition of "*complaint*" in §3 *ante*. Note the use of the word "complainant" as it appears in §§189(3), 195, 253B and *c.f.* §290 *post*. See also §147 para. 2 *ante*.

No order under §194 can be pronounced before process has been issued on the accused.—*Ibrahim v. Kumarapodi*. *C.f. In re Paddaya*.

Day and hour appointed for the appearance of the accused.—See *Form* 1 *Schedule III. post*. The summons served upon the accused will state the day and hour which has been fixed for the appearance of the accused. It has been held in India in the case of *Kuttiyali v. Pari* that the Magistrate may acquit the accused at once when on the case being called, the complainant fails to appear, and that the Court is not bound to wait till the close of the day's work before acquitting the accused. In the local case of *Hope v. Muttusamy* a contrary view was taken, it being laid down under §228 of the old Code, that a complainant has for his appearance, the whole of the day appointed, *i.e.*, the whole of the usual Court hours for that day. This decision appears to be unsound.

Complainant does not appear.—*i.e.*, either in person or through his pleader. *C.f.* the use of the word "*pleader*" in §148(1)(*a*) *ante*. *Qu.*—Must the Magistrate acquit the accused if owing to the *death of the complainant* he fails to appear ? See *Amaratunge v. Perera* para. 10A *post*. Under §247 of the Indian Code it has been held that an acquittal of the accused in such circumstances is wholly without foundation. It is clear from the terms of §194, and particularly from the *proviso* thereto, that what §194 aims at is to penalise an absence of the complainant, which is due to misconduct or neglect, and not to non-appearances, which are unavoidable. Note, that there is nothing in the words used in §194 to show that "the accused should have appeared" to enable an order under the section to be made; but see *Ibrahim v. Kumarapodi* and *c.f. In re Paddaya*.

5. **Or at any time to which the hearing may be adjourned.**—When the accused appears before the Court and pleads to the charge, §188 *ante* authorizes the Magistrate to adjourn the trial under certain circumstances. If on such adjourned date the private complainant fails to appear, the accused can claim to be acquitted—*c.f. Somasunderam v. Kathirevelu*. Justice, however, requires that for such an order of acquittal to be valid the complainant should have had notice of the adjournment of the trial. Under §247 of the Indian Code it has been laid down that when the order of adjournment was not made in the presence and hearing of the parties, the order of acquittal was bad. Similarly, where a case had been adjourned *sine die*, and in consequence of the absence of the complainant on the day on which the trial was resumed, the accused was acquitted, such an order is bad. An order of acquittal pronounced upon a day which had not been fixed for the trial of the case, and on

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§194 which day the complainant is necessarily absent is not a valid order. Where a complainant failed to appear on a date to which a trial had been adjourned in order to secure the witnesses for the defence, and the Magistrate acquitted the accused this would be a misapplication of §194.

6. **Unless for some reason he thinks proper to adjourn the hearing . . .**—These words vest a discretion in the Magistrate as to whether he will acquit an accused owing to the absence of the complainant, or adjourn the trial so as to allow him to appear—see *Reid v. Kiriwanti*, *Narayanan v. Vengadasalam*, 175 *P.C. Panadura* 54931.

7. **Crown costs and compensation.**—See §253B para. 5(*b*) *post.*

8. **The proviso to §194.**—It should be noted that §228 of the Code of 1883 did not contain a *proviso* similar to that in §194.—See *Hope v. Muttusamy.* In the case of *Somasunderam v. Kathirevelu* Shaw, J. followed the case of *Hope v. Muttusamy* and held that the Magistrate having rightly or wrongly acquitted the accused, he had no power to reinstate the case. It would appear that the mind of the learned Judge had not been directed to the fact that the section of the old Code upon which, the case of *Hope v. Muttusamy* was based, was not identical with the terms of §194.

The *proviso* to §194 enables a complainant whose charge has been dismissed to appear before the Magistrate within a "*reasonable time*" and of proving to the satisfaction of the Court that his absence was due to "*sickness, accident or some other cause over which he had no control,*" and if he satisfies the Magistrate, the order of acquittal can be cancelled, and the trial proceeded with.—*Roberis v. Purani.* The *onus* is upon the complainant to show some good and valid reason for his absence—see §103 Evidence Ordinance 1895, and *Amarasekera v. Gooneratne.* The accused is entitled to have notice before the order of acquittal is set aside.—*Kolandaveloe v. Chelliah.* Before an accused is deprived of the benefit of an acquittal under §194 by virtue of the *proviso* to that section, there ought to be on the record, proof that the terms of the section have been complied with.—6 *Tam.* 66. A mistaken or erroneous order reinstating a case under the *proviso* may be vacated by the Magistrate himself.—*Gunesekera v. Juan.*

Reasonable time.—What is or what is not a "reasonable time" within which a complainant may appear and explain the reason for his non-appearance depends on the circumstances of each case.—*Roberis v. Purani.* Accordingly, in *Umma v. Kanny* it was held that an application made *seven months* after the order was within "reasonable time." In *Kolandaveloe v. Chelliah two days* were held not to be within "reasonable time." See also *Amerasekera v. Gooneratne.*

Some other cause over which he had no control.—See *Amerasekera v. Gooneratne.* Thus, if the complainant had been misinformed as to the trial date, this would amount to a valid excuse for his non-appearance.—*Romanath v. Behari, Roberis v. Purani.* It would also be a good excuse, for example, if the complainant shows that he had been directed to go to a wrong Court.—*Romanath v. Behari,* or that his non-appearance was due to floods or some similar cause.

9. **Does §194 apply to proceedings under the Maintenance Ordinance?**—In *Umma v. Kanny* it was held that §194 did apply to such proceedings. This view has been expressly dissented from in *Perera v. Nonis* which is a decision of two Judges.

10. **Acquittal.**—"*Acquittal*" *v.* "*Discharge.*"—See §191 para. 3 *ante.*

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A valid order of acquittal duly pronounced under §194 operates as a bar to a further prosecution of the accused in respect of the same offence, so long as the order of acquittal remains in force.—See §§330, 331 *post.* In the Indian case *In re Paddaya* it was held that there is nothing in the language of §194 limiting the effect of an acquittal only to a case in which the accused appeared in answer to the summons, when the case has been dismissed under this section—but see *Ibrahim v. Kumarapodi*, and *Eliatamby v. Sinnatamby.* §194

An improper order "acquitting" the accused, purporting to be made on §194 operates only as an order of "discharge."—See §191 para. 3 *ante* and *Mourant v. Seera.*

10A. **Does the death of a complainant cause the proceedings to abate** ?—See *Amaratunge v. Perera.*

11. **Case law.**—

6 *Tam.* 66.—Before accused persons are deprived of the benefit of an acquittal by virtue of the *proviso* to §194, there ought to be on the record proof that the terms of the section have been complied with.

Kolandaveloe v. Chelliah (1905) 5 *Tam.* 34.—Where an order of acquittal in the absence of the complainant was made at 1 p.m. and the complainant coming to Court thereafter found the Magistrate still sitting, but, though informed of the acquittal took no steps to have the order vacated until two days later, *held*, that the application to re-open the proceedings was not made within a reasonable time. *Held further*, that the accused should be noticed before an order of acquittal is set aside.

Gunesekera v. Juan 4 *Tam.* 36.—*Held*, that if a Magistrate is of opinion that he has taken a mistaken view of the facts in reinstating a case under the *proviso* to §194 he would be at liberty to vacate such mistaken order. See *Hope v. Muttusamy infra.*

Hope v. Muttusamy (1896) 2 *N.L.R.* 13, followed in *Somasunderam v. Kathirevelu infra.—Held*, that where a Magistrate acting under §228 of the Code of 1883, makes order acquitting an accused owing to the absence of the complainant, he has no power thereafter to cancel such order. (*Note that* §228 *contained no proviso similar to that in* §194 *of the present Code*). *Held further*, that under §228 a complainant has for his appearance the whole of the day appointed, *i.e.*, the whole of the usual Court hours of that day. See *Ukkurala v. Sinno* (1895) 1 *N.L.R.* 339, *R. v. Appuwa Veda* (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1 and *Umma v. Kanny infra.*

Somasunderam v. Kathirevelu (1916) 3 *C.W.R.* 315, following *Hope v. Muttusamy supra.*—"On the 25th October, 1916 upon the case coming on for trial after an adjournment, the plaintiff was absent. I find the following note made by the Magistrate in the proceedings, '25-10-16, plaintiff absent; accused present, case dismissed, accused acquitted.' On a subsequent date, there is another entry referring to a letter received from the complainant, and purporting to direct a notice to be given to the complainant and the accused for further hearing of the case on the 8th of November. *The Magistrate having rightly or wrongly dismissed the case and acquitted the accused, he had no power to reinstate the case or to convict upon the charge on which he had already acquitted.* If he was wrong in acquitting on the 25th of October, *the only remedy was an appeal from his order by the Attorney-General.* This has been distinctly decided by Bonser, C.J. in *Hope v. Muttusamy*, (*supra*), and *his decision appears to be correct.* I *therefore* set aside the conviction and acquit the accused . . ." *per* Shaw, J. *Qu.*—Is the italicised statement of law above correct ? The case of *Hope v. Muttusamy*

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§194 was decided under §228 of the old Code of 1883, which is quite dissimilar from the terms of §194 of the present Code? It would seem that Shaw, J. did not consider the scope and effect of the *proviso* to §194.

Umma v. Kanny (1909) 12 *N.L.R.* 97.—Where the complainant in a maintenance case being absent on the trial date, the respondent was discharged, and seven months later, she instituted another complaint, and explained her absence on the previous occasion by stating that she absented herself because the respondent had promised to marry her and to pay her some money and thereby induced her to absent herself, *held*, that the order of discharge amounted to an acquittal. *Held further*, that the reason given by the complainant for her absence being satisfactory, the Magistrate had power to set aside the order of discharge, and to regard the present application as a renewal of that application. *Held further*, that with the exception of the *proviso*, §194 of the Criminal Procedure Code 1898, was a re-enactment of §228 of the Code of 1883 as amended by Ordinance No. 22 of 1890. This case was disapproved in *Perera v. Nonis infra.*

Perera v. Nonis (1908) 12 *N.L.R.* 263.—*Two Judges.—Held*, that only those sections of the Criminal Procedure Code, which are expressly incorporated in the Maintenance Ordinance 1889 are applicable to proceedings under that Ordinance, and that the provisions of §194 of the Criminal Procedure Code should not be applied to proceedings under the Maintenance Ordinance.—*per* Middleton & Wood Renton, JJ. See *Hamy v. Karunaratne* (1921) 22 *N.L.R.* 289, 3 *C.L.Rec.* 20, *Beebee v. Mahmood* (1921) 3 *C.L.Rec. at p.* 86, *Beebee v. Tidias* (1914) 18 *N.L.R.* 81, *Umma v. Kanny* (*supra*) *disapproved.*

Roberis v. Purani (1909) 2 *S.C.D.* 65.—When an accused is acquitted under §194 in the absence of the complainant, it is open to the Magistrate to vacate his order if the complainant satisfies him that his absence was due to some cause beyond his control, *e.g.*, as where the complainant was misinformed as to the trial date. "As I read §194, if the complainant can show within a reasonable time, which must, of course, be determined by the circumstances of each particular case, that the absence was due to sickness, accident, or some other cause over which he had no control, the Magistrate is bound to cancel any order made under this section . . ." *per* Grenier, J.

Amerasekera v. Gooneratne (1910) 5 *Bal.* 60.—Before a Magistrate vacates an order of acquittal pronounced under §194 the complainant must appear within a reasonable time, and in addition satisfy the Magistrate that his absence was due to some cause over which he had no control.

Eliatamby v. Sinnatamby (1905) 2 *Bal.* 20.—See §190 para. 6 *ante* and §191 para. 6 *ante*. Where in a summary case a Magistrate "discharged" the accused because he disbelieved the evidence, *held*, that this order amounted to an "acquittal" under §190 of the Code. It was manifestly not an acquittaleither und er §§194 or under 195 of the Code. See *R. v. Appuwa Veda* (1907) 10 *N.L.R. at p.* 200, 2 *A.C.R.* 1.

Ibrahim v. Kumarapodi (1908) 3 *Bal.* 291.—Where on account of the absence of the complainant *before process was issued on the accused*, the Magistrate "dismissed" the case, *held*, that this order did not amount to an acquittal of the accused. See *In re Paddaya infra.*

204 *P.C. Panadura* 55210 (*S.C.M.* March 16, 1917).—Proceedings initiated under §148(1)(*b*) *ante*. In such a case no order of acquittal could be pronounced under §194. See §191 para. 6 *ante*.

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Mourant v. Seera (1917) 4 *C.W.R.* 172.—"The . . . point is that on the 28th of May, when the accused was produced before the Court, the Magistrate discharged him under §191 of the . . . Code, and, therefore, he had no jurisdiction to re-open the proceedings in the same case. Although the Magistrate states in the journal that he discharges the accused, he says that he does it under §194 of the Code. §194 does not apply to discharging an accused, but to acquitting when the complainant is absent. The Magistrate himself obviously considered that he had acted under that section and had acquitted the accused, because . . . when he discovers that he was under a misapprehension about the case, he causes the re-arrest as if the previous order had been an acquittal in the absence of the complainant under §194. The legal point, therefore, fails . . ." *per* Shaw, J. *C.f. Senaratne v. Lenohamy* (1917) 20 *N.L.R.* 44, 4 *C.W.R.* 293.

175 *P.C. Panadura* 54931 (*S.C.M.* February 24, 1917).—See §188 para. 9 *ante*.

Narayanan v. Vengadasalam (1916) 2 *C.W.R.* 234.—See §188 para. 9 *ante*.

Kuttiyali v. Pari 7 *Mad.* 356.—The Magistrate may acquit the accused at once when on the case being called, the complainant fails to appear. The Court is not bound to wait till the close of the day's work before acquitting the accused.—See *Rangasami v. Narasimhulu* 7 *Mad.* 213 and *c.f. Hope v. Muttusamy supra*.

Romanath v. Behari 13 *C.L.R.* 303.—Where the complainant fails to appear, *e.g.*, either because, he was informed of a wrong trial date, or because he was sent into a wrong Court, the acquittal of the accused owing to such absence would be irregular.

Panchu v. Umor 4 *C.W.N.* 346.—*Qu.*—Where complaint is made against two accused, X and Y, and X alone is before the Court, does an order acquitting X under §194 avail Y when he is subsequently produced before the Court ?

In re Paddaya (1910) 34 *Mad.* 253.—Where on the trial date, both complainant and accused being absent, the Magistrate acquitted the accused under §247 of the Indian Criminal Procedure Code (*local*—§194), *held*, under the provisions of §403 of the Indian Code (*local*—§330) that a fresh trial of the accused will not be barred unless the accused in the first case has been "tried," and does not limit the effect of an order of acquittal under §247 of the Code. See *Ibrahim v. Kumarapodi supra*.

Reid v. Kiriwanti (1903) 7. *N.L.R.* 383, not following *Gomis v. Agoris* (1896) 2 *N.L.R.* 180. *Held*, under §289 *post* it would not be "reasonable cause" to adjourn a case whenever the prosecution desires to make further inquiry ; but there may be cases in which the Magistrate might deem it expedient to grant a postponement for further enquiry; which might be deemed "reasonable cause" for such an adjournment. See also *G.A. v. Appuhamy* (1912) 16 *N.L.R.* 39.

Soysa v. Juliana (1922) 1 *T.L.R.* 122.—Accused produced before Court on warrant. Magistrate cannot acquit accused because complainant is absent.

Ameratunge v. Perera (1930) 32 *N.L.R.* 310.—Police prosecution—Death of private complainant—Proceedings do not abate.

Rosairo v. Silva (1933) 34 *N.L.R.* 365.—Plaint filed by a public servant under §148(1) (*b*). Complainant absent on trial date and accused discharged. Later Police Magistrate purported to vacate the order of discharge. *Held*, that this was illegal. §194 does not apply to cases initiated under §148(1)(*b*). (Complainant's remedy was to file a fresh plaint in a new case).

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§195 Withdrawal of charge by complainant.

195. If a complainant at any time before judgment is given in any case under this chapter satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the case the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused, but he shall record his reasons for doing so.

This section not to extend powers of Magistrate under Section 290. [§9, 31 of 1919.]

Provided, however, that nothing herein contained shall be taken to extend the powers of a Magistrate to allow the compounding of offences under the provisions of Section 290.

Complainant.—See §§148(1)(*a*), 189(3), 194, 199, 253B, 290 and *c.f.* "**Complaint.**"—§3 *ante.*

Judgment.—See §§188(1), 190, 304 *et seq. post.*

Magistrate.—See §3 *ante.*

Acquit.—See §194 and *c.f.* §§191, 196, 151(1), 330 - 331.

Record his reasons.—*C.f.* §§188, 191, 196.

Compounding of offences.—See §290 *post.*

Offence.—See §3 *ante.*

Withdrawal of charges by prosecution.—See §§202, 217(3) 221(2), 290, 185.

Nolle prosequi.—See §§196, 202, 217(1), 388, 395.

1. §195 should be compared with §229 of the Code of 1883 and with §248 of the Indian Code.

2. **Scope of §195.**—See §185 para. 2 *ante*, §190, §191 paras. 2, 3 *ante*, §290 *post.*

§195 is closely allied to §§185, 202, 217(3), 388 and 196. On the other hand, the provisions of §195 should be carefully distinguished from those of §290 with regard to the compounding of offences. The former group of sections including §195 deal with the "withdrawal" of a charge from the Court, while the latter section deals with the "compounding" of the charge.

At any time before judgment is pronounced it is open to the "complainant" to show to the Magistrate, that there are "sufficient grounds" for permitting him to withdraw the case, and thereupon the Magistrate "*may*" permit him to withdraw the charge, and thereafter the accused will be acquitted. The *proviso* to §195 draws attention to the fact that nothing stated in the section is to be taken to *extend* the powers of a Magistrate to allow the compounding of offences under the provisions of §290. This *proviso* was added in order to make it quite plain that although as a general rule a Magistrate may under §195 allow the complainant to withdraw any summary charge, yet he shall not allow this to be done in such cases, which either cannot be compounded at all or which can be compounded only with the sanction of the Attorney-General, *viz.*, the offences set out in Part B of §290 *post.*

An improper order pronounced under §195 will not operate as an acquittal, but only as an order of discharge under §191.—See §191 para. 3 *ante.* On the other hand, if a Magistrate on the application of the "complainant" sanctions the withdrawal of the charge in a case, which may lawfully be withdrawn, but "discharges" the accused without pronouncing an order of "acquittal," such order would operate as an

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"acquittal" although called a "discharge" by the Magistrate.—See *R. v. Appuwa Veda.* It would appear that no order under §195 can lawfully be pronounced before the accused has appeared.—*In re Moopan.* Hence, the words "*at any time before judgment*" in §195 must mean "*at any time after the trial has commenced and before judgment.*" It has also been held in India that where a summary offence which needs sanction to prosecute has been made after the requisite sanction has been obtained, an order under §195 may not be lawfully made without the consent of the officer, whose sanction had to be obtained before the proceedings were initiated.—*In re Samsudeen, R. v. Muse Ali.* Similarly, in cases where the police or some public department prosecutes in a criminal case, such public department is the "complainant," and it is irregular for the Magistrate to allow the case to be withdrawn on the application of the private aggrieved party.—114 *P.C. Colombo* 6149 (see para. 7 *infra*).

3, Complainant—means the actual prosecutor and not necessarily the person injured or aggrieved by the offence. Thus, where the injured or aggrieved party informs the Police, who initiate proceedings, the "complainant" is the Crown.—*R. v. Chenchayya,* 114 *P.C. Colombo* 6149. Even the complainant's right to withdraw a case is fettered in cases where the offence is one which needs sanction to prosecute, and in which sanction had been obtained before the charge was made. In such a case no order under §195 can be made without the consent of the authority which gave the sanction to prosecute.—*In re Samsudeen, R. v. Muse Ali,* unless of course the offence is compoundable by the aggrieved party—see para. 7 *infra.* See §147 para. 2 *ante.*

4. At any time before judgment.—§195 does not apply to any stage of the case before the appearance of the accused.—*In re Moopan.* An order under §195 may, therefore, only be made after the trial has commenced and before judgment.

Before judgment.—See §§188(1), 190, §§304 *et seq.*

As to the definition of judgment.—See §304 para. 2 *post.*

5. Satisfies the Magistrate . . . the Magistrate may permit him to withdraw.—The *onus* is upon the complainant to prove to the satisfaction of the Magistrate, that the case is a fit and proper one, in which the powers under §195 should be exercised. It is, however, entirely within the discretion of the Magistrate whether, he will exercise those powers or not. He cannot be compelled to make an order under §195. Were such discretion not vested in the Magistrate, it would be open to anybody to institute a perfectly vexatious charge against his enemy, and thereafter with impunity withdraw the case after putting his adversary to as much inconvenience and degradation as possible.—*R. v. Khushali.*

Qu.—May a "complainant" who withdraws a case under §195 be cast in Crown costs and compensation?—See §253B para. 3, 5 *post.*

6. Acquit.—See §191 para. 3 *ante* and §§330 - 331 *post.*

7. §195 and the compounding of offences.—The difference between the compounding of a case and the withdrawal of a charge is dealt with in the case of *R. v. Murray.* See also §290 para. 2 *post.*

Certain offences may be compounded by the parties to the case. —§290(1) and Part A thereto. Certain other offences may be compounded by the parties with the sanction of the Attorney-General—§290(2) and Part B thereto. All other offences under the Penal Code not specified in §290 cannot be compounded.

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§195 Before the *proviso* was added to §195 its terms were wide enough to allow the withdrawal by " complainants," of cases which, either could not be compounded at all or which could only be compounded with the sanction of the Attorney-General. The *proviso* was therefore added in order to explain the exact scope of §195.

A reference to the provisions of the third column of Part A of §290 will demonstrate that, there may be cases which although the injured party cannot withdraw under §195, he may nevertheless compound under §290. Thus, if X charges Y with causing simple hurt to him (§314 Penal Code), and the Police initiate proceedings against Y, it is not open to X to move the Magistrate under §195 to withdraw the case, inasmuch as the Crown and not X is the " complainant." See 114 *P.C. Colombo* 6149. Under §290, however, it is always open to the " person to whom, the hurt is caused " to compound the case.—See §290 para. 2 *post* and the cases there referred to.

7A. **Where a complainant withdraws a charge under §195 no order under §253B *post* can be passed.**—See *Murugesu v. Chokkan* §253B para. 3 *post.*

7B. **May the accused against whom, the charge is withdrawn be called as a witness against the other accused.**—See *R. v. Hussain.*

8. **Case law.**—

Eliyatamby v. Sinnatamby (1905) 2 *Bal.* 20.—See §191 para. 6 *ante.*

R. v. Appuwa Veda (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1.—See §191 para. 6 *ante.*

114 *P.C. Colombo* 6149 (*S.C.M.* February 2, 1917).—See §191 para. 6 *ante. Qu.*—If the Police charge X with causing simple hurt (§314 Penal Code) to Y, is it open to Y to move the Court under §195 to withdraw the case without reference to the Police ? It is submitted that in such a case Y would not be the " complainant " within the meaning of §195. On the other hand, the *proviso* contained in §195 shows that it is not meant to entitle a Magistrate to override the provisions of §290 *post* with regard to the compounding of offences.

R. v. Hussein 25 *Bom.* 422.—Where X, Y and Z were charged, and the case against X was withdrawn. *Held*, that X could be called as a witness against Y and Z.

R. v. Chenchayya 23 *Mad.* 626.—" Complainant " in §248 of the Indian Criminal Procedure Code means one who, has made a " complaint " within the meaning of §4(1)(*h*) of that Code, and does not include a person who has made a report to the Police, who subsequently prosecuted.

R. v. Muse Ali 2 *Bom.* 653.—In cases of contempt of the lawful authority of public servants (*Chapter X.* Penal Code), the " complainant " referred to is the public servant whose authority has been resisted (or it is submitted, the Attorney-General) without the sanction of either of whom no charge could be initiated. The same rule would hold good with regard to the other offences specified in §147 *ante.*

R. v. Murray 21 *Cal.* 103.—An act of compounding a case is different from withdrawing a case. A withdrawal must be by intimation to the Magistrate holding the trial, and the complainant must satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw the case. See §290 para. 9 *post.*

R. v. Khushali 19 *P.R.* 1888.—" *Satisfies the Magistrate.*" " *The Magistrate may permit him.*" " Had such a restriction not been imposed, a person might be harassed by a perfectly vexatious criminal proceeding,

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from which the complainant, having put the accused to as much inconvenience and degradation as he could, might then calmly withdraw . . ." §196

In re Moopan (1911) 36 *Mad. at p.* 319.—*Held*, that §248 of the Indian Code (similar to §195 of this Code) does not apply to a time before the accused has been ordered to appear.

In re Samsudeen (1896) 22 *Bom.* 711.—Where in the case of an offence needing sanction to prosecute, the Magistrate without having such sanction, discharged the accused under §248 Indian Criminal Procedure Code, *held*, that such order was made without jurisdiction and therefore did not amount to an acquittal.

Accused may be discharged by Magistrate with sanction of Attorney-General.

196. In any case instituted under this chapter otherwise than upon a complaint under section 148(1), heads (*a*), (*c*) and (*d*), the Magistrate may with the previous sanction of the Attorney-General for reasons to be recorded by the Magistrate, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon discharge the accused.

Complaint.—See §3 *ante*, and see §§148, 149, 189(3), 194, 195 *ante* and §§253B, 290, 296 *post.*

Magistrate.—See §3 *ante.*

Attorney-General.—See §3 *ante.*

Reasons to be recorded.—See §§188, 191, 195 *ante.*

Judgment of acquittal or conviction.—See §§190, 192, *Chapter XXIV. post.*

Discharge.—See §§3, 151(1), 191.

Nolle prosequi.—See §§202, 217(1), 388, 393 *post.*

1. §196 should be compared with §230 of the Code of 1883 and with §249 of the Indian Code.

2. **Scope of §196.**—§196 does *not* apply to cases where the proceedings have been initiated under §148(1)(*a*), (*c*) or (*d*).

Where criminal proceedings have been initiated under §148(1)(*b*), (*e*) or (*f*), the Magistrate with the "previous sanction of the Attorney-General" may stop a *summary case, i.e.*, enter a *nolle prosequi* at any stage without pronouncing a judgment of acquittal or of conviction, and merely discharge the accused. It is, however, the duty of the Magistrate to record his reasons when making such an order. *C.f.* §§202, 217(1), 388, 393 *post.*

2A. **Complainant.**—See §147 para. 2 *ante*, §194 para. 4 *ante* and §195 para. 3 *ante.*

2B. **Judgment.**—See §304 para. 2 *post.*

3. **Discharge v. Acquittal.**—See §191 para. 3 *ante.*

3A. **See §253B para. 5(*b*) *post.***

4. **Case law.**—

Eliyatamby v. Sinnatamby (1905) 2 *Bal.* 20.—See §§148 – 151 para. 13 and §191 para. 6 *ante*, and see *R. v. Appuwa Veda* (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1.

197. (*Repealed by* §3 *Ordinance No.* 40 *of* 1921.) See §253B *post.*

198. (*Repealed by* §3 *Ordinance No.* 40 *of* 1921.) See §253B *post.*

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§199

By whom prosecutions under this chapter may be conducted.

199. The Attorney-General, the Solicitor-General, a Crown Counsel, or a pleader generally or specially authorized by the Attorney-General shall be entitled to appear and conduct the prosecution in any case tried under this chapter, but in the absence of the Attorney-General, the Solicitor-General, a Crown Counsel, and any such pleader as aforesaid the complainant or any officer of any Government department or any officer of any Municipality or Local Board may appear in person or by pleader to prosecute in any case in which such complainant or Government department or Municipality or Local Board is interested.

[*Ord. No. 6 of 1924, §3.*]

Attorney-General.—See §3 *ante*.

Solicitor-General.—See §3 *ante*, §§202, 217, 388, 392 – 393.

Crown Counsel.—See Ordinance No. 1 of 1883 §4, and §§201, 216(2), 217, 388, 392 – 393 *post*.

Pleader.—See §3 *ante* and §§7, 189(3), 201, 211, 234(3), 235 and contrast the use of the word "**Advocate**"—in §216(2), with the word "**Counsel**" in §§208, 212, 217(3), 222, 232, 234(3), 237.

Generally or specially authorized.—See §§201, 216(2), 392(1) *post*.

Complainant.—See §§148(1)(*a*), 189(3), 194, 253B, 290. *C.f.* "**Complaint**"—§3 *ante*.

Officer of any Government Department.—*C.f.* §148(1)(*b*).

Municipality.—See Ordinance No. 6 of 1910.

Local Board.—See Ordinance No. 13 of 1898.

Right of accused to be defended by pleader.—See §287 *post*.

1. **Scope of §199.**—§392 *post* declares that in the case of *non-summary investigations*, the prosecution may only be conducted by the Attorney-General, Solicitor-General, a Crown Counsel, or a pleader generally or specially authorized, and in the absence of any of these officers, the investigating Magistrate "shall conduct the prosecution"; but if necessary, it is open to him to avail himself of the assistance of any pleader or public officer in the conduct of the inquiry.

§199 lays down the corresponding rule with regard to *summary trials*. See also §§201, 216(2), 287 *post*.

In "*any*" summary case, the Attorney-General, Solicitor-General, a Crown Counsel, or a pleader generally or specially authorized by the Attorney-General "shall be entitled to appear and conduct the prosecution." In the absence of any of the above-named persons "the complainant or any officer of any Government Department, or any Municipality or Local Board may appear in person or by pleader "in order to prosecute in any case in which "such complainant or Government Department or Municipality or Local Board is interested."

It would appear that §199 needs amendment so as to comprise within its terms Sanitary Boards, and Urban District Councils, &c. It can, perhaps, be contended that such bodies are comprised within the expression "Government Departments" as used in §199. As to the right of every complainant to appear by a pleader, see *Juakino v. Fernando infra*.

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§200

2. **Pleader generally or specially authorized.**—See §201 para. 3 *post.* Where a plaint is filed by a public officer on behalf of the Government or of a department of Government, he must be considered as acting in his official capacity, and not to be vested with any particular racial character which would affect the jurisdiction of the village tribunal.—*R. v. Elaris* (1922) 23 *N.L.R.* 255, *Burah v. Sinniah* (1917) 19 *N.L.R.* 383, *P.C. Matara* 21428 (April 20, 1921), *P.C. Panadura* 68146 (*S.C.M.* March 16, 1921), *Simon v. Siyatu* (1917) 4 *C.W.R.* 426, *Sedris v. Sinno* (1921) 23 *N.L.R.* 171.

3. **The Attorney-General's Department is a prosecuting and not a defending department.**—See §392 para. 3 *post.*

4. **Case law.**—

Juakino v. Fernando (1910) 3 *S.C.D.* 91.—" . . . I do not know on what authority the Magistrate refused to allow Mr. A to appear for the complainant. As stated in the petititon of appeal, §199 of the Criminal Procedure Code gives a complainant the right to appear by a proctor, and a recognition of the same right is contained in §189(3) . . ." *per* Grenier, J.

CHAPTER XIX.

*TRIALS BY DISTRICT COURT**

1. For the purposes connected with the administration of the criminal law Ceylon has been divided into four Circuits, within the territorial limits of which the criminal sessions of the Supreme Court are held annually at certain specified times—see §§27 *et seq.*, Courts Ordinance 1889. Each Circuit is divided into certain Judicial Districts, while each Judicial District is further sub-divided into a number of Judicial Divisions—see *Schedule II.*, Courts Ordinance 1889. Each *Judicial District* has a District Court presided over by a *District Judge*, while each Judicial Division has a Police Court and Court of Requests presided over by a Magistrate and a Commissioner of Requests. Generally one officer acts in both capacities, *i.e.*, as Magistrate and Commissioner of Requests. The duties of a Police Magistrate are twofold, *viz.*, (1) to try summary offences judicially following the procedure laid down in *Chapter XVIII. ante* and (2) to investigate non-summary charges following the procedure prescribed by *Chapter XVI. ante* with a view to committal to a District Court or the Supreme Court for trial.

§55 of the Courts Ordinance 1889 vests the Governor of the Colony with the power to establish District Courts, &c., and when such Courts have been established he may appoint District Judges thereto—§56; or appoint additional Judges—§57. District Judges when appointed, subject to the pleasure of the King, hold office during pleasure.—§58. Moreover, the Governor is empowered to appoint the subordinate officers of the District Court, but the Judge is given power to suspend such officers for misconduct or other sufficient cause—§60. §63 of the Courts Ordinance 1889 deals with the abolition or alteration of the jurisdiction of District Courts, *e.g.*, under §63 a judicial district may be sub-divided into two or more judicial districts.

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*See §3 *ante.*

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§200 All advocates and proctors entitled to practise before the Supreme Court are entitled to practise before any District Court; all persons admitted to practise as proctors in any District Court are entitled to practise in such Court and any of the minor Courts within that judicial district—§61 Courts Ordinance 1889. If a District Court is abolished, §62 of the Courts Ordinance makes provision for the enrolment of the proctors of the Court so abolished in the District Court of any of the districts to or among which, the jurisdiction of the abolished Court has been allotted or distributed, which such proctors shall elect. If a new district is created within an existing district, §62 likewise empowers the proctors of the Court to have their names enrolled in the new District Court.

2. **The criminal jurisdiction of District Courts.**—Every District Court is a Court of Record and has an original jurisdiction (*inter alia*) in all criminal matters, " save and except such of the aforesaid matters as are herein, or by virtue of the provisions of the . . . Criminal Procedure Code, or any other enactment for the time being in force, exclusively assigned to the Supreme Court, and shall also have jurisdiction . . . in any other matter in which jurisdiction has heretofore been, is now, or may hereafter be given to District Courts by law "—§64 Courts Ordinance 1889.

A " *Court of Record* " is a Court, " whose acts and judicial proceedings are enrolled in parchment for perpetual memorial and testimony, whose rolls are the records of the Court. All Courts of Record are the King's Courts, and no other Court hath authority to fine and imprison, so that the very erection of a new jurisdiction with power of fine and imprisonment makes it instantly a Court of Record "—*Mozley & Whitley's Law Dictionary.*

The criminal jurisdiction of a District Court is an " original " jurisdiction, *i.e.*, it has no appellate or revisional* jurisdiction, its sole duty being to try and decide such criminal trials which come before it in the regular way. **The following points should be noted with regard to the original criminal jurisdiction of a District Court :—**

(*a*) No District Court shall take cognizance of any offence unless the accused person (i) has been committed for trial by a Police Court duly empowered in that behalf, or (ii) unless the case has been transferred to it from some other Court for trial by order of the Supreme Court—§12 *ante* and §203(2) *post*. *C.f.* §47 *et seq.* Courts Ordinance.

(i) The procedure which culminates in the committal of the accused for trial by a Police Court is to be found in *Chapter XVI. ante*. The Magistrate takes non-summary proceedings, the case is submitted to the Attorney-General, and thereafter committed for trial upon an indictment drawn and settled by the Attorney-General.

(ii) With regard to the second method by which the District Court† can obtain jurisdiction to try an offender, the law is to be found stated in §46 of the Courts Ordinance and §§12, 203(2) of this Code. §46 of the Courts Ordinance gives the Supreme Court full power under certain circumstances to make order " for the transfer of any prosecution, matter or thing depending in any Court other than the Supreme Court to any other such Court . . . and in every such case the Court to which

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* See however, §121 Evidence Ordinance and the *illustrations* thereto which indicate that a District Court is a " superior court" within the meaning of that section.

† See §218 (2) *post*.

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any such . . . prosecution, matter or thing shall be so transferred shall take cognizance thereof, and have power and jurisdiction for the hearing, trial and decision of the same as fully and effectually to all intents and purposes as if such Court had originally such power and jurisdiction." The plain wording of this section contemplates a state of facts, where the Supreme Court upon an application regularly made, orders that the trial of a criminal case shall be transferred, *e.g.*, from a Police Court to a District Court, without the formality of a non-summary inquiry, or a reference to or commitment ordered by the Attorney-General. In such an event, the case would come before the District Court without previous committal or an indictment ; hence, §203(2) of this Code makes special provision for the indictment in such cases to be framed by the District Court itself. §200

It must be noted, however, that by Ordinance No. 1 of 1900* §46 of the Courts Ordinance has been repealed " so much as relates to the transfer of criminal cases." Hence, the procedure indicated under §46 of the Courts Ordinance is no longer available. The reason why reference has been made to it is because the full extent of the repeal effected by Ordinance No. 1 of 1900 does not appear to be fully realized.

The only other provision made by our law which enables an order to be made for the transfer of criminal trials is §422 *post*. That section, provides *inter alia* that the Supreme Court may order that any offence should " be tried by *any* Court not empowered by this Code, but in other respects competent to try such offence." These words appear to be wide enough to empower the Supreme Court to order that the *trial* of a *summary case* should be transferred for trial before a District Court without the intervention of a non-summary inquiry or a committal supported by the Attorney-General's indictment. Hence it is that §203(2) and §218(2) make special provisions for the framing of the indictment by the Court, to which the trial has been transferred. In practice, however, in such cases the Supreme Court orders that non-summary proceedings should be taken by the Magistrate and that the case be regularly committed for trial in due course.

It also happens that in appeal or in the exercise of its revisional powers the Supreme Court directs that the order made by a Magistrate in a summary case should be set aside, and that the case should be tried before a District Court. In such a case, the record is sent back to the Police Court with directions that the Magistrate is to take non-summary proceedings in the regular way, and submit the case to the Attorney-General. It may, therefore, be stated that the second method, by which cases come up for trial before a District Court, *viz.*, a transfer without a previous committal, is extremely rare.

See §203 para. 2 *post*.

(*b*) No District Judge shall, except with the express consent of the accused, try any case, which he has committed for trial as Police Magistrate—§18 *ante*. Again, except as provided in *Chapter XXXIV*. " No District Judge . . . shall try any person for any offence referred to in §147, clauses (*b*) and (*c*), when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such District Judge . . . in the course of a judicial proceeding."—§384 *post*.

These sections ensure that, not only should there be no bias against the accused in the mind of the trial Judge, but also that there should be

* See Hansard Legislative Council debates of January 10, 1900.

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§200 no reasonable suspicion for entertaining the belief that the Judge may be biassed.—See *R. v. Podisinno* (1912) 16 *N.L.R.* 16, *John v. Perera* (1913) 17 *N.L.R.* 189, *Jainadeen v. Geomonis* (1919) 21 *N.L.R.* 95, *Bogahalande v. Podisinno* (1915) 1 *C.W.R.* 99, *Carbery v. Wickremasinghe* (1917) 4 *C.W.R.* 158, *Fernando v. Bhai* (1918) 5 *C.W.R.* 184, *Mahatmaya v. Mudiyanse* (1922) 24 *N.L.R.* 377, and other cases referred to in §18 para. 2 *ante*. If a Judge personally knows of any facts material to any case, he should enter the witness-box as an ordinary witness, and have the case tried by another Judge. It is highly irregular for him to import into a case, which he is trying as Judge, his own knowledge of the facts.* Note, however, that a juror or assessor may give evidence in the case in which he is engaged—§§215(3), 239 *post*.

The territorial jurisdiction of District Courts.—"Every District Court shall have full power and authority and is hereby required to hear, try, and determine in manner in the Criminal Procedure Code or any Ordinance amending the same provided, all prosecutions and charges instituted and preferred before it against any person for or in respect of any crime or offence committed *wholly or in part within the district in which and for which it is held*, and which crime or offence is by the said Code or by any law in force in the Colony made cognizable by District Courts"—§66 Courts Ordinance and see §§5 and 6 *ibid*.

See also §§135 - 146 *ante*.

The punitive jurisdiction of District Courts.—

(i) **Offences under the Penal Code may be tried by the District Court having territorial jurisdiction, if column 8 of Schedule II. *post* shows that such offence may be tried by a District Court.**—See §10 *ante*.

(ii) **Offences under laws other than the Penal Code.**—

(*a*) No District Court shall try any offence which is punishable with imprisonment for a term which may exceed two years, or with a fine which may exceed Rs. 1,000—§11(*a*).

(*b*) If the law, which creates the offence directs that the offender is to be tried before a District Court, in such a case the District Court has jurisdiction, even though the punishment for the offence exceeds that specified in (*a*)—§11 *ante*. See also §86 Courts Ordinance 1889.

Objections to the jurisdiction of the District Court should be taken when the accused is called upon to plead to the indictment in the District Court, and should be urged before the plea is made. An objection to the jurisdiction of the Court after the plea has been made is as a rule invalid—§73 Courts Ordinance. An objection to the jurisdiction of the Court includes objections both to the punitive jurisdiction as well as to the territorial jurisdiction of the Court.—*R. v. Silva*. See generally §§204 - 206 para. 2 *post* where the whole question is discussed.

3. **The punitive powers of a District Court.**—See **Punitive jurisdiction of District Courts** para. 2 *supra*.

§14 ante.—A District Court may pass any of the following sentences :—

(*a*) Imprisonment of either description for a term not exceeding two years.

(*b*) Fine not exceeding Rs. 1,000.

(*c*) Whipping.

(*d*) Any lawful sentence combining any two of the sentences aforesaid.

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* See *Dias on the Evidence Ordinance p.* 221.

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§16(1) *ante*.—A District Court may award such term of imprisonment in default of payment of a fine as is authorized by law in case of such defaults, provided that the term awarded is not in excess of the Court's powers under this Code—see §312(*b*) *et seq. post* and §§60 *et seq.* Penal Code. The default imprisonment so awarded may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Court under §14—§16(2).

§17 deals with the sentences to be imposed in cases where an accused at one trial is convicted of any two or more distinct offences. The rule is that unless otherwise directed such sentences are to run consecutively. In no case can a sentence in respect of such distinct offences exceed twice the amount of punishment which the Court in the exercise of its ordinary jurisdiction is competent to inflict. See generally under §§13–17 *ante* where the law will be found discussed.

Extraordinary types of punishment.—See the list of enactments authorizing such punishments under §§13–17 *ante*. A good example of an extraordinary type of punishment is where under Ordinance No. 2 of 1926, District Courts are empowered to impose sentences of preventive detention on reconvicted criminals.

Whipping.—See §§13–17 *ante*.

Continuing offences.—§67 of the Courts Ordinance empowers the District Judge after conviction to order the removal or abatement of the act, matter or thing complained of.

4. **Change of District Judges during trial.**—§89 of the Courts Ordinance provides for this contingency. *C.f.* §292 *post*. The trial may be continued before the successor of the Judge, who commenced the trial, who may act upon the evidence already recorded, or partly recorded by the first Judge and partly recorded by the new Judge, or he may, instead, recall the witnesses and commence the trial afresh. Either party has the right to demand that the witnesses be recalled afresh in which case the trial is to commence afresh. See *Fernando v. Syndicate Boat Co., Ltd.* (1896) 2 *N.L.R.* 206, *Samaraweera v. Jayawardene* (1900) 4 *N.L.R.* 106, *Mudianse v. Appuhamy* (1920) 22 *N.L.R.* 169, 8 *C.W.R.* 5, 2 *C.L.Rec.* 153, and the other cases noted under §292 *post*. Under §306(1) *post* the judgment must be written by the Judge, "who heard the case."

5. **Appeals from judgments of District Courts.**—See §§75–76 Courts Ordinance, and generally under *Chapter XXX. post*.

6. **The sittings of District Courts should be in public.**—See §86 Courts Ordinance and generally under §7 *ante*.

7. **Assessors.**—See §72 Courts Ordinance. The law will be found fully discussed under §200 para. 2 *et seq.*, 207 para. 3 *et seq.*, 213 para. 4 *et seq.*, 214 para. 2, 215 para. 2 *et seq. post*.

8. **The stages of a District Court criminal trial.**—

(1) The case is submitted to the District Court (i) after a commitment by a Police Court having jurisdiction to hold the non-summary investigation, the committal being supported by a valid indictment drawn and approved of by the Attorney-General—see §§203 *post* and 12 *ante*. See also para. 3 *supra*. (ii) If the case comes by virtue of an order of transfer by the Supreme Court, the District Court frames an indictment as indicated by §203(2).

(2) The District Judge is bound to try the Attorney-General's indictment—see §203 para. 3 *post*. The District Judge must first decide whether he should have the assistance of assessors in trying the case, or whether he will try it alone. This is a matter solely within his discretion —see §200 para. 2 *post*.

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§200 If he decides to have the assistance of assessors, he will select two or more assessors to be summoned—see §207 *post* and §72 of the Courts Ordinance. The selection will be made from the list of persons prepared by the Fiscal under §257 *post*, and he will cause a certain number of such persons to be summoned—see §207 *post* and §72 Courts Ordinance. The summons will be issued by the District Court under *Chapter V. ante* and not by the Fiscal.

(3) Prosecutions in the District Court can be conducted only by the Attorney-General, Solicitor-General, Crown Counsel, or a pleader generally or specially authorized by the Attorney-General in that behalf—§201.

(4) The Attorney-General may at any time before the verdict is recorded enter a *nolle prosequi**—§202 paras. 2 and 3 and see §393 *post*. The prosecuting counsel may at any time before the verdict is recorded withdraw the indictment with the permission of the District Judge—§202. See also §185 *ante*.

(5) The arraignment of the accused—§§203, 204 *post*, *i.e.*, the accused is called to the bar by name, the indictment is read out to him, and interpreted if necessary, and he is called upon to plead thereto. If the indictment contains any reference to previous convictions, this is not made public at this stage—§253 *post*.

(6) If any objection is to be taken either (i) to the form of the indictment, *e.g.*, due to any alleged defect or misjoinder therein, or (ii) to the jurisdiction of the Court—§73 Courts Ordinance, or (iii) in bar of the trial, *e.g.*, by raising the plea either of *autre fois acquit* or *convict*—§§330-331 *post*, a pardon, or that the offence is statute barred the proper time to take such objection is at this stage *before the accused pleads*.

(7) (1) (*a*) If the accused pleads that he is guilty of the offence charged or of some lesser offence, and the prosecuting counsel is willing to accept the latter plea (see §221(2) *post*), the Judge may convict him on such plea if he is satisfied that the accused rightly comprehends the effect of his plea—§205 *post*.

(*b*) If the accused pleads not guilty, the trial proceeds—§206 *post*.

(2) If the accused does not plead, *i.e.*, if he *stands mute*, (i) if he *stands mute of malice*, *i.e.*, if he contumaciously refuses to plead, the trial proceeds—§206 *post*, (ii) if he stands mute by *visitation of God*, and if this be due, (*a*) to deafness or dumbness or similar cause, the procedure laid down by §288 *post* will be followed; (*b*) if the accused is insane and incapable of making his defence, the Court will proceed as indicated in §§368, 369 *post*.—*R. v. Pindorissa* (1927) 5 *T.L.R.* 101.

(8) The selected assessors are now sworn, if the trial is to be held with the aid of assessors—§207. See §227(3) *post*.

(9) The prosecuting counsel opens his case—§208(1).

(10) The proof in support of the prosecution is now called, the witness being examined-in-chief, cross-examined and re-examined——§208(2). All statements of the accused recorded during the non-summary inquiry are put in and read at the end of the proof for the prosecution—§209.

Crown Counsel will then intimate to the Court that the proof is closed, and will tender any witnesses, who have not been called by the prosecution for cross-examination by the accused. This closes the proof for the prosecution, unless evidence in rebuttal is allowed to be led at a later stage—§212.

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* *Qu.* – May a *nolle prosequi* be entered where the case is transferred to the District Court by order of the Supreme Court ? See §202 para. 3 *post*.

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(11) The District Judge must now make up his mind, whether or not he will call upon the accused for a defence. If he totally discredits the case for the prosecution or, does not think that upon the evidence led in the case he can either convict the accused on the charges laid in the indictment or in respect of any lesser offence, he will acquit the accused—§210(1), but the prosecuting counsel in such a case is entitled to sum up his case—§210(2). In all probability before acquitting the accused, the Judge will call upon the prosecuting counsel to sum up. §200

If the Judge decides to call upon the accused for a defence, he will inquire whether the accused intends calling evidence. If the accused is undefended, the Judge will have to observe the provisions of §296(1) *post*, as well as inform the accused that, if he so desires it, he may make an unsworn statement from the dock.—*R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.

(12) If the defence intimates that it is not calling any evidence, then, Crown Counsel may sum up his case at this stage—§210(2). If the only evidence led by the defence consists in that of the accused's testimony from the witness-box or his unsworn statement from the dock, Crown Counsel is entitled to sum up *after* such evidence is given or statement is made.—*R. v. Joronis* (1921) 22 *N.L.R.* 468, *R. v. Gardner* (1898) 1 *Q.B.* 150 and *Mrs. Maybrick's Case*—see §§208–212 para. 3 *post* and §296(3) *post*.

(13) The accused or his pleader now enters upon the defence. If no evidence is called, or if the only evidence is that of the accused himself, defending counsel will have the right to the last word with the Court. If evidence is to be called for the defence, defending counsel may open his case by making an opening speech. The defence witnesses are now called, examined-in-chief, cross-examined and re-examined. With regard to the cross-examination of the accused, the provisions of §§120(4) and 54 of the Evidence Ordinance should be kept in view—see also §122 para. 7 *pp.* 240 – 241 *ante*. Thereafter the defending counsel sums up his case—§211.

(14) Under certain circumstances the prosecuting counsel may ask permission to call evidence in rebuttal—see §§208 – 212 para. 6 *post*.

(15) Where evidence whether oral or documentary is called by the defence other than that of the accused himself, the prosecuting counsel is entitled to *reply* on the whole case, *i.e.*, the prosecution becomes entitled to " the last word "—§212. The provisions of §296(3) should be noted. If the defence, even while the case for the prosecution is going on, puts in a document, this amounts " to adducing evidence for the defence," and gives the prosecution the right to the last word.

(16) An assessor who is cognizant of any relevant fact can be examined as a witness—§215(3), §239 *post*.

(17) The District Judge *may* now sum up the evidence, and if he is assisted by assessors, he *must* do so—§213(1). See §§243 – 245 para. 2 *post*.

(18) The assessors then state their opinions orally, which are to be reduced into writing by the Judge—§213(1). The Judge is not bound to conform to the opinions of the assessors—§213(2) and §72 Courts Ordinance.

(19) The District Judge either " forthwith " or " within not more than twenty-four hours " records a verdict of acquittal or conviction—§214(1), and see *Chapter XXIV. post*. If previous convictions are to be proved against the accused this will be now proceeded with.

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§200 (20) If the accused is convicted, the Judge will pass sentence on him according to law—§214(2) and see *Chapters XXV., XXVI. post* and Ordinance No. 2 of 1926.

(21) The Judge may also make an order as to costs—see §§253D and E *post*.

(22) §215(1), (2) deals with the procedure to be adopted if all or any of the assessors are absent at the trial.

9. **The following provisions of the Code, which apply to trials before the District Court should be noted.—**

§282.—Power of the Court to compel the attendance of witnesses.
§287.—Right of the accused to be defended.
§289.—Power of the Court to adjourn or postpone the trial.
§293.—Power of the Court to order the detention of offenders.
§294.—Trial not to be invalid because it is held on a *dies non*.
§297.—Evidence to be recorded in the presence of the accused.
§§298 - 301.—Mode of recording the evidence.
§300.—Evidence to be interpreted if necessary.
§429.—Power of Court to examine persons as witnesses.
Chapter XXA.—Payment of assessors and witnesses in District Court trials—§253A.
Chapter XXIV.—Judgment.
Chapter XXV. } Sentences.
Chapter XXVI. }
Chapter XXXVI.—Bail. See also *Chapter XXXIX*.
Chapter XXXVIII.—Special provisions relating to evidence.
Chapter XL.—Disposal of property, which is the subject of an offence.

See also Courts Ordinance—
§86.—Sittings of the Court to be in public.
§89.—Death or sickness, &c., of Judge during trial.

10. **Appeal and revision—**
See §§332 - 352; 353 - 354; 356 - 360 *post*. See *Silva v. Heyzer* §§204 - 206 para. 6 *post*.

Trials before District Court to be by Judge or with assessors.

200. Trials before a District Court shall be before a District Judge alone or aided by assessors.

District Court.—See §3 *ante*.
District Judge.—See §3 *ante*.
Assessors.—See §§207, 213, 215, 239, 254 - 255, 257 - 260, 280, 364 *post*. See also §72 Courts Ordinance. "**Assessors**" are public servants—see §19(6) Penal Code.
Payment of assessors.—See §253A(1)(*b*).

1. §200 is based upon §260 of the Code of 1883.

2. **Scope of §200.**—§72 of the Courts Ordinance 1889, provides that it is open to the District Judge to have the assistance of assessors in the hearing of any cause or proceedings which has come before him for trial. §200 calls attention to this provision of the law at the outset of *Chapter XIX*.

It may be stated that the law relating to the trial of criminal cases before the District Court with the assistance of assessors is almost a dead-letter. About the year 1900, Bonser, C. J. deplored the fact that advantage was not being taken of these provisions of the law, *e.g.*, see

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R. v. Fernando. As a result, an experiment was made in certain District Courts of trying criminal cases with the assistance of assessors. The procedure, however, appears to have been tacitly abandoned after some time, apparently because it was found that such trials consumed more time than was really necessary without leading to any great advantage either to the prosecution or the defence.

The question whether a criminal trial should be held with or without the assistance of assessors is a matter solely within the discretion of the District Judge—see §72 Courts Ordinance and §§200, 207 of this Code. The Supreme Court will not interfere with any exercise of this discretion by the District Judge, even though it thinks that the manner in which such discretion has been used in the particular case before it is wrong. —*R. v. Eliatamby, R. v. Thuriappa.* The kind of cases in which the Supreme Court has indicated that assessors should be summoned are to be found indicated in *R. v. de Silva, R. v. Thuriappa, R. v. Fernando.* Where, however, a trial has been commenced with the aid of assessors, the District Judge may not under §215(2) stay the trial and proceed without assessors—see §215 para. 3.

Assessors are not jurymen for they are not judges of fact*.—*Owen v. Ratnaike*—§213 para. 8 *post.* They do not give verdicts, but only state their opinion. The verdict is the District Judge's, and he is not bound to follow the opinion of the assessors—§213(2) *post*, §72 Courts Ordinance, *Owen v. Ratnaike, R. v. Eliatamby, R. v. Silva, R. v. Kulkain, Ayer v. Changarapillai.* In certain respects, however, assessors are like jurymen, *viz.*, (*a*) they are sworn as jurymen are sworn—§207, (*b*) they may be examined as witnesses as jurymen may be examined —§215(3), 239 *post*, (*c*) they are in a certain sense judges of fact in that if there is any part of the indictment in which reference is made to previous convictions of the accused, that part of the indictment is not made public until after conviction—§253 *post*, (*d*) jurymen and assessors are empanelled or selected from lists made under *Chapter XXI. post.*

Assessors are public servants.—See §19(6) Penal Code.

3. **The summoning of assessors.**—The procedure for summoning assessors is different from that specially provided for the summoning of jurymen. §53(5) of the Courts Ordinance empowers the Judges of the Supreme Court to make rules for the summoning of assessors, but hitherto no rules have been framed. In the case of assessors, it is the duty of the District Judge to "*select*" the assessors he desires to have, and thereafter to have them summoned—§72 Courts Ordinance. He makes his selection from the list of persons prepared by the Fiscal under §257 *post*, and he will select such persons as in his opinion are competent to assist him in the trial of the particular case. The Judges of the Supreme Court have not this power of selecting the persons to be summoned for jury service. The panels of jurymen are drawn by lot (§§262, 263 *post*) from the lists prepared under §257 *post.*

When the District Judge has selected his assessors, he is required to summon them—see §72 Courts Ordinance. The language used in §207 indicates that the Judge should cause to be summoned several persons out of whose number he makes the final selection necessary for the trial of the particular case. The method of summoning assessors differs from the procedure adopted for summoning jurymen. The latter are summoned under §§269, 270 *post;* whereas in the case of assessors no special procedure is indicated for summoning them. It follows, therefore,

* See §17 *ill.* (*d*) Penal Code.

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§200 that the necessary summons will be prepared in the District Court and served under the general provisions applicable to process under *Chapter V. ante.* This was the procedure adopted in 1900, when the experiment of trying criminal cases with the assistance of assessors was made. Six persons were summoned at a time, and the final selection under §207 *post* was made from the persons so summoned. See §280 *post.*

The penalty for non-obedience to a summons by an assessor is to be found in §280 *post.*

4. **The number of assessors to be associated with the Judge** —See §207 para. 4 *post.*

5. **§72 of the Courts Ordinance provides that assessors "shall be otherwise subject to such rules as may be made by the Judges of the Supreme Court as hereinbefore provided**—see §53(5) Courts Ordinance, but no such rules appear to have been made up to date. See §441 *post.*

6. **The payment of assessors.**—*General Orders* 421–429 as originally framed provided for the payment of travelling allowances and of batta to assessors. §253A of this Code now makes provisions "for the payment out of the public revenue of the expenses of persons summoned to serve as . . . assessors in any trial before . . . a District Court." The Governor in Executive Council is empowered to make rules for this purpose, and rules have been framed—*vide Gazette* 7241, dated, February 3, 1922. It follows that the payment of assessors is regulated by §253A *post*, and the regulations framed thereunder. See also the old case of *Rockwood v. Mohamadu.*

7. **See also §§207, 213 *post.***

8. **Case law.**—

R. v. de Silva (1895) 1 *N.L.R.* 296.—The accused was regularly committed for trial before the District Judge in respect of an alleged offence of perjury committed by him before the same Judge in another judicial proceeding. *Held*, that it was open to the District Judge to try the accused, but that it would have been more satisfactory if at such trial he had the assistance of assessors. "I need only say that I wish it had occurred to the Judge in this instance to call in the assistance of assessors. Assistance of this kind is very valuable to a Judge in case of falsehood or fraud . . ." *per* Withers, J.

Ayer v. Changarapillai (1896) 1 *N.L.R. at p.* 18 (*Civil case*).—*per* Bonser, C.J. "That is not the object of the appointment of assessors. Their duties are analogous to those of jurymen . . ."; but see *Owen v. Ratnaike infra.*

Owen v. Ratnaike (1899) 3 *N.L.R.* 333.—See §213 *post.*

Rockwood v. Mohamadu (1903) 8 *N.L.R.* 45.—There is no provision in the common or statute law of this Colony entitling assessors in civil or criminal cases to demand remuneration for their services. See §253A (1)(*b*) *post.*

R. v. Thuriappa (1904) 8 *N.L.R.* 70.—The appointment of assessors for the trial of a criminal case is a matter in the discretion of the Judge. The appointment of assessors may, in some cases, be of considerable assistance to the Judge even where he differs from them in opinion.

R. v. Eliatamby (1909) 12 *N.L.R.* 14.—Where a Judge in the exercise of his discretion under §72 of the Courts Ordinance 1889, refuses to summon assessors to try a criminal case, such refusal is final, and the Supreme Court has no power to review such discretion. "It appears to me that the Legislature intended to leave the matter absolutely in

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the hands of the Judge, and that he is not bound to give any reason . . . In my opinion, the discretion of the Judge is absolute, and whether he gives no reason at all, or gives one which we may think is mistaken, this Court cannot overrule his discretion," *per* Hutchinson, C.J. §201

R. v. Fernando (1900) 1 *Br.* 54.—Should a District Judge, who is called upon to try an habitual offender have the assistance of assessors ?

R. v. Silva (1890) 9 *S.C.C.* 65.—" The District Judge appears to have misunderstood the extent of his functions as a Judge trying an indictment with the aid of assessors. Questions of law or procedure, including questions of the allowance or disallowance of applications to amend the indictment, or applications for postponement of the trial are questions entirely for the decision by the Judge, and not by the assessors . . . ." *per* Clarence, J., see §213 *post* and *c.f.* §§244 – 245 *post.*

R. v. Kulkarni 14 *Bom. L.R.* 710.—Assessors are not judges of fact and cannot bind the Judge.

By whom trials before District Court to be conducted.

201. In every trial before a District Court the prosecution shall be conducted by the Attorney-General or the Solicitor-General or a Crown Counsel or by some pleader generally or specially authorized by the Attorney-General in that behalf.

District Court.—§3 *ante.*

Attorney-General.—§3 *ante.*

Solicitor-General.—§3 *ante.*

Crown Counsel.—See Ordinance No. 1 of 1883 §4 and §§199, 216(2), 392–393.

Pleader.—§3 *ante.*

Pleader generally or specially authorized.—See §§199, 392 and contrast with this the words **" Advocate generally or specially authorized "** in §216(2) *post*, and the words **" Prosecuting Counsel "** —in §§202, 210(2), 212.

Right of accused to be defended by a pleader.—§287 *post.*

1. §201 is based on §261 of the Code of 1883.—See *Fernando v. Fernando, R. v. Sinno Appu.*

2. **Scope of §201.**—§201 together with §§199, 216(2) and 392 form a group of sections which indicate the officers or persons by whom prosecutions in the various criminal Courts may be carried out. Thus, in non-summary investigations before the Police Court it is the Attorney-General, Solicitor-General, Crown Counsel, or a pleader generally or specially authorized who may conduct the prosecution. In their absence, the Magistrate acts as prosecutor, subject to the power given him to avail himself of the assistance of any pleader or public officer in the conduct of the inquiry—§392 *post.* In summary trials the rule is stated in §199 *ante*, while §§201 and 216(2) provide the corresponding rule for District Courts and the Supreme Court respectively. It should be noted that whereas in the case of the Supreme Court it is only an " *advocate* generally or specially authorized " who may conduct a prosecution in the absence of the Law Officers or of Crown Counsel—§216(2); in all the other cases the words used are a " *pleader* generally or specially authorized." This distinction is drawn in the Code for the reason that the Legislature did not intend that proctors should conduct prosecutions before the Supreme Court.

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§201 It follows that with regard to trials before the District Court, no pleader retained by the parties actually concerned can appear and conduct the prosecution, unless he is either generally or specially authorized in that behalf by the Attorney-General. The reason for this rule is found stated in the case of *Fernando v. Fernando.* See also *R. v. Sinno Appu.*

See §§208-212 para. 2 and §287 para. 2 *post.*

3. **Pleader generally or specially authorized in that behalf.**—"**Pleader**"—see §3 *ante.* The word includes advocates as well as proctors.

Every *Crown Advocate* and *Crown Proctor* is a "pleader generally authorized" within the meaning of this Code. The letters appointing these gentlemen to the offices they hold, give them the general authority required by law.

A general or special authority may be given to any pleader by the Attorney-General. The granting of such authority is a matter solely within the discretion of the Attorney-General. The terms of such authority are as follows :—

I, *A.B.* His Majesty's Attorney-General, do hereby authorize and empower *X. Y.* Esquire, Advocate (*or Proctor as the case may be*), to appear on my behalf before the District Court of *Z* and therein conduct the prosecution of the accused in *P.C. . . . Case No. . . .* (or, "*in all cases*" *if the authority is a general one*), committed before the said District Court for trial at its Sessions commencing on . . .

Given under my hand this . . . day of . . ., in the year of our Lord 19 . . .

(Signed) *A.B.*
Attorney-General.

Note that under §393 *post* such an authority may be signed by the Solicitor-General or by Crown Counsel. In practice it is usual for the Solicitor-General or Deputy Solicitor-General to sign such sanctions.

4. **The powers and duties of prosecuting counsel.**—(*a*) He must open his case.—§208(1). The opening speech should state clearly, concisely and in chronological order, the facts upon which the prosecution relies as establishing the guilt of the accused. He must not open any fact which he is not prepared with evidence to prove, and he should at this stage of the proceedings abstain from all denunciation or invective against the accused, whose guilt has not yet been established. If the accused is undefended, he should prominently bring to the notice of the Court any points which exist in favour of the accused and which may legitimately be urged in his favour.—See *Fernando v. Fernando.* See §§208 – 212 para. 2 *post;* §§232 – 237 para. 2 *post.*

(*b*) He must call his material witnesses—§208(2), examine them in chief, and if needs be, re-examine them after their cross-examination by the defence. When, in his judgment, sufficient evidence has been led to prove the various issues arising in the case, he should intimate to the Court that the proof for the prosecution is closed, and that he tenders the remaining witnesses, if any, for cross-examination by the defence—see *R. v. Perera* (1915) 18 *N.L.R.* 215, *R. v. Iyampillai* (1913) 4 *B.N.C.* 14, 2 *Leader* 81 and *R. v. Kaiya* noted under §§208-212 para. 6 *post.*

(*c*) If the defence calls no evidence at all, the prosecuting pleader may *sum up* his case at the close of the proof for the prosecution—§210(2). He may, however, not comment upon the failure of the accused or of his

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spouse to give evidence—§296(3). Subject to this he may make comments regarding the omission of the defence to lead other evidence—see §114 *illustration* (*g*) Evidence Ordinance.* §201

If the only witness called for the defence is the accused himself, the prosecuting counsel may *sum up immediately after the accused has given evidence.—R. v. Joronis* (1921) 22 *N.L.R.* 468, *R. v. Gardner* (1898) 1 *Q.B.* 150. The reason for this rule is to enable the prosecuting counsel to comment on, and if needs be, to criticise the evidence given by the accused.

If no evidence is called by the defence, but *the accused makes an unsworn statement from the dock,*† prosecuting counsel would similarly be entitled to sum up after such statement is made. This point has not yet arisen for decision in Ceylon, but in *Mrs. Maybricks' case*, the prisoner made an unsworn statement from the dock, and prosecuting counsel was allowed to comment on and criticise such statement.

(*d*) If the defence leads evidence, whether by calling witnesses other than the accused himself, *or by putting in some documentary evidence*, the prosecuting counsel obtains the right of reply, or as it is called, the right to the last word, which is regarded by the bar as a great privilege—§212. In this connection it should be remembered that the failure of the accused or of his spouse to enter the witness-box and give evidence must not form the subject of adverse comment by prosecuting counsel in his final speech.—§296(3) *post.*‡ Subject to this, he may freely comment upon the absence of evidence on any given point—see §114 *illustration* (*g*) Evidence Ordinance.

(*e*) He may cross-examine any witnesses called for the defence, including the accused. The cross-examination of the accused is specially subject to the provisions of §§54 and 120(4) of the Evidence Ordinance.¶ See §122 para. 7 *pp.* 240-241 *ante.*

(*f*) If the prosecution is taken by surprise by the evidence led for the defence counsel may apply to the Judge for permission to lead evidence in rebuttal—§212 *post.*

(*g*) He may with the permission of the Judge withdraw the indictment at any time before the verdict is recorded—§202.‖ Likewise, if the accused is convicted on one count of the indictment he may move to withdraw the other counts—§185 *ante.*

(*h*) The prosecuting pleader should always remember that he is there to assist the Court in the furtherance of justice, and that he is not there as counsel for a particular person or party—*R. v. Thursfield* ; nor should he be betrayed into feelings of professional rivalry to regard the questions at issue as one of professional superiority, and a contest for skill and pre-eminence—*R. v. Puddick.* His duty in short is to see that a fair trial takes place—*Fernando v. Fernando.*

4A. **The Attorney-General's Department is a prosecuting and not a defending department**—see §392 para. 3 *post.*

5. **Case Law.**—

R. v. Sinno Appu (1885) 7 *S.C.C.* 51—*Full Court.*—The Attorney-General may, under §261 of the Code of 1883 authorize any advocate or proctor to conduct a prosecution before a District Court, but such person may not, unless an advocate, withdraw a case under §262 of that Code.

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* See *Dias on the Evidence Ordinance p.* 216 – 217.
† *R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.
‡ See *Dias on the Evidence Ordinance p.* 216—217.
¶ See *Dias on the Evidence Ordinance p.* 217.
‖ But see §202 para. 1.

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§201

Fernando v. Fernando (1897) 2 *N.L.R.* 340.—"Now §261 of the Criminal Procedure Code provides that in every trial before the District Court the prosecution shall be conducted by the Attorney-General or by some officer empowered by him in that behalf. The reason for that provision is obvious. Offences tried before a District Court are serious offences . . . Of course, the Attorney-General cannot conduct prosecutions in person, but the policy of the law is that *some officer responsible to him* is to have charge of these prosecutions. It is his duty to see that all material witnesses are called, that all the important facts of the case are properly brought out, as well in the interests of the prosecution as of the defence; in short, to see that a fair trial takes place . . . ," *per* Bonser, C. J.

R. v. Thursfield (1838) 8 *C. & P.* 269.—The prosecuting counsel should assist the Court in the furtherance of justice, and not act as counsel for any particular person or party. See *R. v. Berens* (1865) 4 *F. & F.* 842.

R. v. Puddick (1865) 4 *F. & F.* 497.—Counsel for the prosecution should not be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence. See *R. v. Banks* (1916) 2 *K.B.* 621.

R. v. Perera (1915) 18 *N.L.R.* 215.
R. v. Iyampillai (1913) 4 *B.N.C.* 14.
2 *Leader* 81.
R. v. Amudeen (1907) 3 *Bal.* 127.
} Tendering prosecution witnesses for cross-examination.

Attorney-General may withdraw prosecution.

202. The Attorney-General may at any time before the verdict is recorded withdraw any indictment, and the prosecuting counsel may also with the permission of the District Judge at any time before the verdict is recorded withdraw any indictment, and thereupon all proceedings thereon shall be stayed and the accused shall be discharged.

Attorney-General.—§3 *ante.*

Solicitor-General or Crown Counsel cannot enter a *nolle prosequi*.—§393 *post.*

Before the verdict is recorded.—See §§210(1), 214(1).

Indictment.—See §§158(2), 161(4), 167-185, 186, 203, *Form* 11, *Schedule III. post.*

Prosecuting counsel.—See §212 and *c.f.* §§199, 202, 216(2), 392.

Withdrawal of charge by prosecution with consent of the Judge.—See §§195, 185, 217(3), 221(2).

***Nolle prosequi*.**—§§196, 217(1), 388, 393.

District Judge.—§3 *ante.*

Discharged.—§3 *ante.*

1. §202 is based upon §262 of the Code of 1883. In the case of *R. v. Sinno Appu*—§201 para. 5 *ante*—the *Full Court* had decided that the prosecuting "officer" unless he happened to be an *advocate*, had no power to withdraw an indictment from the Court under §262 of the old Code. It is noteworthy that the Legislature in framing §202 has made use of the words "*prosecuting counsel*" as opposed to the word "*pleader*" used in §201. It can therefore be contended that no person

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other than **counsel** can withdraw an indictment under the latter part of §202. It is submitted that the words "prosecuting counsel" in §202 were never intended to curtail the powers of prosecuting officers generally, *viz.*, by withholding from a prosecuting **Crown Proctor** the power to withdraw an indictment from the Court. That these words have been loosely used is made clear upon reference to §210(2), 212 *post* where the same words occur. If the word "counsel" is to be strictly interpreted, it follows that a prosecuting proctor is unable to "reply" or ask for permission to call evidence in rebuttal. The case of *R. v. Sinno Appu* cannot any longer be regarded as laying down a correct principle of law or practice on the point. See para. 2 (*b*) *infra*. §202

2. **Scope of §202.**—This section deals with two distinct matters, *viz.*, (*a*) the entering of a *nolle prosequi* by the Attorney-General, and (*b*) the withdrawal of the indictment by the prosecuting officer, with the consent of the District Judge.

(a) The entering of a nolle prosequi in District Court cases.—It is only the Attorney-General who has power to enter a *nolle prosequi*—§393 *post*.

§388 *post* gives the Attorney-General power to enter a *nolle prosequi* "at any stage of an inquiry (*i.e.*, a non-summary inquiry) by a Police Court. 196 *ante* conferred the same power in a limited degree upon him with regard to summary trials. §202 deals with the power of the Attorney-General to enter a *nolle prosequi* in District Court cases, while §217(1) *post* gives him a similar right with regard to cases before the Supreme Court.

The *nolle prosequi* may be entered "at any time before the verdict is recorded"—§202, and *c.f.* §217(1) *post*. Do these words imply that at any time after committal by the Police Court or transfer to the District Court by the Supreme Court and before the recording of the verdict in the District Court, the Attorney-General can enter a *nolle prosequi* under §202 ? In other words—may a *nolle prosequi* under §202 be entered after committal and before the commencement of the trial ? The words used in §202 are "at any time before the verdict is recorded," whereas in §217(1) the words used are "*at any stage of a trial* before the Supreme Court . . . before the return of the verdict." See also §388—"*at any stage of an inquiry*" and "*at any stage*" in §196. It is submitted that the Legislature did not intend to make any difference in cases tried before District Courts and cases tried before the Supreme Court with regard to the powers of the Attorney-General to enter a *nolle prosequi*. The intention of the Legislature appears to be that all these sections—196, 202, 217(1), 388 should be used only during the continuance of the proceedings in Court. Thus, in a non-summary inquiry, such inquiry ordinarily ceases with the committal of the accused, and it follows that the Attorney-General cannot act under §388 when once the inquiry is concluded. Moreover, it would appear that §§202 and 217 (1) preclude the Attorney-General from entering a *nolle prosequi* in committed cases between the committal of the accused and the trial. The other interpretation would imply that the prosecuting officer would also have power of withdrawing the indictment at any time after committal and before trial. If, therefore, it is desired to enter a *nolle prosequi* in a committed case before the trial date, the proper procedure would be to move the trial Judge to have the case listed for trial, formally commence the trial, and then enter the *nolle prosequi*.

Where a *nolle prosequi* is entered, the indictment is withdrawn. This means that the whole proceeding is at an end, and the accused

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§202 cannot again be tried on that indictment, but there is nothing to prevent his being proceeded against *afresh*, for the accused is only "discharged" and is not "acquitted."—*R. v. Appuwa Veda.*

Form of *Nolle Prosequi* under §202.

I, ... His Majesty's Attorney-General for the Island of Ceylon, under and by virtue of the powers vested in me by Section 202 of the Criminal Procedure Code do hereby withdraw the indictment against....., the accused in Police Court..... Case No. ....., now committed to stand his trial before the District Court of.....upon the said indictment.

Given under my hand at Colombo this.....day of.....

(Sgd.).....

Attorney-General.

'(*b*) **Withdrawal of indictment by the prosecution.**—

§202 together with §§185, 195, 217(3) 221(2), form a group of sections which confer upon the person conducting the prosecution, under certain circumstances the power of withdrawing the charge with the permission of the Court.

In the case of a trial before the District Court the "prosecuting *counsel*" is given power at any time before the verdict is recorded to move the Judge for permission to withdraw the indictment. The words "prosecuting counsel" appear to have been loosely used—see para. 1 *supra*. It is submitted that both a prosecuting **counsel** as well as a prosecuting **proctor** have power to act under §202. They are both responsible to the Attorney-General, under whose authority and in whose name they act, for a proper exercise of their powers under §202—*Fernando v. Fernando* §201 para. 5 *ante*. Where an indictment has been withdrawn by the prosecuting officer under §202 the accused is not "acquitted," but only "discharged," *i.e.*, the accused can be charged again in fresh proceedings.—*R. v. Appuwa Veda.*

"At any time before the verdict is recorded."—*C.f.* §215(1). **"At any time before the finding."**—See para. 2(*a*) *supra*.

3. **If the Supreme Court transfers a summary trial from the Police Court to a District Court, or in appeal or revision orders that a trial should proceed before a lower Court, or that a new trial should take place before a higher Court, may the Attorney-General or prosecuting counsel acting under §202 nullify the order of the Supreme Court ?** This question was adverted to in *R. v. Noordeen*. As stated by Wood Renton, J., the possibility of such a contingency ever arising is very rare. It is submitted that in strict law the power of the Attorney-General to enter a *nolle prosequi* exists in such cases, the order of the Supreme Court merely being to vest a given court with the requisite jurisdiction.

4. **All proceedings . . . shall be stayed and the accused shall be discharged.**—These words apply to a *nolle prosequi* entered by the Attorney-General, as well as to the withdrawal of an indictment by the officer conducting the prosecution. See *R. v. Appuwa Veda.*

Discharged.—See *R. v. Appuwa Veda* and the definition in §3 *ante*.

5. **Case law.**—

R. v. Sinno Appu (1885) 7 *S.C.C.* 51—see §201 *ante*.

R. v. Appuwa Veda (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1.—In the course of a criminal trial in the District Court objection was raised to a document being admitted in evidence on the ground that it was not

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entered upon the list of productions on the back of the indictment. The objection having been upheld, the Crown Proctor who prosecuted, moved to withdraw the indictment. The Judge permitted this to be done and discharged the accused under §202 of this Code. Subsequently, fresh proceedings were instituted against the accused, and upon committal for trial, he pleaded *autre fois acquit*. *Held*, that the plea was untenable, inasmuch as an order under §202 did not amount to an acquittal. See §217(3) *post*. §203

R. v. Noordeen (1910) 13 *N.L.R. at p.* 117.—*Qu.*—Where the Supreme Court orders a new trial, could the Attorney-General acting under §§202, 217(3), 388 nullify such order? "I feel quite sure that no Attorney-General would feel himself justified in exercising his powers under §202, and I desire to guard myself expressly from being supposed to hold that in such a case where the Legislature has itself conferred jurisdiction on the Supreme Court, it would be competent for the Attorney-General to over-ride that jurisdiction under the provisions of §202 . . . ", *per* Wood Renton, J.

Indictment.

203. (1) If the case comes before the court on the committal of a Police Court the accused shall be arraigned on the indictment served on him as provided by Section 158.

In case of transfer indictment to be framed upon the evidence.

(2) If the case comes before the court from a Police Court by virtue of an order of transfer made by the Supreme Court the indictment shall be framed upon the facts disclosed in the examination of the complainant or informant, and the evidence taken in the case and a copy of such indictment shall be served on the accused.

District Court.—§3 *ante*.

Police Court.—§3 *ante*.

Arraignment of accused.—§204 *post*.

Evidence.—§3 Evidence Ordinance 1895.

Indictment.—See §§158(2), 161(4), 167-175, 186, *Form* 11, *Schedule III*. *post*.

Supreme Court.—§3 *ante*.

Order of transfer by Supreme Court.—See §§12, 218, 422 *post*.

Jurisdiction of District Court to hold trial.—§12.

Complainant.—See §§3, 189(3), 194, 195, 253B, 219(2).

Committal of a Police Court.—§158 *et seq. ante*.

Copy served on the accused.—See §§158(1), 161(3)(4), 218(2).

1. §203 is based on §§263, 264 of the Code of 1883.

2. **Scope of §203.**—

See Introduction to *Chapter XIX*. para. 2 *ante*.

No criminal trial can take place in a District Court except upon an indictment which charges the accused with one or more specified offences. §§12 and 203 indicate that there are two methods by which a case might come before a District Court for trial upon indictment, *viz.*, (*i*) on a committal by a Police Court having jurisdiction, after a non-summary inquiry under *Chapter XVI.*, and upon an indictment duly settled and approved of by the Attorney-General—§203(1), or (*ii*)

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§203 where the Supreme Court has transferred a case for trial by the District Court—§203(2). It has already been pointed out* that this second method by which cases may come before District Courts for trial is not often adopted, inasmuch as §46 of the Courts Ordinance 1889 has been repealed by Ordinance No. 1 of 1900 in so far as it relates to the transfer of criminal cases, and because §422 *post* which appears to cover the provisions of §46 of the Courts Ordinance is not often used for this purpose. The usual procedure adopted when the Supreme Court orders that a case should be tried in the District Court instead of a Police Court, is to remit the case to the Magistrate with orders that he should take non-summary proceedings in due form. See §218(2) *post.*

3. **If the case comes . . . on the committal of a Police Court.**—The District Judge is bound by the Attorney-General's indictment. The Judge is bound to try the accused on the charge or charges framed in the indictment—*R. v. Perera.* He has no power to review the circumstances under which the committal was made—*R. v. Kolandavail, R. v. Boosa*, provided the indictment is regular on the face of it, *i.e.*, it contains no misjoinder of charges or of accused, or other irregularities, and provided it is supported by a regular committal from a Police Court having the necessary jurisdiction—*R. v. Veda.* Thus, it is not open to the District Judge to refuse to try an accused who has been indicted on a charge of causing grievous hurt, because the Judge thinks that upon the evidence the charge should have been one of attempted murder—*R. v. Perera, R. v. Kolanda.* It is only the Supreme Court that can question the validity of the committal, and it will not so interfere unless such discretion has been manifestly abused—*R. v. Fernando.* It is only in some extreme case that a Court of Appeal would go behind the discretion vested in the Attorney-General—*R. v. Sinno.* In framing the indictment the Attorney-General is not bound to confine himself to the actual charges framed against the accused in the Police Court, but the accused may be indicted in respect of any other offences disclosed in the evidence led in the non-summary investigation—*R. v. Sittambaram.* See *General Order* 888(i).

See generally §158 para. 2 *ante.*

3A. **If the case comes before the Court without being committed thereto, by reason of a transfer by the Supreme Court, it is the duty of the District Judge to cause its officer to draft an indictment upon the facts disclosed in the examination of the complainant or informant.** The evidence taken in the case together with a copy of the indictment would be served on the accused. See Introduction to *Chapter XIX.* para. 2 *ante* and §12. This procedure, however, is extremely rare and seldom arises in actual practice. See 218(2) *post.* "*A copy of such indictment shall be served on the accused*" —see §218 para. 5 *post.* In whose name should this indictment be drafted? §186 provides that *all* indictments shall be brought in the name of the Attorney-General and in accordance with the prescribed form. Obviously, an indictment drafted under §203(2) cannot be signed by Crown Counsel. It is submitted that an indictment under §203(2) should be drafted like one under §439(1)—see para. 10 to that section.

4. **Arraigned.**—See §204 paras. 2, 3 *post.*

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* Introduction to *Chapter XIX.* para. 2 *ante.*

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5. **Case law.**—

R. v. Kolandavail (1891) 1 *S.C.R.* 198.
R. v. Perera (1897) 3 *N.L.R.* 43.
R. v. Kolanda (1901) 5 *N.L.R.* 236 ; 2 *Br.* 142, 315.
R. v. Fernando (1905) 8 *N.L.R.* 354.
R. v. Veda (1907) 10 *N.L.R.* 199 ; 2 *A.C.R.* 1.
R. v. Boosa (1908) 11 *N.L.R.* 355.
R. v. Sittambaram (1918) 20 *N.L.R. at p.* 265.
R. v. Sinno (1919) 21 *N.L.R.* 142 ; 6 *C.W.R.* 10.

See §158 para. 10 *ante*.

Commencement of Trial.

Arraignment of accused.

204. When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

Plea of guilty.

205. If the accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon.

Refusal to plead or plea of not guilty.

206. If the accused does not plead or if he pleads not guilty, he shall be tried.

District Court.—§3 *ante*.

Indictment.—See §203 *ante* and see also §§158, 161(4), 167-185, 186, *Form* 11, *Schedule III*.

Offence.—§3 *ante*.

District Judge.—§3 *ante*.

Plea of accused.—See §§155, 187-188, 219-221.

Offence.—§3 *ante*.

1. §204 is based on §266, §205 on §267, and §206 upon §268 of the Code of 1883.

2. **Scope of §§204 - 206.**—See Introduction to *Chapter XIX.* para. 8 (5)-(7) *ante*.

On the day fixed for the trial, the accused, if he is out on bail will surrender to the Court ; if he is on remand, he will be brought before the Court in custody.* Thereafter, when the Court is ready to proceed with the trial, the first thing that has to be done is to "*arraign*" the accused.—§204, and to take his plea.—§§205-206.

3. **The arraignment of the accused.**—(*a*) The accused is called to the bar by name, (*b*) the indictment referred to in §203 *ante* is read out and interpreted to him if necessary—§167(6). If the indictment contains any reference to previous convictions, that part of the indictment is not read or made public at this stage—§253 *post*. (*c*) The accused is thereafter called upon to plead to the charge or charges framed against him in the indictment.

4. **If it is desired to take any objection either (*i*) to the form of the indictment, *e.g.*, on the ground that it contains some defect**

* *Qu.*—May the trial proceed in the absence of the accused?—see §297 para. 4 *post*.

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or misjoinder, or (*ii*) to the jurisdiction of the Court—§73 Courts Ordinance, or (*iii*) in bar of the trial, *e.g.*, by raising the plea of *autre fois acquit* or *convict*—§§330-331 *post*, the proper time to take such objection is at this stage, before the accused has pleaded to the indictment. If the accused is defended, his counsel or proctor will take the objection at this stage on behalf of the accused.

(i) Objections to the form of the indictment, *e.g.*, (*a*) that it does not set out sufficient particulars of the offence charged—see §§167-170, but no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was misled by such error or omission—§171 *ante* and §425 *post*. Any such error or omission can be amended by the Court of trial—§§172-177 *ante*. (*b*) That it discloses a misjoinder of charges—see §§178-181, §168(2) *ante* and §425 *post*. (*c*) that it discloses a misjoinder of accused—§§178, 184 *ante* and §425 *post*.

If the Court considers that any such objection to the indictment is well founded, it may amend the indictment so as to make it regular, and proceed with the trial at once or after any necessary adjournment, or it may direct a new trial—§174 *ante*. See generally §§172-176 *ante* and *Hami v. Appuhamy* §§208-212 para. 2(2) *post*.

(ii) Objections to the jurisdiction of the Court.—As to the criminal jurisdiction of District Courts—see Introduction to *Chapter XIX*. para. 2 *ante*.

Any objection whether to the *territorial jurisdiction* of the Court, or to the *punitive jurisdiction* of the Court must ordinarily be taken before the accused pleads to the charge—§73 Courts Ordinance and see *R. v. Fernando*, *R. v. Silva*, *R. v.*————, *R. v. Nikajutiya*. Where, however, the objection is made, not against the jurisdiction of the District Court alone, but also against the jurisdiction of the Police Court ordering committal, the objection may be urged at any stage and may even be raised in appeal—*R. v. Perera*.

(iii) Pleas in bar, *e.g.*, *autre fois acquit or convict*.—See §§330-331 *post* ; a pardon, or that the offence is statute barred—§444 *post*.

5. **The plea.**—See Introduction to *Chapter XIX*. para. 7 *ante* and §188 para. 5 *ante*.

If no objection is urged as indicated in para. 4 *supra*, the accused is called upon to plead to the indictment, immediately after it has been read out and interpreted to him.

(i) If the accused pleads guilty to the indictment, or if the accused pleads guilty to some lesser offence—see §§182-183 *ante*, and the prosecuting officer is willing to accept such latter plea—*c.f.* §221(2) *post*, the Judge may convict the accused on his plea, provided he is satisfied that the accused rightly comprehends the effect of his plea. Such plea will then be recorded on the indictment, and he *may* be convicted thereon—§205.

The use of the term "*may*" indicates that although a formal conviction must follow upon a plea of guilty—*R. v. Babappu*, the Judge is not obliged to convict "*forthwith*" or "*within twenty four hours*" as provided in §214(1) *post*. Thus where X and Y are jointly charged upon indictment, and X pleads guilty and Y pleads not guilty, it is open to the Judge to postpone convicting X until after the trial of Y, but even if Y is ultimately acquitted, X ought formally to be convicted—*R. v. Babappu*.

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(ii) If the accused pleads not guilty, this casts the burden of proving the accused's guilt beyond reasonable doubt upon the prosecution, and the trial proceeds—§206. §§204-206

(iii) If the accused "stands mute"—

(*a*) if he stands "*mute of malice*," *i.e.*, contumaciously refuses to plead, the trial proceeds as if a plea of not guilty had been offered—§206.

(*b*) if he stands "*mute by visitation of God*—(*i*). If although the accused is not insane he cannot be made to understand the proceedings, *e.g.*, owing to deafness or dumbness, the trial may proceed, and if the case ends in a conviction, the Judge will forward the record to the Supreme Court with a report of the circumstances of the case, and the Supreme Court, thereafter, will pass such order as it thinks fit—§288 *post*. See also §6 *ante* and *R. v. Harris*. (*ii*). If the accused owing to insanity is incapable of making his defence, the Court will proceed as indicated in §§368, 369 *post*. See *R. v. Stafford* (1909) 2 *K.B.* 81. *R. v. Pindorissa*. (1927) 5 *T.L.R.* 101.

As to the plea when the Supreme Court orders a new trial— See *Silva v. Heyzer*.

6. **Case law.—**

R. v. Silva (1911) 14 *N.L.R.* 336.—The proper time to take an objection to the jurisdiction of the Court to try the case is when the accused is called upon to plead to the indictment—§73 Courts Ordinance. Thus, where it was contended for the first time in appeal that the District Court had no jurisdiction under §11 of this Code to try the case, *held*, that the proper time at which this objection should have been urged was when the accused was called upon to plead to the indictment. *Held further*, that §73 of the Courts Ordinance does not refer solely to the territorial jurisdiction of the Court. *R. v. Fernando* (1905) 8 *N.L.R.* 357, *R. v.*————(1879) 2 *S.C.C.* 50, and *R. v. Nikajutiya* (1880) 3 *S.C.C.* 96 considered.

R. v. Perera (1916) 19 *N.L.R.* 310, 3 *C.W.R.* 176.—The indictment charged the accused with having committed an offence at B, within the jurisdiction of the District Court of K. When the accused was called upon to plead, no objection to the jurisdiction of the Court was taken. During the trial it was discovered that that offence was really committed at P, which was outside the territorial jurisdiction of the District Court of K. *Held*, that it was open to the accused *in such circumstances* to raise an objection to the jurisdiction in appeal. "I do not think that §73 can be read as giving a District Court the power to try a case in which the preliminary inquiry has been held without any jurisdiction by a Police Magistrate . . .," *per* Shaw, J. See *Paul v. Sinniah* (1918) 5 *C.W.R.* 143. Note that, *Paul v. Sinniah* is a Police Court and not a District Court case.

R. v. Fernando (1905) 8 *N.L.R.* 354.—Objections to jurisdiction should be taken immediately upon arraignment and before the plea. There is nothing in the wording of §73 to confine its operation solely to objections to the territorial jurisdiction of the Court. See also *R. v. Appuhamy* (1878) 1 *S.C.C.* 23.

R. v.————(1879) 2 *S.C.C.* 50.—Time at which to take objection to the jurisdiction of the Court indicated.

R. v. Nikajutiya (1880) 3 *S.C.C.* 96.—Objection to the jurisdiction of the Court should be taken before the plea.

R. v. Babappu (1916) 2 *C.W.R.* 317.—Where one of two accused who were committed for trial to the District Court pleaded guilty to the

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charge, but the Judge proceeded to hear the case as against both of them and eventually acquitted them both, *held*, that upon the plea of Guilty, it was the duty of the Judge to have recorded a formal conviction against him.

Hami v. Appuhamy (1898) 3 *N.L.R.* 101.—See §§208-212 *post.*

R. v. Harris (1897) 61 *J.P.* 792.—Where the accused could not read or write, and could only speak in a whisper, and not sufficiently to instruct his solicitor, but was sane, his whispered plea was taken and the trial adjourned.

Silva v. Heyzer (1924) 2 *T.L.R.* 212; 26 *N.L.R.* 189.—Where a conviction is set aside and a new trial directed to be held before another Judge, it is irregular for this Judge to consider the evidence already recorded except with the express consent of the accused or his duly authorized pleader. It is desirable that his plea should be taken afresh—and this *must* be done if the accused is undefended.

Choosing Assessors.

Assessors to be chosen and sworn.

207. When the trial is to be held with the aid of assessors two or more shall be chosen, as the District Judge thinks fit, from the persons summoned to act as such and shall be duly sworn as jurors are sworn.

Assessors.—See §§200, 213, 215, 239, 254 – 255, 257 – 260, 280, 364. See also §72 Courts Ordinance, and §19(6) Penal Code.

District Judge.—See §3 *ante.*

Summoning of assessors.—See §§44-49 and *c.f.* §62 *ante.* See §280 *post* as to the penalty for not obeying summons.

Swearing in of assessors.—See §227(3) *post.*

1. §207 is based on §265 of the Code of 1883. Note the use of the words "*two or more shall be chosen*" in §207 of this Code and in §265 of the old Code; and compare §72 of the Courts Ordinance 1889, which provides that, where assessors are associated with the Judge in any cause or proceeding, he is to have "*three assessors associated with him,*" and that "*such assessors shall be selected and summoned, and shall be otherwise subject to such rules as may be made by the Judges of the Supreme Court as hereinbefore provided,*" *i.e.*, under §53(5) of the Courts Ordinance. See §284 of the Indian Code.

2. **Scope of §207.**—If the trial is to take place before the District Judge with the aid of assessors the next step after the plea of the accused has been taken, is for the assessors to be selected and sworn.

3. **The summoning of assessors.**—See §200 para. 3 *ante.*

The summoning of assessors is different from the method adopted for summoning jurymen. §53(5) of the Courts Ordinance empowers the Judges of the Supreme Court to make rules regulating "the mode of *summoning*, *empanelling*, and *challenging* of *assessors* and *jurors*," but hitherto no regulations have been framed. See §441 *post.* As a matter of fact the summoning, empanelling, and challenging of *jurymen* has been adequately provided for by this Code.

With regard to *assessors*, §72 of the Courts Ordinance requires the District Judge "to select and summon them." The practice is for the District Judge to select certain names, ordinarily six, from the list of persons prepared by the Fiscal under §257 *post.* Having made his selection, he causes them to be summoned. In the case of *jurymen*

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§§269 – 270 *post* indicate the manner in which they are to be summoned. The Code does not make any special provision for the summoning of assessors. It follows, therefore, that assessors must be summoned, not by the Fiscal, but by the District Court itself under *Chapter V.* of this Code. The penalty for not obeying such a summons is indicated in §280 *post.* §207

4. **The number of assessors.**—§72 of the Courts Ordinance provides that " it shall be lawful for the District Judge in his discretion . . . to have *three* assessors associated with him " in any cause or proceeding. It follows, therefore, that under the Courts Ordinance the number of assessors to be associated with the Judge is fixed at three. §265 of the Code of 1883 provided that " when the trial is to be held with the aid of assessors, *two or more* shall be chosen, as the Judge thinks fit, from the persons summoned to act as such." Hence, §265 of the old Code reduced the minimum number of assessors from three to two, but gave the Judge the power if he so desired it to have more than two associated with him in any given case. §207 of this Code follows §265 of the old Code in this respect.

5. **The selection of the assessors.**—As has been indicated in para. 3 *supra* there are two occasions on which the District Judge is called upon to select assessors, *viz.*, (*a*) when he orders that certain persons should be summoned, and (*b*) when he selects " two or more " out of the number of persons so summoned—§207. As our law stands at present, neither side appears to have the right of challenging any particular assessor, whether with or without cause shown, as in the case of jurymen. It should be noted that §53(5) of the Courts Ordinance empowers the Judges of the Supreme Court to make rules, regulating *inter alia* " the challenging of assessors," but hitherto no rules have been framed under that sub-section.

6. **Swearing in of the assessors.**—After the assessors have been finally selected they are sworn. §207 provides that, they shall be sworn " as jurors are sworn "—see §227(3) *post.* The form of the oath is " I swear that I shall well and truly try and true deliverance make between our Sovereign Lord, the King and the prisoner at the bar, whom I shall have in charge, and a true verdict give, according to the evidence." If the assessors are Christians these words will be followed by the words " So help me God," if on the other hand, the assessors are persons, who do not take an oath, they will be affirmed, the words " I do solemnly, sincerely and truly declare and affirm " being substituted at the commencement of the above.

See Oaths Ordinance No. 9 of 1895 §§5(1)(*c*), 6.

See §253(1)(*c*) *post.*

7. **Procedure after the swearing in of the assessors.**—The position which §207 occupies in this chapter shows that the assessors are finally selected and sworn after the accused has pleaded to the indictment. It follows, therefore, that after they have been sworn it is the duty of the Judge to intimate to them what the charges are that have to be tried, and shortly, to indicate to them that their duty is to listen to the evidence, and at the close of the proof to deliver their opinions—see §213(1) *post.* If the indictment contains any reference to previous convictions against the accused, that fact is not made public at this stage or at any stage until after the conviction of the accused —see §253(1) *post.* See also the procedure provided by Ordinance No. 2 of 1926.

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§207 8. **Case law.**—

(1) See cases noted under §200 *ante*.

(2) *R. v. Singh* 35 *Alla.* 570.—*Held*, under §284 of the Indian Code that when a criminal trial is to be held with the aid of assessors, only such persons can be selected by the Judge, who have been summoned as such for the purposes of the trial. When one of the assessors only was summoned for the particular case, it was held that the trial with other assessors not so summoned was illegal.

Counsel to open his case and call witnesses.

208. (1) The trial shall commence by the prosecuting counsel stating his case to the Court.

(2) The witnesses for the prosecution shall then be examined.

Accused's statement to be put in.

209. All statements of the accused recorded in the course of the inquiry in the Police Court **shall** be put in and read in evidence before the close of the case for the prosecution.

Court may acquit without calling for defence; or call for defence.

210. (1) When the case for the prosecution is closed, if the District Judge wholly discredits the evidence on the part of the prosecution, or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he **shall** record a verdict of acquittal; if however, the District Judge considers that there are grounds for proceedings with the trial he **shall** call upon the accused for his defence.

[§10, 31 of 1919.] (2) If the accused or his pleader announces his intention not to adduce evidence, the prosecuting counsel may address the Court a second time in support of his case for the purpose of summing up the evidence against the accused.

Accused may make his defence.

211. The accused or his pleader may then enter upon his defence and may examine his witnesses (if any) and the accused person or his pleader may then sum up his case.

When prosecuting counsel entitled to reply.

212. If any evidence is adduced on behalf of the accused the prosecuting counsel shall, subject to the provisions of sub-section (2) of Section 296, be entitled to reply and with the leave of the District Judge to call witnesses in rebuttal.

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Prosecuting counsel.—See §201 *ante.*
Stating his case.—See §§189(3), 232.
District Court.—See §3 *ante.*
Examination of witnesses.—See Evidence Ordinance §§135–166.
Statements of the accused.—See §§155, 295, 302.
Opening of case for the prosecution.—See §§189(3), 232.
Police Court.—See §3 *ante.*
The inquiry in the Police Court.—See *Chapter XVI. ante.*
District Judge.—See §3 *ante.*
Evidence.—See §3 Evidence Ordinance.
Offence.—See §3 *ante.*
Indictment.—See §§158(2), 161(4), 167 – 185, 186, 203, *Form* 11, *Schedule III.*
Lesser offence.—See §§182 – 183 *ante.*
Verdict of acquittal.—See §§190, 234, 304 *et seq.*
Pleader.—See §3 *ante.* *C.f.* "**Prosecuting counsel**" in §208(1).
Summing up the case for the prosecution.—See §§189(3), 234(3), 296.
Reply by the prosecution on the case for the defence.—See §§189(3), 237(2), 296.
Evidence in rebuttal.—See §237(1).

1. §208 is based on §269 of the Code of 1883.
§209 is based on §270 of the Code of 1883.
§210 is based on §271 of the Code of 1883. Note, however, that §210(2) is not covered by the old Code.
§211 is based on §272 of the Code of 1883.
§212 is based on §273 of the Code of 1883.

2. **Scope of §208–212.—(1) After the accused has pleaded Not Guilty to the indictment, and the assessors, if any, have been duly selected and sworn, the actual trial begins, by the prosecuting counsel stating his case to the Court—208(1).** See §189(3) *ante* and §232 *post.* The "*opening speech*" of counsel for the Crown should state accurately, concisely, and in chronological order, the facts upon which the Crown relies as establishing the guilt of the accused. No fact should be opened regarding which there is no proof, and counsel should at this stage abstain from all denunciation or invective against the accused whose guilt has not yet been established upon proof—see *R. v. Banks* and also §190 para. 3 *ante.* The prosecuting counsel should remember that he is there to assist the Court in the administration of justice, and not as counsel for any particular person or party.—*R. v. Thursfield.* If the accused is undefended, it is his duty to bring to the notice of the Court any existing points favourable to the defence which the defending counsel would have done during the trial, had the accused been defended. See §201 para. 4 *ante,* §§232-237 para. 2 *post.*

Note the use of the words "*prosecuting counsel*" in §§208(1), 210(2), 212, and contrast the words used in §201 where it is clearly indicated that prosecutions in the District Court may be conducted both by Advocates as well as by Proctors—see para. 5 *infra.*

(2) After the opening speech, the proof for the prosecution is led—§208(2). It is irregular merely to read the Police Court depositions and to tender the witnesses for cross-examination.—*R. v. Heval.* The material witnesses are called, examined-in-chief, cross-examined*

* See *Dias on the Evidence Ordinance p.* 269.

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§§208-212 and re-examined in due form. No witnesses may be called, nor may any documents or other productions be produced at the trial on behalf of the Crown, unless the same appears on the lists of witnesses or of productions at the back of the indictment—§186(2), 161(4) *ante;* but it is always open to the Court to allow the indictment to be amended by having any omission, &c., rectified—§172–176 *ante,* or by calling for the evidence of its own accord—see §165 Evidence Ordinance and §429 *post.*

Before the case for the prosecution closes, it is the duty of the prosecuting counsel to put in evidence and have read all statements of the accused recorded before the committing Magistrate's Court—§209. See §§155, 233, 295, 302 para. 6 and *R. v. Sidda, R. v. Sinnatamby.*

Prosecuting counsel will thereafter intimate to the Court that the proof for the prosecution is closed; and he will formally tender for cross-examination by the defence any witnesses whose names are on the back of the indictment, but who have not been called—*R. v. Kaiya* and the cases cited thereunder.

As to the calling of evidence in cases sent back by the Supreme Court for a new trial before a new District Judge.—See *Silva v. Heyzer.*

After the close of the case for the prosecution, it is too late to move to quash the indictment which has been accepted by the Court without objection. If, after the close of the case for the Crown, the evidence warrants a conviction, but the facts proved are not in accordance with the counts or charges in the indictment, it is the duty of the Court to amend the indictment and call upon the accused for his defence.—*Hami v. Appuhamy* and see *R. v. Appu.*

(3) After the close of the case for the prosecution, the District Judge has to decide whether he will call upon the accused for his defence or not. If he discredits the case for the prosecution, or does not think upon the evidence led that any of the counts in the indictment have been proved beyond reasonable doubt, or that the evidence fails to establish the commission of any "lesser offence," he will acquit the accused—§210(1), *R. v. Vajiram*; but the prosecuting counsel in such a case has the right to sum up his case. What usually happens unde r such circumstances, is for the Judge to intimate to prosecuting counsel that in his opinion there is no case against the accused, and call upon him to address the Court.

On the other hand, if he is of opinion that the Crown has proved sufficient facts which throw the *onus* on the accused, he will call upon him for his defence—see *R. v. Sedoris.** If the accused is undefended, the Judge will have to observe the provisions of §296(1) *post,* as well as inform him that without entering the witness-box, he is at liberty, if he so desires it, to make an unsworn statement from the dock—*R. v. Sittambaram.*

Prosecuting counsel is entitled to "sum up his case" *after* the accused has given evidence, if no other evidence is called by the defence. —§210(2) *R. v. Joronis, R. v. Gardner.*

§210(2) was added to this chapter by §10 of Ordinance No. 31 of 1919, the object of the amendment being to assimilate the procedure in the District Court to that of the Supreme Court (see §234(3) *post*) by allowing the counsel for the prosecution a right of summing up, when the accused calls no witnesses, other than himself. If the accused makes an unsworn statement from the dock without entering the witness-box,

* See *Dias on the Evidence Ordinance p.* 139 *et seq.*

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it is submitted, that prosecuting counsel has a similar right of summing up after the accused has made such statement—see *Introduction* to *Chapter XIX.* para. 8(12) *ante.*

(4) The defending counsel is entitled to "open" his case—see Rowel v. Perera, and thereafter call his evidence, as in the case of the prosecution*—§211. With regard to the cross-examination of the accused by prosecuting counsel—see *Introduction* to *Chapter XIX.* para. 8(13) *ante* and see §122 para. 7 *pp.* 240-241 *ante.* The defence witnesses may be cross-examined by the other accused in the case. If the defence, even while the case for the prosecution is in progress puts in a document (see *R. v. Martin* as to procedure), this amounts to "leading evidence for the defence" and gives the prosecuting officer the right to the last word—3 *Bal. Supp.* 5, *R. v. Stephen.*

An accused has an inherent right to call any competent and compellable witness he likes, and if he is not allowed to do so, the Supreme Court will quash the proceedings and order that he be given the opportunity which was denied him.—*Palihawadene v. Silva, R. v. Hinniappu, R. v. Dinoris Appu,* 268 *D.C. Crim. Colombo* 16. *C.f.* §236 *post* and see §159 *ante.* An accused intending to give evidence is entitled to remain in Court while his co-accused gives evidence—*Peris v. Perera.*

(5) In cases where evidence for the defence has been led, if witnesses other than the accused have been called, or if documentary evidence has been produced by the defence, the Crown has the right to the last word, and defending counsel must sum up his case before the Crown replies on the whole case—§211. See §§232–237 para. 2(5) *post,* §296(2) *post.*

(6) Evidence in rebuttal—§212 and see §237(1). The Court may allow the prosecution to call evidence rebutting the evidence led by the defence, if it considers that the prosecution has been taken by surprise by any evidence called by the defence. The point which the prosecution seeks to meet by rebutting evidence must be something that arises *unexpectedly* in the evidence called by the defence, and which the prosecution could not have met at the time its case was in progress—9 *Halsbury's Laws of England* §719 *p.* 368. See also *R. v. Crippen, R. v. Seddon.* Where rebutting evidence is called after defending counsel has summed up, he is entitled to be given an opportunity of commenting on such evidence before Crown Counsel finally replies on the whole case—*R. v. Steinie Morrison.*

(7) Reply by the prosecution—§212. See para. 5 *supra.* Where the defence leads evidence whether oral or documentary, other than the evidence of the accused himself, the Crown is entitled to the last word, *i.e.*, the right of replying on the whole case—see also §237(2). In his reply prosecuting counsel is entitled to make any comment he desires on the evidence, whether called by the prosecution or the defence, **but he may not comment upon the omission of either the accused or of his spouse to enter the witness-box—§296(3)** and see *Dias on the Evidence Ordinance pp.* 216–217, where the whole question has been discussed. Thus, where an accused in his statutory statement before the Magistrate refers to the names of certain witnesses other than his spouse, whose testimony he states will exculpate him from the charge, it is perfectly legitimate for the prosecuting counsel to comment on the omission of the defence to call such witnesses—see §114 *illustration* (*g*) Evidence

* See *Dias on the Evidence Ordinance p.* 269.

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Ordinance, but no comment may be made of the fact that the accused himself has not entered the witness-box. Where an accused or his spouse enters the box, it follows that the evidence given by them can be commented upon as in the case of any other witness.

Where a prosecuting counsel was allowed to have the last word, in a case in which he was not entitled to reply, it was held that the defect was cured under §425 *post*.—*R. v. Martin.*

Under the English Law, the Attorney-General or Solicitor-General, if present in Court, have the right to the last word irrespective of whether the accused has called evidence or not—see §6 *ante*.

3. **In a criminal case, unlike a civil suit, the rules of procedure cannot be departed from even with the consent of the parties**—*Punchirala v. Punchibanda, Hamiappu v. Babappu, R. v. Sen, Silva v. Heyzer, R. v. Heval.*

The following sections of the Code should also be noted :—

§282.—Power of District Judge to compel the attendance of witnesses.

§287.—Right of accused to be defended.

§289.—Power of Court to adjourn trial.

§293.—Power of Judge to detain offenders.

§294.—Power of Court to hold trial on a *dies non*.

§297.—Evidence to be recorded in the presence of the accused.*

§298.—Method of recording the evidence.

§300.—Interpretation of the evidence.

4. **Assessor giving evidence.**—By reason of §215(3) an assessor who is personally acquainted with any relevant fact should inform the Court that such is the case, whereupon he may be sworn as a witness and examined—§239 *post*. See *R. v. Rosser* (1836) 7 *C. & P.* 648.

5. **Prosecuting counsel v. Pleader.**—§201 *ante* provided that prosecutions in the District Court should be carried on by the Attorney-General, Solicitor-General, or a Crown Counsel, or " by some *pleader* generally or specially authorized in that behalf "—see §§199, 392(2), and *c.f.* §216(2), where the words used are " some *advocate* generally or specially authorized." Hence, it is clear that under §201 *ante*, any " pleader " whether an advocate or proctor may lawfully appear and conduct the case for the prosecution in District Court trials.

§§208(1), 210(2) and 212, however, appear to draw a distinction between " *prosecuting counsel* " and other officers conducting prosecutions. A " *counsel* " means an " advocate " as opposed to a " proctor." Does the Legislature by the use of these words in §§208(1), 210(2) and 212 indicate where prosecutions are conducted by persons who are not " counsel " that such persons may not " open", " sum up " or " reply " as provided by those sections ? This cannot possibly have been the intention of the Legislature, and it is curious that in the amendment of §210 by Ordinance No. 31 of 1919, the ambiguity of the language was not detected. The clue to the interpretation, is, it is submitted to be found in §216(2) where the word used is " advocate." It would seem that the word " counsel " as used here is a loose manner of describing " pleaders."

6. **Case law.**—

R. v. Kaiya 6 *Tam.* 90.—The Supreme Court in appeal or revision only looks at the evidence recorded at the trial, and will not regard the evidence led at the non-summary inquiry. Therefore,

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*See *Peris v. Perera* (1912) *I B.N.C.* 3, *Fernando v. Appu* (1895) *I N.L.R.* 90; *R. v. Denoris Appu* (1918) 5 *C.W.R.* 266.

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where the prosecution does not call a witness, whose name appears on the back of the indictment, the accused should demand that the witness be tendered for cross-examination, or call the witness himself. See also *R. v. Perera* (1915) 18 *N.L.R.* 215, *R. v. Iyampillai* (1913) 4 *B.N.C.* 14, *R. v. Fernando* (1908) 2 *Leader* 81, *R. v. Amerdeen* (1907) 3 *Bal.* 127, *R. v. Lal* (1884) 10 *Cal.* 1070, *R. v. Tulla* (1885) 7 *Alla.* 904.

Punchirala v. Punchibanda (1897) 3 *N.L.R.* 38.—A District Judge cannot, even with the consent of the parties, depart from the rules of procedure regulating the manner in which evidence should be given and recorded.

Hamiappu v. Babappu (1885) 1 *S.C.R.* 120.—In a criminal case no consent on the part of the accused or his pleader can make the depositions of witnesses taken in another case legal evidence in the former, unless the same are declared by law to be admissible, *e.g.*, under §33 Evidence Ordinance 1895. See 54–55 *D.C. Crim. Chilaw* 37206 (*S.C.M.* May 12, 1914) and *c.f. Appu v. Sinno* (1916) 19 *N.L.R.* 188, 3 *C.W.R.* 39, *Hamy v. Hamy* (1908) 3 *Bal.* 272, *Bilinduhamy v. Mathes* (1908) 1 *S.C.D.* 29, *Cornelis v. Sinno* (1909) 1 *Curr. L.R.* 263.

Hami v. Appuhamy (1898) 3 *N.L.R.* 101. In a criminal case it is too late to quash the indictment after it has once been accepted by the Court, and the case for the prosecution is closed. If at that stage the case for the Crown warrants a conviction, but the facts proved are not in conformity with the indictment, the Court should amend the indictment and call upon the accused for his defence.

R. v. Appu (1896) 2 *N.L.R.* 170.—At the close of the case for the prosecution the accused called no defence, but merely contended that the evidence led for the Crown failed to disclose the offence. The District Judge reserved judgment until the next day, when he upheld the accused's contention, but purporting to act under §211 of the Code of 1883 (§182 *ante*) convicted the accused of a different offence. *Held*, that the procedure was unfair, and that the accused should at least have been given an opportunity of defending himself with reference to the latter charge.

269 *D.C. Crim. Colombo* 16 (*S.C.M.* August 31, 1915).—An accused has an inherent right to call any witnesses he likes, and if he is not allowed to do so, the Supreme Court will quash the conviction and remit the case to the Court below ot enable him to do so. See also *Sampanther v. Hinniappu* (1916) 2 *C.W.R.* 109—§282 *post.*

R. v. Sittambaram (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287 (*Full Court*). An accused may if he desires to do so make an unsworn statement from the dock without giving evidence on oath or affirmation from the witness-box. *Qu.*—In making such a statement can the accused be allowed to produce documents or read out their contents? It is submitted that he may not. The accused has elected to make a statement and must abide by it.

R. v. Joronis (1921) 22 *N.L.R.* 468—Where the only witness called for the defence is the accused himself, the appropriate time for the summing up of his case by Crown Counsel is after the accused has given evidence and before the reply of the defending counsel. If there is another person accused in the same indictment and that person calls evidence, other than himself, the summing up of Crown Counsel may be postponed till the conclusion of the case for that person, so that Crown Counsel may sum up as regards one accused, and reply as regards the other in the same speech. *The same would apply where the accused instead of entering the witness-box makes an unsworn statement from the*

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dock. Thus in *Mrs. Maybrick's Case,* the prisoner made an unsworn statement from the dock, and prosecuting counsel in his address was permitted to comment upon and criticise the statement so made. See *R. v. Gardner* (1898) 1 *Q.B.* 150.

R. v. Martin (1915) 2 *Crim. App. R.* 38.—The right of reply given to the prosecuting counsel by §212 is dependent on evidence for the defence being adduced at the right time, *viz.*, the time indicated in §211. *Held further,* where a prosecuting counsel who had no right to the last word, was heard in reply, that the irregularity was curable by §425 *post.*

3. *Bal. Supp.* 5.—Where the defence produces a document, this amounts to " calling evidence for the defence " and gives the Crown the last word. In *R. v. D. M. D. Stephen* (1923) Third Western Circuit Sessions, August 2nd, 1923, the accuracy of the above proposition of law was challenged by the defence, but without success. See *Sohoni's* Indian Criminal Procedure Code *pp.* 783 – 784.

R. v. Crippen (1910) *Notable British Trials p.* 143.—At the close of the case for the defence, the prosecution having been taken by surprise with regard to certain evidence called by the accused, prosecuting counsel moved to call witnesses in rebuttal. *Held, per* Lord Alverstone, C.J., that the application should be allowed. The Court of Criminal Appeal held, that the order of the Lord Chief Justice was correct. See (1911) 1 *K.B.* 149. In the case of *R. v. Seddon* (1912) Bucknill, J., allowed the same thing to be done, under similar circumstances.

R. v. Steinie Morrison (1911) *Notable British Trials p.* 225.—Where the Crown has been allowed to lead evidence in rebuttal, the defending counsel should be given an opportunity of commenting on such evidence, after which prosecuting counsel will reply on the whole case. In this case, the evidence in rebuttal was led after the closing speech of counsel for the defence, but before the prosecuting counsel replied.

R. v. Thursfield (1838) 8 *C. & P.* 269.—The prosecuting counsel is an assistant to the Court in the furtherance of justice and should not act as counsel for any particular person or party. See *R. v. Berens* (1865) 4 *F. & F.* 842; *R. v. Puddick* (1865) 4 *F. & F.* 497; *R. v. Banks* (1916) 2 *K.B.* 621; *R. v. Webb* (1865) 4 *F. & F.* 862.

R. v. Sinnatamby (1901) 3 *Br.* 36.—The statement of the accused made before the Magistrate must be read in evidence. See *R. v. Sidda infra.*

R. v. Sidda (1918) 20 *N.L.R.* 190, 5 *C.W.R.* 73.—A conviction based solely on accused's confession of guilt to the Magistrate under §155 *ante* is sufficient in law to support a conviction.

R. v. Vajiram 16 *Bom.* 414.—See §§232 – 237 para. 6 *post.*

R. v. Seddon (1912) *Notable British Trials p.* 138.—See §§232 – 237 para. 6 *post.*

R. v. Sen 2 *Cal.* 23.—" A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law . . ."

R. v. Hinniappu (1916) 2 *C.W.R.* 109.
Peris v. Perera (1912) 1 *B.N.C.* 3.
Palihawadene v. Silva (1908) 1 *S.C.D.* 26.
R. v. Dinoris Appu (1918) 5 *C.W.R.* 266.
} See §§232 – 237 para. 6 *post.*

Rowel v. Perera (1922) 24 *N.L.R.* 456; 4 *C.L.Rec.* 131; 1 *T.L.R.* 43. —See §189 *ante.* The defending pleader in opening the case for the defence may comment upon the evidence led by the prosecution. See §235 *post.*

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R. v. Banks (1916) 2 *K.B.* 621.—Prosecuting counsel ought not to press for a conviction, but should regard themselves rather as ministers of justice assisting in its administration than as advocates, and an appeal to the jury on the trial of a prisoner for having unlawful carnal knowledge of a young girl (*c.f.* §364A Penal Code), "to protect young girls from men like the prisoner" is not in accordance with the character which prosecuting counsel should always bear in mind.

Silva v. Heyzer (1924) 26 *N.L.R.* 189, 2 *T.L.R.* 212.—Conviction quashed. Supreme Court directs new trial to be held before a new Judge. May such Judge rely on evidence recorded at the first trial? *Qu.*—Can the accused or his pleader consent to the adoption of this course? *R. v. Dorasamy* (1914) 17 *N.L.R.* 245, *Murugesu v. Charles* (1922) 4 *C.L.Rec.* 225 referred to.

R. v. Heval (1929) 30 *N.L.R.* 479, 6 *T.L.R.* 117.—The trial of an indictment before a District Court must proceed upon evidence given before the Court of trial. It is irregular merely to read the Police Court depositions and to tender the witnesses for cross-examination.

Judge to sum up evidence.

213. (1) When the cases for the prosecution and the defence are concluded the District Judge **may** sum up the evidence for the prosecution and defence; and in a case tried with the aid of assessors he shall do so and **shall** require each of the assessors to state his opinion orally and shall record such opinion.

(2) The District Judge shall not be bound to conform to the opinion of the assessors.

Closing of case for the prosecution.—See §§209, 210(2), 212 *ante*.

Closing of case for the defence.—See §211.

District Judge.—§3 *ante*.

Summing up by Judge.—*C.f.* §§243 - 244 *post*.

Evidence.—§3 Evidence Ordinance.

Assessors.—See §§200, 207, 214, 215.

1. §213 is based upon §274 of the Code of 1883. *C.f.* §309 of the Indian Criminal Procedure Code.

2. **Scope of §213.**—When the prosecution and the defence have closed their respective cases, (*a*) if the trial has been without the assistance of assessors the District Judge *may* "sum up" the evidence led on both sides.—§213(1). Why he should do this is not clear. Thereafter follows the judgment—§214(1), and if the accused is convicted, he must be sentenced according to law —§214(2), (*b*) if the trial has been with the aid of assessors, when both sides have closed their respective cases, the District Judge *is bound* to "sum up" the evidence on both sides to the assessors. Thereafter, the Judge will call upon each assessor to "state his opinion orally," which the Judge will duly record—§213(1), *Owen v. Ratnaike.* It should be remembered that assessors do not perform functions similar to those discharged by jurymen—*Owen v. Ratnaike, R. v. Kulkarni* and see §200 para. 2 *ante*. They are there merely to assist the Court—*R. v. Silva.* The Judge is not bound to follow the opinion of the assessors—§213(2), §72 Courts Ordinance, and see *Owen v. Ratnaike, R. v. Silva, R. v. Kulkarni, R. v. Eliatamby.* After

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§213 the opinion of the assessors have been recorded, the Judge will deliver his judgment—§214(1); and if the accused is convicted, pass sentence upon him according to law—§214(2).

3. **Amendments of the indictment should be made before the opinion of the assessors is expressed.**—See §172(1) *ante.*

4. **Relative functions of the District Judge and assessors.**—See §200 para.2 *ante.*

The relationship which exists between a District Judge and assessors is not the same as that which exists between the Judge and jury in a Supreme Court criminal trial.* In the latter case, the Judge's duty is indicated in §244 *post*, whereas the jury are the sole judges of the facts proved in the case—§245 *post.* In a District Court criminal trial with the aid of assessors, the District Judge is the ultimate judge both of the law as well as of the facts—*R. v. Silva*, *Owen v. Ratnaike*, *R. v. Eliatamby*, *R. v. Kulkarni.* In some respects, however, assessors are like jurymen.—*Ayer v. Changarapillai, viz.*, (i) They are sworn as jurymen are sworn—§207, (ii) they may be examined as witnesses, just as jurymen may be examined—§§215(3), 239 *post*, (iii) they are in a certain sense judges of fact, inasmuch as if the indictment contains a reference to the previous convictions of the accused, that part of the indictment is not made public until after conviction—§253 *post*, (iv) the Code in *Chapters XXA.* and *XXI.* deal with jurors and assessors together.

The duty of the assessors is only to assist the Court.—*R. v. Silva*, *R. v. de Silva*, and note the words "*aided*" in §§200, 207, 213(1), 215(1). They do not "decide" any of the issues to be determined, as jurymen do. If the opinion of the assessors coincides with that formed by the Court, the Judge will adopt such opinion, and act upon it. If, on the other hand, he disagrees with such opinion, he is at perfect liberty to reject it—§213(2), §72 Courts Ordinance.

During the trial, all questions of law and procedure, such as questions relating to the admissibility of evidence and the like, are decided by the District Judge alone—*R. v. Silva* and *c. f.* §244 *post.*

5. **Summing up of the evidence for the prosecution and the defence.**—(i) In trials without assessors, the Judge has the right to sum up the evidence—§213(1), but this is seldom or never done; and it is not clear what purpose such a summing-up is to serve. (ii) In trials with the aid of assessors, the District Judge "*shall*" sum up the evidence. In summing up the case, the District Judge will proceed as indicated in §§243, 244 *post. Qu.*—Should the record show the nature of the Judge's summing-up ?—see §§243 – 245 *post.*

6. **The opinion of the assessors.**—The assessors give their *opinion.* They do not give a *verdict*—see para. 4 *supra.*

The assessors' opinion should be given upon the whole body of the evidence led in the case, whether on the part of the prosecution or of the defence. It is the duty of the Judge to call upon each assessor to give his opinion. When this has been done, it would be open to an assessor to state that he agrees with the opinion of an assessor who has already delivered his opinion.

It is the duty of the Judge to enter upon the record the opinion expressed by the assessors.—See §213(1), *Owen v. Ratnaike.*

7. **§215 provides for certain matters connected with the trial of a criminal case with the aid of assessors.**—(i) If during

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* See §17 *ill.* (*d*) Penal Code.

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a trial *any assessor* is "from sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors "—§215(1). If *all the assessors* are prevented from attending, or absent themselves, the trial must be stayed, and a new trial held with the aid of fresh assessors—§215(2). (ii) As in the case of jurymen, assessors may be examined as witnesses in the case in which they are engaged—§215(3), and see §239 *post*. §214

8. **Case law.**—

R. v. Silva (1890) 9 *S.C.C.* 65.—"The District Judge appears to have misunderstood the extent of his functions as a Judge trying an indictment with the aid of assessors. Questions of law and procedure, including questions of the allowance or disallowance of applications to amend the indictment, or applications for postponement of the trial, are questions entirely for the decision of the Judge, and not by the assessors . . . When a District Judge tries an issue under . . . the Criminal Procedure Code, with the aid of assessors, the verdict is his, and not of the assessors. He is not bound by the opinion of the assessors . . . ," *per* Clarence, J.

Owen v. Ratnaike (1899) 3 *N.L.R.* 333.—" . . . This was just the case in which a District Judge might derive great help from having competent and respectable people of the district associated with him at the trial . . . The assessors were called upon to give their *verdicts, but they are not jurors, and they do not give verdicts.* The Judge, in my opinion, is the ultimate Judge of law and fact, for he is not bound to conform to the opinion of the assessors . . ." *Held also*, that except in clear cases where witnesses testify without serious contradiction, the reasons for the opinion of the assessors should be stated—but see §213(1) which requires each assessor to state his reasons orally, which are to be recorded by the District Judge.

R. v. Eliatamby (1909) 12 *N.L.R. at p.* 15.—"The Ordinance does not give any hint as to what kinds of cases ought to be tried with assessors. The Judge cannot know until he has heard the evidence whether the case which he is going to try is easy or difficult, and the opinions of Judges may very well differ as to the kinds of cases in which they would like to have the advice of assessors . . . It appears to me that the Legislature intended to leave the matter absolutely in the hands of the Judge, and that he is not bound to give any reason . . . The trial with assessors, who do not decide, but only give their opinion, which the Judge may over-rule, is not peculiar to Ceylon ; it exists in other Colonies, and the principle is the same as that which prevails in the Executive Council of every Colony, in all of which the Councillors give their opinion, but the Governor decides . . . In my opinion, the discretion of the Judge is absolute, and whether he gives no reason at all, or gives one which we may think mistaken, this Court cannot over-rule his discretion," *per* Hutchinson, C. J. See *R. v. Thuriappa*—§200 para. 8 *ante*.

R. v. de Silva (1895) 1 *N.L.R.* 296.—See §200 para. 8 *ante*.

Ayer v. Changarapillai (1896) 1 *N.L.R. at p.* 18.—See §200 para. 8 *ante*.

R. v. Kulkarni 14 *Bom. L.R.* 710.—See §200 para. 8 *ante*.

And to pass judgment.

214. (1) When the cases for the prosecution and defence are concluded and the assessor's opinion, if the trial has been with the aid of

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§214 assessors, has been recorded the District Judge shall forthwith or within not more than twenty-four hours record a verdict of acquittal or conviction.

(2) If the accused person is convicted the District Judge shall pass sentence on him according to law.

Conclusion of the case for the prosecution.—See §§209, 210.
Conclusion of the case for the defence.—See §211.
Assessor's opinion.—See §213.
District Judge.—See §3 *ante.*
Record a verdict of acquittal or conviction.—See §§190, 249, 251.
Judgment.—See *Chapter XXIV. post.*
Sentence.—See *Chapters XXV., XXVI. post,* and §§14, 16, 17 *ante.*

1. §214 is based upon §275 of the Code of 1883.

2. **Scope of §214.**—(i) In cases tried without assessors, after the proof on both sides has been closed, and (ii) in cases tried with the aid of assessors, after the opinion of the assessors has been recorded by the District Judge, it is his duty (*a*) either " forthwith " or (*b*) " within not more than twenty-four hours " to record a verdict either acquitting the accused or convicting him—§214(1). If the accused is convicted, it is the duty of the District Judge to pass sentence upon him according to law—§214(2). A sentence passed in the absence of the accused is bad.—*R. v. Lawrence.* The period within which an appeal against the judgment can be lodged commences from the time the judgment is passed—see §338 *post.*

As to the release of offenders on probation.—See *Chapter XXVI. post.*

3. **Forthwith.**—See §190 para. 5 *ante* and the cases cited thereunder, and *R. v. Kiriya* para. 9 *infra.* " *Forthwith* " in §214(1) means " *immediately,*" the words " *or within not more than twenty-four hours* " clearly indicating that the verdict must be pronounced either " immediately " after the conclusion of the trial, or within twenty-four hours thereafter.—See §§251, 304 *post.* A failure to record a verdict " *forthwith* " is not a fatal irregularity.—*Peris v. Silva, Peter v. Perera,* §190 para. 5 *ante.*

Under §205 *ante,* if the accused upon being arraigned and charged pleads guilty, " the plea shall be recorded, and he *may* be convicted thereon." The use of the word " may " indicates that although a formal conviction must follow upon such a plea, the Judge is not bound to convict either " forthwith " or " within twenty-four hours."—See §205 para. 5 *ante.*

4. **Within not more than twenty-four hours.**—See para. 3 *supra.*

The failure on the part of a District Judge to record a verdict within twenty-four hours, does not vitiate the proceedings, unless the delay has occasioned a failure of justice.—*R. v. Fernando, Samsudeen v. Seethoris.* See also *R. v. Kiriya* and §304 *post.*

" **Within** "—as to the computation of time—see *Wickremasinghe v. Appusinno* (1895) 1 *N.L.R.* 178, *Andris Appu v. Silva* (1896) 2 *N.L.R.* 175, *Kandiah v. Velupillai* (1925) 27 *N.L.R.* 58.

5. **Record a verdict of acquittal or conviction.**—See §§190, 192(1), 249, 251.

The verdict.—In trials before the District Court, this means the " *judgment* " of the Court.—*Chapter XXIV. post.* The judgment must be delivered in open Court and in the presence of the parties and their

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legal representatives—§304. The judgment must be written by the trial Judge,* and shall be dated and signed by him in open Court at the time of pronouncing it, and "in cases where appeal lies" shall contain the point or points for determination, the decision thereon and the reasons for the decision—§306(1). If the judgment is one of conviction, the offence, the section of the law under which the accused is convicted and the sentence should be stated—§306(2). If the judgment is one of acquittal, it should state the offence in respect of which the accused is acquitted—§306(3). After the judgment has been signed it cannot be altered or vacated by the trial Judge, provided that any clerical error may be rectified at any time, and any other error may be rectified at any time before the Court rises for the day—§306(4). The judgment must be explained to the accused affected thereby, and a copy of it given to him without delay, if applied for—§306(5). The original judgment must be filed in the record—§306(6). If the accused is acquitted the Judge has no power to reserve to the Crown the right to institute a fresh charge which might have been included under §§181, 182.—*Canagasingham v. Bawa* (1931) 9 *T.L.R.* 29.

Conviction.—See *Chapters XXV., XXVI. post* and §§14 16, 17 *ante*. See also §§67, 67A Penal Code and §§182 – 183 *ante*, and §311, 312 *post*, and *Chapter XXVI. post*.

6. **Costs.**—See §§253D – E *post*.

7. **Measure of punishment.**—Ordinance No. 2 of 1926 provides that in the case of specified "crimes," reconvicted criminals are to be committed for trial before a higher Court, even though the offence charged is one summarily triable by a Police Court. The object of this Ordinance is to enable the court of trial to impose a deterrent sentence upon the offender, whether of imprisonment, police supervision, or preventive detention.

In the case of reconvicted criminals, the Attorney-General drafts a supplementary indictment according to the provisions of Ordinance No. 2 of 1926.

Where there is a supplementary indictment charging previous convictions of the accused, and the trial is with assessors, the provisions of §253 (1) (*a*) *post* should be observed. After conviction, the prosecuting counsel will intimate to the Court, that there is a further indictment against the accused who will then be called upon to admit or deny the previous convictions. If the accused denies the same, the prosecution must be ready to prove the previous convictions as indicated under §7 of Ordinance No. 2 of 1926.

Over and above these provisions the court has the inherent right, even if there is no supplementary indictment charging previous convictions, to inquire after the conviction of an accused, into the character and antecedents of the convict, in order to enable it to regulate the punishment to be imposed—*R. v. Kandaiya, Kikapota v. Gunesekera.*

8. **Shall pass sentence on him according to law.**—See paras. 5, 6, 7 *supra*. Where an accused is convicted a formal sentence must follow.—*Udesinghe v. Marsal, Chelliah v. Samman, Akbar v. James Appu, R. v. Babappu* §190 para. 3(xii) *ante*. A sentence passed in the absence of an accused is bad—*R. v. Lawrence*. See *Chapter XXVI. post* as to the release of convicted persons on probation.

8A. **Execution of the sentence.**—See *Chapter XXV. post*.

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* See Introduction to *Chapter XIX.* para. 4 *ante*.

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§214

9. **Case law.**—

R. v. Fernando (1905) 2 *Bal.* 46.—The failure on the part of a District Judge to record a verdict of acquittal or conviction within twenty-four hours after the conclusion of the trial is a mere irregularity which will not vitiate the proceedings, unless such delay has occasioned a failure of justice. This ruling was followed in 189 *D.C. Crim. Kalutara* 3253 (*S.C.M.* August 29, 1917). *C.f. R. v. Podisinno* (1914) 18 *N.L.R.* 28, *Rodrigo v. Fernando* (1898) 4 *N.L.R.* 176, see §190 *ante*.

R. v. Kandaiya (1911) 14 *N.L.R.* 211.—It is competent for the District Judge after convicting the accused to inquire into the character and antecedents of the persons so convicted.

Nikapota v. Gunesekera (1911) 14 *N.L.R.* 213 (*Two Judges*).—A previous conviction may be proved or admitted after conviction for the purpose of enabling the Court to regulate the punishment to be awarded. See also *R. v. Clementu Appu* (1916) 2 *C.W.R.* 1, *Daniel v. Othoman* (1916) 2 *C.W.R. at p.* 312, *R. v. Ukkinda* (1917) 4 *C.W.R.* 125, *Sinno v. Lebbe* (1913) 1 *B.N.C.* 33.

R. v. Kiriya (1894) 3 *S.C.R.* 100.—It is the duty of a District Judge trying a criminal case to record his verdict on the facts immediately after the conclusion of the trial. But see *R. v. Fernando supra.* See also *Venasy v. Velan* (1895) 1 *N.L.R. at p.* 125. *P.C. Panadura* 9292 (1901) 5 *N.L.R.* 140, and (1899) *Koch* 22, 33.

Samsudeen v. Seethoris (1927) 29 *N.L.R.* 10; 8 *C.L.Rec.* 146.—When should the District Judge record his verdict ? See §190 *ante*.

R. v. Lawrence (1933) 13 *C.L.Rec.* 111.—(*Privy Council*).—In the case of an indictable offence, a sentence passed in the absence of the accused is bad.

In case of absence of an assessor.

215. (1) If in the course of a trial with the aid of assessors at any time before the finding, any assessor is from any sufficient cause prevented from attending throughout the trial or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

(3) The provisions of Section 239 with regard to trial by jury in the Supreme Court shall apply to trials with the aid of assessors in the District Courts.

Trial with the aid of assessors.—See §§200, 207, 213 – 215.
Finding.—See §§213 – 214 *ante*.
Supreme Court.—§3 *ante*.
District Courts.—§3 *ante*.

1. §215 has been based upon §276 of the Code of 1883. See §285 of the Indian Criminal Procedure Code which covers §215(1) and (2).

2. **Scope of §215.**—§215 deals with two distinct matters, *viz.*, (i) the procedure to be adopted when one or more of the assessors summoned to assist the District Judge in a criminal trial, either absents himself, or is prevented from attending throughout the trial—§215(1),(2)

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and (ii) the right of any assessor, who is personally aware of any relevant fact to be examined as a witness and to give evidence in the case in which he is engaged—§215(3). §215

3. **The effect of the absence of one or all the assessors at the trial.**—See §215(1),(2) and §229 *post.*

The wording of §§215(1) and (2) is not so clear as at first sight it would appear to be. Paraphrasing the two sub-sections we find that "if in the course of a criminal trial with the aid of assessors, *one* of the assessors at any time before the "finding" is from any sufficient cause prevented from attending *throughout the trial*, or absents himself, and it is not practicable to enforce his attendance throughout the trial, the Judge *shall* proceed with the trial with the aid of the other assessor or assessors."—§215(1). "If *all* the assessors are similarly prevented from attending throughout the trial, or absent themselves, and it is not practicable to enforce their attendance throughout the trial, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors."—§215(2). See §§223 – 230 para. 3B *post.*

It would appear that §§215(1) and (2) apply only to cases where the trial has been commenced with two or more assessors, and at any time before the finding it is found that all or any of the assessors are unable to be associated with the judge "*throughout the trial*," *i.e.*, from the time they first absented themselves up to the time of the finding. Therefore, §§215(1) and (2) do not apply to any casual absence of an assessor on any one of the trial dates. If all or any of the assessors absent themselves on one of the trial dates and it is known that they will appear on the subsequent dates, the proper procedure would be to adjourn the trial. Moreover, if an assessor absents himself on one of the trial dates, and evidence has been recorded in his absence, the Indian Courts have held that he may not thereafter be allowed to sit as an assessor in that trial.—*R. v. Chamar* (1 *Sanjiva Row's Digest of the Criminal Law p.* 1901). Apparently the view taken by the Indian Courts is that in such circumstances the status of the absent assessor is determined.—*R. v. Messeruddin* 6 *C.W.N.* 715, *R. v. Tirumal* 24 *Mad.* 523.

If the absence of the assessor is due not to "any sufficient cause," or if it is "practicable to enforce his attendance," it would appear that the provisions of §215(1) and (2) cease to apply. In such cases the Court will have to adjourn the trial and take steps to have the attendance of the assessor procured.* Where the District Judge decides to proceed with the trial under §215(1) he should enter upon the record all facts and circumstances which show that, the absence of the assessor was due to some "sufficient cause," or that it is not "practicable" to enforce his attendance. If all the assessors are absent, a new trial must take place before new assessors.

Qu.—When such a new trial takes place, may not the District Judge in the exercise of his discretion, decide to have the new trial without the aid of assessors ? It would appear that such new trial must be with the aid of assessors—"And a new trial shall be held with the aid of fresh assessors."—§215(2).

Penalty for non-attendance.—See §280 *post.*

Not practical to enforce his attendance.—See §229 *post* and *c.f.* "If his presence cannot be obtained without an amount of delay

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* *C.f.* §240 *post.* There is no section corresponding to §240 in *Chapter XIX.*

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§215 or expense which, under the circumstances of the case, the Court considers unreasonable."—§33 Evidence Ordinance.*

At any time before the finding.—This means " at any time before the opinion of the assessors is recorded " under §213 *ante*—see " At any time before the return of the verdict "—§229 *post*. See also §202 " At any time before the verdict is recorded."

4. **Incompetency of the assessors.**—

Deaf Assessor.—*R. v. Lal* 21 *Alla.* 106.

Blind and deaf assessor.—See 1 *Sanjiva Row's Criminal Law Digest p.* 1901, *Case No.* 2792.

5. **Assessor giving evidence at the trial.**—§215(3) merely states that the provisions of §239 *post* with regard to trial by jury in the Supreme Court shall apply to trials with the aid of assessors in the District Courts. Therefore, reading §239 with §215(3) if an assessor is personally acquainted with any relevant fact, it is his duty to inform the Court that such is the case, whereupon he may be sworn, and examined in the same manner as any other witness—see *R. v. Rosser* (1836) 7 *C. & P.* 648. The assessor by giving evidence does not cease to be an assessor. See §239 paras. 2 – 6 *post*.

CHAPTER XX.

TRIALS BEFORE THE SUPREME COURT

The title to this chapter indicates that the Legislature intended it to provide the general procedure regulating the trial of all criminal cases before the Supreme Court in the exercise of its original criminal jurisdiction.—See para. 2(B) *infra*.

1. The powers of the Supreme Court are set out in Chapter IV. of the Courts Ordinance, 1889; and §5 of the Criminal Procedure Code specially provides that " nothing in this Code shall be construed as derogating from the powers or jurisdiction of the Supreme Court." The powers and jurisdiction of the Supreme Court are as follows:—(***a***) **an original criminal jurisdiction**—§§21, 27 – 38 Courts Ordinance, Chapter XX. and §440A of this Code, (***b***) **an appellate jurisdiction** in civil as well as in criminal cases—§§21, 39 – 41 Courts Ordinance, Chapter LVIII. Civil Procedure Code, and Chapter XXX. of this Code, (***c***) **a revisional jurisdiction** for the correction of all errors committed by minor Courts—Chapter LVIII. Civil Procedure Code, and Chapter XXXI. of this Code, (***d***) **power to grant injunctions**—§22 Courts Ordinance, (***e***) **power to grant and issue writs of *mandamus, quo warranto, certiorari, procedendo,* and prohibition**—§46 Courts Ordinance as amended by Ordinance No. 4 of 1920, §2, (***f***) **power to transfer the trial of cases**—§422 *post*, and see §46 Courts Ordinance and Ordinance No. 1 of 1900, (***g***) **power to issue writs of *habeas corpus***—§§49 – 50 Courts Ordinance, (***h***) **power to punish contempts** of its own authority as well as that of minor Courts—§51 Courts Ordinance, (***i***) **power to superintend and inspect all minor Courts and to issue directions as to the keeping of the records thereof**—§8 *ante*. See §5 *ante*.

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* See *Dias on the Evidence Ordinance p.* 41.

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§216

2. The original criminal jurisdiction of the Supreme Court.—(A) **The Supreme Court "shall have and exercise an original criminal jurisdiction for the inquiry into all crimes and offences committed, throughout the Island, and for the hearing, trying, and determining all prosecutions and charges which shall be commenced, and all *indictments** and *informations*† which shall be presented therein against any person for or in respect of any such crimes or offences, or alleged crimes or offences "—§21(1) Courts Ordinance.** Accordingly, it will be observed that the *territorial jurisdiction* of the Supreme Court extends throughout the Island and the territorial waters thereof. On grounds of convenience, however, §5 of the Courts Ordinance divides up the Island into four circuits, and §28 of that Ordinance (as amended by §3 of Ordinance No. 36 of 1921) provides that the Judges shall hold the criminal sessions of the Supreme Court at stated periods annually within each Circuit, except in trials at bar which take place at Colombo—§216(1), §440A. It is interesting to note that this practice of the Judges of the supreme tribunal going out on circuit took its rise in the reign of King Henry II. and exists throughout the British Empire to this day. Although, the Supreme Court has power to try a criminal case at any place within the Island, such trials may take place as a rule only within the territorial limits of the judicial circuit within which the offence was committed, unless the trial has been regularly transferred‡ to another circuit under §422 *post*, or is to be tried at bar. Hence, it is that §32 of the Courts Ordinance makes special provision if a trial before the Supreme Court is commenced in a wrong Circuit, and the accused has pleaded to the charge without taking objection to the jurisdiction, that the trial is to proceed.

The capacity of the Supreme Court to try offences.—(i) All offences under the Penal Code may be tried by the Supreme Court.—§10 *ante*. (ii) All offences under laws other than the Penal Code, shall, if the Court of trial be not specified, or if the punishment exceeds that which the minor Courts can lawfully award, be tried by the Supreme Court—§11 *ante*. (iii) Contempts of court—§51 Courts Ordinance and §440 *post*.

The capacity of the Supreme Court to punish.—" The Supreme Court may pass any sentence authorized by law."—§13 *ante*.

(B) **The different methods by which criminal cases come before the Supreme Court for trial:—**

(1) **Trials upon indictment.**—(*a*) On a committal by a Police Court having jurisdiction, upon an indictment drafted and approved by the Attorney-General after a non-summary investigation in the Police Court regularly held—see §218(1) *post*, §21(1) Courts Ordinance. (*b*) After a transfer of a trial from a minor Court, without a non-summary investigation, committal or indictment approved by the Attorney-General—see §218(2), §422 *post*, and see §46 of the Courts Ordinance which has been repealed by Ordinance No. 1 of 1900 so far as it relates to the transfer of criminal cases is concerned. See Introduction to *Chapter XIX.* para. 2 *ante*. Where the trial has been thus transferred on the orders of the Supreme Court, the indictment will be drafted by the Registrar of the Supreme Court—§218(2). (*c*) Summary trials for perjury—§439 *post*.

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* See §218 *post*.
† See §§385, 440A *post*, §§21(1), 32 Courts Ordinance.
‡ *C.f.* §47 *et seq.* Courts Ordinance.

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§216 (2) **Trial upon informations exhibited by the Attorney-General** —See para. 5(B) *infra*, and §§21(1), 32 Courts Ordinance, §§385, 440A *post*.

(3) **Summary trials for contempt of Court.**—See §51 Courts Ordinance 1889, §440 *post* and Ordinance No. 9 of 1895 §12. These trials are summarily disposed of without a jury. See *Chapter LXV.* Civil Procedure Code and *Silva v. Carolis* (1918) 20 *N.L.R.* 445.

3. All trials before the Supreme Court, whether upon indictment or information shall be by jury before a Judge or a Commissioner of Assize (see §§24 – 26 Courts Ordinance).—§31 Courts Ordinance, §216(1)* *post*. The draftsman of *Chapter XX.* has apparently lost sight of the fact that criminal trials before the Supreme Court may be upon information—see §§218, 219, 220, 231, 249. Ordinarily, the trial takes place before a *common jury* summoned from the panel elected by the accused but, it is open to the prosecution as well as to the defence to move the Court, that the trial should take place before a *special jury*—§222 *post*.†

The Chief Justice may in the exercise of his discretion order that any particular trial shall be "*a trial at bar*," and thereupon such trial takes place at Colombo by a jury before three Judges of the Supreme Court.—§216(1), §31 *proviso* Courts Ordinance. See *R. v. Asirwatham* (1914) 18 *N.L.R.* 11. In exhibiting any information, it is open to the Attorney-General to demand a trial at bar, and §440A *post*, also provides that in any proceedings upon information under that section, the trial may be at bar, *but without a jury*. This is an exception to the rule that a criminal trial before the Supreme Court shall be held before a Judge *and jury*. See also §51 Courts Ordinance and §440 *post*—trials for contempt of Court which are tried summarily and without a jury.

4. The Right to speedy trial.—

(1) If a prisoner, who has been *committed* for trial before the Supreme Court is not brought to trial at the first criminal sessions after the date of his committal, he has the right to demand that he be liberated on giving bail, unless there are good grounds for refusing the application. If the prisoner is not brought to trial at the next sessions, he will be discharged altogether, unless the delay is due to the insanity or sickness of the prisoner, or by reason of his application for a postponement of the trial—§33 Courts Ordinance. See also §§34 *et seq.* Courts Ordinance.

(2) If upon an *information* exhibited by the Attorney-General a prisoner is kept in custody, and is not brought to trial within twelve calendar months next after a plea of not guilty has been pleaded, he may, after giving twenty days' notice to the Attorney-General apply to the Supreme Court, which may authorize the accused to bring on the trial which he may do, unless a *nolle prosequi* is entered.

(3) The law is silent as to delays in proceedings where a case has been transferred for trial before the Supreme Court—see §385 para. 9 *post*.

5. The stages in criminal trials before the Supreme Court.—(A) Trials upon indictment.

(1) The case is submitted to the Supreme Court either :—(*a*) after a non-summary inquiry held under *Chapter XVI.* in a Police Court having the requisite jurisdiction, based on a valid commit-

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* See §277 of the Code of 1883.
† See §286 of the Code of 1883.

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ment by the Magistrate under §§158 *et seq. ante* and supported by an indictment drawn up and approved by the Attorney-General—§186 *ante*. See §218(1) *post;* or (*b*) after the transfer of a case for trial to the Supreme Court from a minor Court upon orders of the Supreme Court, *without a previous non-summary inquiry, committal or indictment*—§422(1) *post*, §46 Courts Ordinance read with Ordinance No. 1 of 1900. §216

It has already been pointed out (see Introduction to *Chapter XIX.* para. 2, §203 para. 2, 3 *ante*) that inasmuch as §46 of the Courts Ordinance in so far as the **transfer of criminal cases** is concerned, has been repealed by Ordinance No. 1 of 1900, such transfer of trials can now be made only under §422 *post.*

When the trial of a case is transferred from a minor Court to the Supreme Court, the indictment will be drawn up, not by the Attorney-General, but by the Registrar of the Supreme Court—§218(2).

(2) **The general rule is that the trial must take place in the circuit within the limits of which the non-summary investigation was held.**—See §§28, 32 Courts Ordinance. There are two exceptions to this rule: (i) the trial may be transferred from one circuit to another under §422 *post*, and (ii) all "*trials at bar*" must take place at Colombo —§216(1) *post*, §31 *proviso* Courts Ordinance. *C.f.* §440A *post.*

Two Sessions Courts may sit simultaneously within the same Circuit. The third criminal sessions of the Western Circuit 1922 were held simultaneously both at Colombo and at Ratnapura. *C.f.* §262(2) *post* and §23 Courts Ordinance, 1889.

(3) Before the sessions are held, the trial Judge will issue his mandate through the Registrar of the Supreme Court to the Fiscals or other keepers of prisons within the limits of the circuit for which the sessions are held, with the direction that they are to certify to the Judge, the several persons, then and there in custody of any of them committed for and charged with any crimes or offences whatsoever. A return is made to the mandate in the form of a Calendar of cases—§30 Courts Ordinance. It is lawful thereafter to add new cases to the Calendar with the permission of the trial Judge.

Preparation of the Calendar.—What takes place in practice is that as the cases are committed for trial, the Magistrates acting under §165 *ante* keep the Fiscals informed of the cases that are awaiting trial. As the opening date of the Sessions draws near—see §28 Courts Ordinance; the Fiscals will submit a draft calendar of cases to the Attorney-General. The Crown Counsel in charge of the circuit concerned will satisfy himself that the calendar is in order, and submit it to the trial Judge for approval, and when this has been done the calendar will be returned to the Fiscal, who embodies it in his return to the mandate.

(4) **Opening of the Sessions.**—On the day fixed for the opening of the sessions, the various panels of the jury, whether English-speaking, Sinhalese-speaking or Tamil-speaking, will have been summoned and be in attendance. When the Judge appears in Court, the Fiscal will make his return to the mandate issued to him by the Court. Thereafter, the Registrar of the Court will call out the names of each person summoned to serve on the various panels of the jury, and the Judge will entertain any applications that may be made by individual jurymen for exemption, or deal with such of them as are absent without lawful cause. Thereafter, all undefended prisoners in murder cases will be produced in Court, and on the application of Crown Counsel, advocates or proctors will be assigned for their defence. When this has been done the other work of the sessions, *viz.*, the trials will be proceeded with.

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§216 (5) **In every trial* before the Supreme Court, the prosecution shall be conducted either by the Attorney-General, Solicitor-General, Crown Counsel, or by some "advocate generally or specially authorized by the Attorney-General in that behalf"** —§216(2). See §§199, 201 *ante* and §392 *post.*

(6) (*a*) **Nolle prosequi.**—The Attorney-General may, at any stage of a trial before the Supreme Court under this Code, before the return of the verdict, inform the Court on behalf of His Majesty that he will not further prosecute the accused upon the *indictment* or any charge therein, and thereupon all proceedings on such indictment or charge against the accused *shall* be stayed, and he *shall* be discharged of and from the same—§217(1). Such information by the Attorney-General may either be oral or in writing—§217(2). The Solicitor-General or Crown Counsel cannot enter a *nolle prosequi*—§393 *post.* See also §§196, 202, 388. Under the English law the Attorney-General has the right of entering a *nolle prosequi* in trials upon his *information.* The same right exists in Ceylon by reason of §385 *post.*

(*b*) **Withdrawal of indictment by prosecuting counsel.**—The prosecuting counsel may, with the consent of the presiding Judge, at any stage of the trial before the return of the verdict, withdraw the *indictment* or any charge therein, and thereupon such proceedings are stayed and the accused discharged therefrom—§217(3). See §§185, 195, 202, 221(2). Note that the prosecuting officer unless he is the Attorney-General has no power to withdraw a charge when the proceedings are held upon an *information* exhibited by the Attorney-General.

(7) **The arraignment of the accused.**—When the Court is ready to commence the trial, the accused having surrendered to the Court, if he is on bail, or brought before it in custody, if he is on remand, the trial proper commences by the arraignment of the accused.

The arraignment consists in (i) calling the accused to the bar by name, (ii) reading out and interpreting to him, if necessary—§167(6), the indictment referred to in §218(1),(2). If the indictment contains any reference to the previous convictions of the accused, this fact is not disclosed until after conviction—§253 *post;* (iii) calling upon the accused to plead to the charge or charges laid against him in the indictment.

(*A*) **If the accused or his advisers desire to prefer an objection against the continuation of the trial, the proper time at which to advance such objection, is at this stage, *i.e.*, before the accused pleads to the charge.** Such objections are :—(1) **Objection to the jurisdiction of the Court,** *i.e.*, either that the trial is taking place in the wrong circuit—§32 Courts Ordinance, or that the proceedings which culminated in the committal of the accused are irregular, *e.g.*, as being held in a Police Court having no jurisdiction to investigate the charge—see §§204 – 206 para. 4 *ante.* 2. **Objection to the indictment,** *e.g.*, on the ground that it discloses a misjoinder or contains some defect. 3. **Objection in bar of the trial,** *e.g.*, a plea of *autre fois acquit* or *convict*—§§330 – 331 *post;* a pardon; or that the offence is statute barred.

See §§204 – 206 para. 4 *ante* where the law is discussed.

(*B*) **Accused "standing mute."**—(*a*) If he stands "*mute of malice,*" *i.e.*, contumaciously refusing to plead to the indictment, the trial proceeds as on a plea of Not Guilty—§221(1). (*b*) If he stands mute "*by visitation of God,*"—(i) If the accused cannot make his defence

* *i.e.* whether on indictment or on information.

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owing to his being insane, the jury will be sworn in the first instance to try the issue of such unsoundness of mind or incapacity, and if the issue is decided in favour of the accused the trial will be postponed—§368(1). See §369 *et seq.* and *R. v. Pindorissa* (1927) 5 *T.L.R.* 101. (ii) If the accused, although not insane, cannot be made to understand the proceedings, the Court may proceed with the trial—§288. See *R. v. Pindorissa* (1927) 5 *T.L.R.* 101 and §§204 – 206 para. 5 *ante*. §216

(*C*) **The plea.**—(i) If the accused pleads Guilty, the plea shall be recorded and he may be convicted thereon—§220. If the accused pleads Guilty to a charge of murder, the Judge *may* refuse to accept such plea and cause the trial to proceed as if the accused had pleaded Not Guilty—§220. (ii) If the accused pleads Guilty to a "lesser offence" —see §§182 – 183 *ante*—for which he might have been convicted on the indictment, *and the prosecuting counsel is willing to accept the plea*, the Judge may order such plea to be recorded and sentence him. Such an order operates as an acquittal on the charges laid in the indictment—§221(2). (iii) If the accused pleads Not Guilty, the trial proceeds—§221(1).

(8) **The Jury.**—

(*A*) **Composition and empanelling of the jury.**—

(i) The jury consists of seven persons—§223(1).

(ii) The jury must be empanelled from the panel elected by the accused under §160 *ante*, unless the Court otherwise directs—§224(1); or unless a special jury has been appointed to try the case—§222.

(iii) The jury are chosen by lot from the panel—§224(2).

(iv) As each juror is chosen his name is called—§224(3).

(v) The right of challenge—(*a*) The *accused*, whether there be only one accused or several, have the right to challenge any two of the chosen jurors without having to state any reasons for doing so—§224(4). The accused have an unlimited right of challenging any number of jurors, provided they show justification for every such challenge in any of the ways indicated in §225. (*b*) The *prosecution* may, without stating reasons, request any number of the jurors, who are chosen "to stand down"—§224(5). If the panel of the jury has been exhausted by reason of the prosecuting counsel having asked the jurors "to stand down," the names of such jurors will be called again and the prosecuting counsel will then be invited to state the grounds he may have to urge against such jurors—§§224(6), 225.

Every objection to a juror will be decided by the trial Judge on the spot, and his decision shall be recorded, and is final—§226(1).

If there shall not be a sufficient number of jurors present unchallenged, the requisite number may be made up from such of the bystanders as are not by law disqualified from serving as jurors—§224(7). It would be open to either side upon cause shown to the satisfaction of the Judge under §225 to object to any such juror. *C.f.* §226(2).

(*B*) **When seven jurors have been chosen, the Registrar will call upon them to elect their Foreman.** If the jurors are unable to agree upon the person, who should act as their Foreman, the Judge will appoint one of their number to act as such—§227(1), (2). The jury acts through their Foreman, who presides at their debates, asks for information, and delivers their verdict—§228.

(*C*) **After the Foreman has been elected or appointed, the jurors are sworn or affirmed**—§227(3).

(*D*) **Absence of jurors.**—If during a trial at any stage before the return of the verdict, a juror from any sufficient cause is prevented

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§216 from attending throughout the trial, or if any juror absents himself, and it is not practicable to enforce his attendance, or if a juror does not understand the language in which the evidence is given, or the language in which it is interpreted, the Judge may either order a new juror to be added, or discharge the jury and order that a new jury be chosen —§229.

(9) **After the jurors have been sworn or affirmed the Registrar, in the hearing of the accused reads the charge to them, and informs them that it is their duty to listen to the evidence, and upon that evidence to find by their verdict whether or not the accused is guilty of the charge, or any of the charges laid against him in the indictment—§231.**

(10) **Opening speech for the prosecution—§232.**

(11) **The proof in support of the prosecution is led, the material witnesses being examined-in-chief, cross-examined and re-examined—§232.** All statements made by the accused during the non-summary inquiry before the Magistrate must be put in and read in evidence as part of the case for the prosecution—§233.

When the prosecuting counsel considers that sufficient evidence to cover the issues arising in the case has been led, he will intimate to the Court that the proof for the prosecution is closed, and he will tender for cross-examination by the defence any witnesses who have not been called, and whose names appear on the back of the indictment. This closes the case for the prosecution, unless evidence in rebuttal is allowed to be led under §237(1) *post.*

(12) **The Judge now has to decide whether or not he will call upon the accused for a defence.** This is a question of law which he has to decide for himself—§244(1) (*d*). If he considers that there is no evidence, or as it is sometimes put—there is not a *scintilla* of evidence, that the accused committed the offence charged, or any lesser offence, he will as a matter of law direct the jury to find a verdict of Not Guilty—§234(1). Before the Judge so directs the jury, the prosecuting counsel is entitled to sum up his case. In all probability before acting under §234(1), the Judge will call upon the prosecuting counsel to sum up.

On the other hand, if the Judge considers that, there is evidence led by the Crown, **which if accepted by the jury,** would shift the burden of proof on to the defence, he will address the accused or his pleader and enquire whether he means to adduce any evidence—§234(2). If the accused is undefended it is the duty of the Judge when calling upon him for his defence to observe the provisions of §296(1) *post*, as well as to inform him, that without entering the witness-box, he may, if he prefers it, make an unsworn statement from the dock—*R. v. Sittambaram* (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.

(13) **If the accused or his pleader intimates that no evidence is to be led, then, the prosecuting counsel may sum up his case** —§234(3), see §296(2) *post.* If, however, the only witness for the defence is the accused, the prosecuting counsel has the right to sum up his case *after the accused has given evidence.—R. v. Joronis* (1921) 22 *N.L.R.* 468, *R. v. Gardner* (1898) 1 *Q.B.* 150. If without giving evidence, the accused makes an unsworn statement from the dock, it is submitted that in such a case too, the prosecuting counsel would be entitled to sum up after such statement was made. See Introduction to *Chapter XIX.* para. 8(12) *ante*, §§208 – 212 para. 3 *post*, §§232 – 237 para. 2(3) (5) *post.*

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The omission of the accused or of his spouse to give evidence must not form the subject of adverse comment by the prosecution—§296(3). Subject to this qualification, the prosecuting counsel may freely comment upon the absence of evidence on the part of the defence to meet the points established by the case for the prosecution.

(14) **If evidence is to be called on the part of the defence, the case for the defence may be opened by the accused or his pleader—§235.** The defending counsel may in the opening speech state the facts or the law on which he intends to rely, and make such comments as he thinks necessary on the evidence led for the prosecution —§235.

(15) **The proof in support of the defence is now led, the witnesses being examined-in-chief, cross-examined and re-examined.** With regard to the cross-examination of the accused by the prosecution the provisions of §§54 and 120(6) of the Evidence Ordinance should be kept in view. See §122 para. 7 *pp.* 240 – 241 *ante.* The accused may examine any witness not named by him under §§159(1), (2), if such witnesses are in attendance—§236.

Where the only evidence called by the defence is that of the accused, the defending counsel has the right to the last word, and the prosecuting counsel will sum up immediately *after* the accused has given evidence—para. 13 *supra.* Where evidence, whether oral or documentary other than the testimony of the accused given in the witness-box has been called by the defence, this gives the Crown the right of reply, or the right to the last word with the jury, and accordingly, defending counsel must sum up his case before the prosecuting counsel replies—§235. See §237(2). If while the case for the prosecution is in progress the defence produces a document which is not a production entered on the back of the indictment, this amounts to leading evidence for the defence, and the Crown can claim the last word—see §§232 – 237 paras. 2(5) *post.* In his reply the prosecuting counsel must keep the provisions of §296(3) in view. He may, however, comment freely on the evidence that has been called and on the omission on the part of the defence to lead material evidence which was available, but has not been called, provided he makes no comment on the omission of the accused or his spouse to give evidence.

(16) **If the evidence led by the defence takes the prosecution by surprise, the prosecution may, with the leave of the Judge, call evidence in rebuttal—§237(1).** The summing-up of the defending counsel, and the final reply of the prosecuting counsel will take place after the evidence in rebuttal has been led—see §237 para. 6 *post.*

(17) **Any juror, who is personally acquainted with any relevant fact should inform the Judge that such is the case, whereupon he may be sworn and examined in the same manner as any other witness—§239.**

(18) **The Judge will then " sum up " the case to the jury —§§244, 245.** The jury may, thereafter, retire to consider their verdict —§246. When they retire they are committed to the charge of an officer of the Court—§246(2), who has taken the oath prescribed in Form 14, *Schedule III. post.* Save with the leave of the Judge no one may communicate with the jury—§246(3).

(19) **Any amendment of the indictment can lawfully be made at any stage of the trial *before the verdict of the jury is returned*—§172(1).** Moreover, if a *nolle prosequi* is to be entered, or the indictment or any charge therein is to be withdrawn, this should be done *before the return of the verdict*—§217 *post.*

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§216 (20) **The verdict.**—Verdicts are either (i) *General, i.e.*, Guilty or Not Guilty on the whole charge ; (ii) *Partial*—as when the jury convicts on one or more out of several counts, and acquits on the rest, or (iii) *Special* —when the facts of the case as found by the jury are stated by them, but the Judge is desired to draw the legal inferences from the facts. A good example of a special verdict will be found set out in the case of *R. v. Dudley* (*The "Mignonette Case"*) (1884) *L.R.* 14 *Q.B.D.* 273.

Unless otherwise ordered by the Judge, the jury shall return a verdict on all the charges in the indictment, and the Judge may ask them such questions as are necessary to ascertain what their verdict is—§248(1). It is, of course, open to the jury to find a verdict on a lesser offence—see §§182 – 183 *ante*.

The verdict must either be unanimous or by a majority of not less than five against two—§223(2).

When the jury is ready to deliver its verdict and are all present, the Registrar asks them whether they are unanimous—§247(1). If the answer is that they are, the Registrar will ask them whether they find the accused Guilty or Not Guilty of the offence or offences with which he is charged—§247(3). Thereupon the foreman of the jury will state what the verdict is—§247(4). It is open to the Judge to direct the jury to reconsider a unanimous verdict—§248(2). See *in re de Souza* (1914) 18 *N.L.R. at p.* 45, *R. v. Appusinno* (1920) 22 *N.L.R.* 353, 8 *C.W.R.* 278, 2 *C.L.Rec.* 199. The verdict delivered after such reconsideration shall be deemed to be the true verdict, provided it is unanimous or by the requisite legal majority of not less than five to two—§248(2).

Prosecuting counsel may withdraw any remaining charges in the indictment—§185 *ante*.

If the jury state that they are not unanimous, the Judge may request them to retire for further consideration—§247(2). The Judge may also ask the jury to reconsider their verdict, if he does not approve of the verdict which has been delivered and the verdict then pronounced is the true verdict—§248(2).

The verdict when delivered is recorded by the Registrar and in the hearing of the jury and the effect of the recorded verdict is stated. After this is done, the foreman is required to sign the verdict—§§249(1), (2). The verdict when so recorded and signed, but not before, is final. Where, however, by mistake or accident a wrong verdict is delivered, the jury may either before the foreman signs the verdict or "immediately thereafter" amend the verdict—§249(3).

(20A) **The discharge of the jury.**—If the jury or the required majority of them cannot agree, the Judge shall after the lapse of such time as he thinks reasonable, discharge them—§250. If any juror is prevented from attending or absents himself, or if a juror finds he cannot understand English—the jury may be discharged—§229. The jury may be discharged whenever the prisoner becomes incapable of remaining at the bar, or whenever the interests of justice so require—§230. Whenever the jury is discharged, the accused shall be brought to trial before another jury, and for that purpose he may be either detained in custody or released on bail as the Judge may think fit—§252.

The jury will also be discharged after they have found a legal verdict.

(21) **If the accused is convicted of the offences charged, or of any of them, or of any lesser offence, the prosecuting counsel will proceed to prove any previous convictions which may lawfully be proved against him**—see §214 para. 7 *ante*, §253(1), (*b*), (*c*)

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post. The Judge will either "forthwith" or "before the close of the sessions" pass judgment on him according to law, provided that if it appears to him expedient so to do, he may, without pronouncing judgment, direct that the accused be released on his entering into a bond, with or without sureties and during such periods as the Judge may direct, to appear and receive judgment if and when called upon, and in the meantime to keep the peace and be of good behaviour—§251. See *Chapter XXVI. post.* §216

If the accused is acquitted, it follows that he will at once be discharged.

(21A) **As to the judgment**—see *Chapter XXIV. post.*

(21B) **As to the execution of the sentence**—see *Chapter XXV. post.*

(22) **General.**—

(i) If in the course of a trial at any time before the return of the verdict a juror is prevented from attendance, or absents himself, or a juror finds that he is unable to understand the evidence, the Judge may either direct that a new juror be added, or discharge the jury and order that a new jury be chosen—§229.

(ii) It is not essential that the jury should be kept together during the adjournments previous to the close of the Judge's summing up, but it is open to the Judge to make such an order if it should appear to him to be advisable in the interests of justice—§241(1). Where the jury are allowed to separate during the course of a trial they may first be sworn not to hold communication with any person other than a fellow juror upon the subject of the trial—§241(2). If after such oath or affirmation is administered it is proved that any juror has acted in violation of his oath or affirmation, he can be punished as for a contempt of Court.

(iii) The Judge may order that the jury be taken to view the place where the offence is alleged to have been committed—§238.

(iv) The Judge may direct the Fiscal to provide the jury with reasonable refreshment at public expense—§242.

(v) Jurors are public servants—§19(6) Penal Code, and are judges of fact—§17 *illustration* (*d*) Penal Code.

(vi) The jurors are bound to attend on all dates to which the trial has been adjourned—§§240, 280 *post.*

(vii) Payment of jurors and witnesses in Supreme Court trials—§253A *post.*

(B) **Trials upon informations exhibited by the Attorney-General.**—

In the case of *R. v. Peris Perera* (1880) 3 *S.C.C. at pp.* 163, 164, 166, the question was argued whether the Queen's Advocate of Ceylon had the power to have persons tried by the Supreme Court upon his "*information*" without any commitment for trial in the ordinary way. Cayley, C.J. & Clarence, J., having reviewed the authorities came to the conclusion that, such power did not exist. This led to the Legislature expressly declaring that such power existed in the Attorney-General.

§239 of the Criminal Procedure Code of 1883, specially declared the power, which the Attorney-General* possessed by law to exhibit informations. In the Courts Ordinance 1889, the power of the Attorney-General to exhibit informations is recognized in two places, *viz.*, in §21(1) and §32.

*The title of the Queen's Advocate was changed to that of Attorney-General by Ordinance No. 1 of 1883.

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§216 §385 of this Code generally declares that the Attorney-General may exhibit to the Supreme Court informations for all purposes for which Her Majesty's Attorney-General for England may exhibit informations on behalf of the Crown in the High Court of Judicature, but no such information shall be exhibited for any offence punishable by death or by rigorous imprisonment for three years or upwards. Such proceedings may be taken upon every such information as may lawfully be taken in cases of similar informations filed by Her Majesty's Attorney-General in England *so far as the circumstances of the case and the course of practice of proceeding in the said Supreme Court respectively will admit.* See also §440A *post.*

The English law defines an "Information" to mean a complaint in writing made on behalf of the Crown in the King's Bench Division of the High Court in respect of some offence not being a "*treason*" or "*felony,*" whereby the offender is brought to trial without a previous commitment or the finding of a true bill by a Grand Jury. Such informations are of two kinds (i) informations *ex officio*, and (ii) informations by the Master of the Crown Office. The law of Ceylon is concerned solely with informations *ex officio*, which may only be exhibited by the Attorney-General, or in the vacancy of that office, by the Solicitor-General.

An information by the Attorney-General or as it is usually styled an information *ex officio* is a formal written suggestion on behalf of His Majesty the King of a "*misdemeanour*" committed, and filed in the King's Bench Division of the High Court, without the intervention of any Magisterial proceedings or of the finding of a Grand Jury. The usual objects of such informations are properly such enormous "*misdemeanours*" as peculiarly tend to disturb or endanger the Government, or to molest or affront the regular discharge of the functions of Government. It will be observed that §385 of this Code empowers the Attorney-General to exhibit informations in the case of all offences except those punishable (i) by death, or (ii) by rigorous imprisonment for three years or upwards. For an exception to this rule see §440A(2) *post.*

Form of the information.—See §385 *post.*

(1) **Filing of the information.**—Under the English Law, the information is filed in the Crown Office without any leave obtained of the Court for that purpose. In Ceylon the information will be filed in the same manner in the Registry of the Supreme Court.

(2) **When the information is filed it must be tried in the usual manner before a Judge and jury within the circuit, where the alleged offence was committed.** Hence, it is that §32 of the Courts Ordinance expressly declares that, where an accused has pleaded to the charge upon an information without pleading to the jurisdiction, the trial is to proceed. It is the inherent right of the Attorney-General to demand that, the trial of any information shall be "*at bar,*" *i.e.*, before a jury and three Judges, and in such a case, the trial must necessarily take place in Colombo—§216(1) *post*, §31 *proviso* Courts Ordinance.

§440A *post* provides that the offence of sedition (§120 Penal Code) may, if the Governor by warrant under his hand so directs, be tried at bar by the Supreme Court *without a jury.* It is likewise provided that such a trial may be held either upon an indictment or upon an information exhibited by the Attorney-General. It follows, therefore, that where such an information is tried at bar without a jury, the trial will take place in Colombo by reason of §216(1) *post.*

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(3) **All prosecutions on informations must be conducted by the Attorney-General, Solicitor-General, Crown Counsel or some advocate generally or specially authorized in that behalf by the Attorney-General**—§216(2). §216

(4) **The Attorney-General has the same power of entering a *nolle prosequi* in the case of an information as he has in the case of an indictment**—see §217(1), (2) para. 3 *post*. The prosecuting counsel not being the Attorney-General has no power to withdraw the charge, his power of withdrawing the charge being confined to indictments—§217(3).

(5) **The arraignment of the accused and the subsequent proceedings at the trial are similar to that adopted at the trial of an indictment and, therefore, need not be restated.** §32 of the Courts Ordinance declares that if an accused pleads to the charge on an information without objecting to the jurisdiction, the trial is to proceed.

After appearance the accused is entitled under the English Law to demand a copy of the information free of cost, if he applies for it.

(5A) **In the case of a trial for sedition at bar without a jury —the Court will proceed as in the case of criminal trials before the District Court.**

(6) **As to the right of the accused to demand a speedy trial** —see para. 4(2) *supra*.

(7) **Under the English Law the Attorney-General has the right to amend the information.**—§172 *ante* which deals with the amendment of indictments and charges, does not specifically mention informations. The terms of §385 *post* make the English Law applicable to Ceylon "so far as the course of practice and proceeding in the Supreme Court respectively will admit." Therefore, §§385 and 172 read together would entitle the Court to amend the information at any time before the verdict is returned.

(C) **As to summary trials before the Supreme Court for contempt of Court.**—See §440 *post*.

6. The following provisions of the Code which apply to trials before the Supreme Court should be noted:—

§253A.—Payment of jurors.

Chapter XXI.—The qualifications of jurors and the procedure for summoning them.

§287.—Right of the accused to be defended.

§289.—Power of the Court to adjourn or postpone the trial.

§293.—Power of the Court to order the detention of offenders.

§294.—Trial may be held on a *dies non*.

§297.—Evidence to be recorded in the presence of the accused.*

§300.—Evidence to be translated.

§303.—The trial Judge in a Supreme Court trial "shall take or cause to be taken in writing" notes of the evidence.

§309.—Sentences of death. See §310A.

§310.—Other sentences of the Supreme Court. See also §312 *et seq.*, *Chapter XXVI. post*.

§386.—What persons are deemed to have been regularly brought before the Supreme Court.

Chapter XXXVI.—Bail. See also *Chapter XXXIX. post*. §33 *et seq.* Courts Ordinance.

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*See *Peris v. Perera* (1912) 1 *B.N.C.* 3; *Fernando v. Appu* (1895) 1 *N.L.R.* 90; *R. v. Dinoris Appu* (1918) 5 *C.W.R.* 266.

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§216 **Chapter XXXVIII.**—Special provisions relating to evidence.

Chapter XL.—The disposal of property which is the subject of an offence.

§429.—Power of Court to examine any person as a witness. See §430.

§441.—Power of the Judges of the Supreme Court to make rules. See §53 Courts Ordinance.

The following provisions of the Court Ordinance 1889 should also be noted.—

§86.—Sittings of the Court should be in public. *C.f.* §7 *ante.*

§89.—Death or sickness, &c., of Judge during trial.

7. It should be noted that as a general rule no appeal either on the law or on the facts lies against a verdict and sentence pronounced by the Supreme Court in the exercise of its original criminal jurisdiction.—See §§332, 355 *post,* and §§21(2), 39, Courts Ordinance 1889.

Exceptions.—(1) An accused has an inherent **right to appeal to the Privy Council**—§§333 - 334 *post*, and see §§43 *et seq.* Courts Ordinance 1889. The Privy Council, however, is not a Court of Criminal Appeal, and will not review or interfere with the course of criminal proceedings, unless it can be shown that by a disregard of the forms of legal process, or the violation of the principles of natural justice substantial and grave injustice has been done—*Re Dillet* (1870) 12 *App. Cas.* 459, 467. *Ex parte Aldred* (1902) *App. Cas.* 81; *Lanier v. R.* (1914) *App. Cas.* 221; *R. v. Loku Nona* (1908) 11 *N.L.R.* 381. Before taking an appeal to the Privy Council an application must be made to the Privy Council for leave to appeal—see *R. v. Loku Nona* (1908) 11 *N.L.R.* 116.—See generally as to the procedure—§§333 - 334 *post.* (2) The trial Judge may upon conviction and sentence of the accused **reserve "any question of law"** for decision by a Court of two or more judges—§§355(1), (2) *post.* (3) Upon the conviction of an accused **the Attorney-General may certify that "any question of law," which has not been reserved under §355(1) ought to be further considered,** and thereupon the Supreme Court has power to decide the question so raised—§355(3) *post.*

A.—Preliminary

Trials before Supreme Court.

216. (1) All trials before the Supreme Court shall be by jury before a Judge or a Commissioner of Assize, provided always that the Chief Justice may, in his discretion, order that any trial shall be a trial at bar and thereupon such trial shall be held at Colombo by jury before three Judges.

(2) In every trial before the Supreme Court, the prosecution shall be conducted by the Attorney-General or the Solicitor-General or a Crown Counsel or by some advocate generally or specially authorized by the Attorney-General in that behalf.

Supreme Court.—See §3 *ante.*

Trials before the Supreme Court are either upon indictment or information.—See *Introduction to Chapter XX.* para. 2(B). *ante.*

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Jury.—See §§223 – 230, 238 – 242, 245 *and Chapter XXI. post.*
Judge.—See §3 *ante.*
Commissioner of Assize.—See §§24 – 26 Courts Ordinance 1889.
Chief Justice.—See §3 *ante.*
Trial at Bar.—See §31 *proviso* Courts Ordinance 1889.
Attorney-General.—See §3 *ante.*
Solicitor-General.—See §3 *ante.*
Crown Counsel.—See Ordinance No. 1 of 1883, §4 and §§199, 201, 392 – 393.
Advocate generally or specially authorized.—See §§199, 201, 392.
Right of accused be to defended by a pleader.—See §287 *post.*

1. §216 is based upon §277 of the Code of 1883. *C.f.* §§267 – 268 Indian Criminal Procedure Code.

2. **Scope of §216.**—*Chapter XX.* of this Code is meant to regulate the procedure applicable to all* criminal trials held before the Supreme Court in the exercise of its original criminal jurisdiction—see *Introduction to Chapter XX.* §216 at the outset provides the rule for two distinct and very important matters connected with such trials.

Rule 1.—Every criminal trial before the Supreme Court, whether the same shall be held upon indictment (see §218 *post*), or upon an information exhibited by the Attorney-General (see §§385, 440A *post*, and *Introduction to Chapter XX.* para. 2(B) *ante*), shall be by jury before a single Judge of the Supreme Court or a Commissioner of Assize—§216(1), and see §31 Courts Ordinance 1889 and para. 3 *infra.*

Rule 2.—In every criminal trial before the Supreme Court, whether upon indictment or on an information, the prosecution shall be conducted by the Attorney-General, Solicitor-General, Crown Counsel, or by some advocate generally or specially authorized in that behalf by the Attorney-General—§216(2). See para. 4 *infra* and §287 *post.*

3. **All trials before the Supreme Court shall be by jury before a Judge . . .—**

Trial by jury.—" The most transcendent privilege which any subject can wish for is, that he cannot be affected in his . . . liberty or person, but by the . . . consent of twelve of his neighbours and his equals. This, for a long succession of ages, has secured the just liberties of this nation "—*Blackstone.* Trial by jury and the power of the superior Courts to issue writs of *habeas corpus*, are the two corner-stones of British liberty. See §§223 – 230 para. 5 *post.*

The general rule is found stated in §§216(1) of this Code and §31 of the Courts Ordinance. Every criminal trial before the Supreme Court, whether such trial takes place upon indictment (see §218) or on an information exhibited by the Attorney-General (see §§385, 440A *post* and *Introduction to Chapter XX.* para. 2(B) *ante*), shall be tried (i) by jury, (ii) before a single Judge of the Supreme Court, or a Commissioner of Assize, and (iii) such trial shall ordinarily take place within the territorial limits of the judicial circuit within which the offence was committed—see §§5, 27 – 28, 32 Courts Ordinance.

Jury.—This term includes an " ordinary " as well as a " special jury "—see §§222, 224 *post.*

Commissioner of Assize.—See §§24 – 26 Courts Ordinance 1889.

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* See §§218, 219, 220, 231, 249 *post* where the draftsman has apparently lost sight of the fact that Criminal trials before the Supreme Court may be held upon information – see §§385, 440A *post* and §§21, 32 Courts Ordinance 1889.

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§216 **Exceptions to the general rule contained in §216(1):—**

(A) Cases where a criminal trial before the Supreme Court may take place without a jury.—(i) Under §440A *post* provision is made for the trial of charges of " sedition " before the Supreme Court without a jury if the Governor so directs by warrant under his hand. This is the only exception which is recognized by our law to the rule that criminal trials before the Supreme Court, upon an indictment or information shall be tried by jury. During 1915 and 1916 several trials for offences of " sedition " were tried in the manner provided for by §440A *post*. (ii) Trials for contempt of court are tried summarily without a jury—see §51 Courts Ordinance 1889, §440 *post*. See also *Chapter LXV*. Civil Procedure Code.

(B) Cases where a criminal trial takes place with a jury, but before more Judges than one.—

Trials at Bar.—It is within the discretion of the Chief Justice to order that any trial, whether on indictment or information, shall be " a trial at Bar," and thereupon such trial shall be held at Colombo by jury before three Judges—§216(1), and §31 *proviso* Courts Ordinance. The only trial " at Bar " held in Ceylon *with a jury* and three Judges is that of *R. v. Asirwatham* (1914) 18 *N.L.R.* 11.

(i) In proceedings upon informations exhibited, it is the inherent right of the Attorney-General to demand that such trial shall be " at Bar "—see *Introduction to Chapter XX*. para. 3 *ante*. Such a trial will take place before a jury and three Judges.

(ii) Persons charged with the offence of " sedition " **may** under §440A *post* be tried " at Bar " *without a jury*, whether such proceedings are based upon an indictment or on an information.

(C) Cases where the trial takes place outside the territorial limits of the circuit within which the offence was committed.—(*a*) Every trial " at Bar," whether such trial takes place with or without a jury, must be held at Colombo, even if the offence was committed beyond the territorial limits of the Western Circuit—§216(1), and §31 *proviso* Courts Ordinance. (*b*) If the trial of the case has been transferred from one judicial circuit to another—see §47 Courts Ordinance and *c.f.* §422 *post*. (*c*) Summary trials for contempts—§51 Courts Ordinance.

If an accused pleads to the charge contained in an indictment or information, without objecting to the jurisdiction, and thereafter, the evidence discloses the fact that the offence was committed outside the territorial limits of the circuit within which the trial is being held, " the Supreme Court shall, nevertheless, at such session proceed to try such crime or offence in such and the same manner as if such crime or offence had been committed within the limits of such circuit—§32 Courts Ordinance.

4. **The prosecution shall be conducted by the Attorney-General, &c.**—§216(2) together with §§199, 201 and 392 form a group of sections which indicate the persons by whom prosecutions before the various criminal courts are to be conducted. In trials before the Supreme Court, whether the proceedings are on indictment or on information, such trials are to be conducted by the Attorney-General, Solicitor-General, Crown Counsel, or by some advocate generally or specially authorized in that behalf by the Attorney-General. Hence, no proctor can conduct a prosecution before the Supreme Court. See §§208 – 212 para. 5 *ante*, *Introduction to Chapter XX*. para. 5(A), (5) *ante*.

Advocate generally or specially authorized.—See §201 para. 3 *ante*.

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The powers and duties of prosecuting counsel.—See §§208 – 212 para. 2 *ante*, §201 para. 4 *ante*, §§232 – 237 para. 2 *post*, and the cases cited in para. 5 *infra*.

N.B.—Under §217(3) *post*, the prosecuting officer, unless he is the Attorney-General, cannot withdraw charges upon an *information*—see §217 para. 4 *post*.

Shall.—This word is merely directory. An accused cannot claim an acquittal on the ground that no person appeared to prosecute on behalf of the Crown.—*R. v. Ismail.* See, however, §§33 *et seq.* Courts Ordinance.

The right of an accused to be defended by a pleader is provided for by §287 *post*.

The Attorney-General's department is a prosecuting and not a defending department.—See §392 para. 3 *post*.

5. **Case law.**—

R. v. Asirwatham (1914) 18 *N.L.R.* 11.—This case was tried "*at Bar*" before Pereira, Ennis & de Sampayo, JJ. *and a jury* at Colombo.

R. v. Sinno Appu (1885) 7 *S.C.C.* 51 (*Full Court*).—The Attorney-General may, under §261 of the Code of 1883, authorize any advocate or proctor to conduct a prosecution before a District Court, but such person may not, unless an advocate, withdraw a charge under §262 of that Code.

Fernando v. Fernando (1897) 2 *N.L.R.* 340.—See §201 para. 5 *ante*. The duties and obligations of prosecuting counsel indicated.

R. v. Thursfield (1838) 8 *C. & P.* 269.—The prosecuting counsel should assist the Court in the furtherance of justice, and not act as counsel for any particular person or party. See *R. v. Berens* (1865) 4 *F. & F.* 842.

R. v. Puddick (1865) 4 *F. & F.* 497.—Counsel for the prosecution should not be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and a contest for skill and pre-eminence. See *R. v. Banks* (1916) 2 *K.B.* 621.

R. v. Stauntons (1877) *Notable British Trials p.* 243.—*Per* Hawkins, J.—"It is a source of great comfort to me to know that each of these prisoners has been most ably defended by the learned counsel. It is a source of equal comfort to me to know that those learned counsel have, but done common justice to the Attorney-General, when they acknowledged the fair, the temperate, and the humane way in which he has discharged his stern, imperative, but painful duty . . ."

R. v. Ismail 35 *P.R.* 1887.—"The word 'shall' in §217(2) is merely directory. An accused cannot claim an acquittal on the ground that no person appeared to prosecute." See, however, §§33 *et seq.* Courts Ordinance.

Discontinuance of prosecution.

217. (1) At any stage of a trial before the Supreme Court under this Code before the return of the verdict the Attorney-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the accused upon the indictment or any charge therein, and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.

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§217 (2) The information under this section may either be oral or in writing under the hand of the Attorney-General.

(3) The prosecuting counsel may with the consent of the presiding Judge at any stage of the trial before the return of the verdict withdraw the indictment or any charge therein and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.

Supreme Court.—See §3 *ante.*

This code.—See §1 *ante.*

Before the return of the verdict.—See §§247 *et seq. post.*

Attorney-General.—See §3 *ante.*

Nolle prosequi.—See §§196, 202, 388, 393.

Indictment.—See §§158(2), 161(4), 167 - 186, 218, Form 11, *Schedule III. post.*

Discharged.—See §3 *ante.*

Writing.—See §3 *ante.*

Prosecuting counsel.—See §216(2) *ante.*

Judge.—See §3 *ante.*

Withdrawal of indictment.—See §§185, 195, 202, 221(2).

1. §217(1) is based upon §278 of the Code of 1883.

§217(2) does not appear to have been covered by the old Code, §217(3) is analogous to §494 of the Indian Code which gives a " public prosecutor " the right to withdraw " from the prosecution " with the consent of the presiding Judge. *C.f.* §202 *ante.*

2. **Scope of §217.**—§217(1) gives the Attorney-General the right " at any stage of a trial before the Supreme Court under this Code " before the verdict is returned, to inform the Court on behalf of His Majesty the King, that he will not further prosecute (***nolle prosequi***) the accused upon the indictment or any charge therein. Such information is to be conveyed to the Court either orally or in writing—§217(2). No one save the Attorney-General can enter a *nolle prosequi*—§393 *post.* When the *nolle prosequi* has been entered, the Judge has no option, but to direct that all further proceedings on such indictment or any charge therein should be stayed, and the accused " discharged " therefrom—§217(1).

It is to be observed that §217(1) does not make it clear whether the Attorney-General may enter a *nolle prosequi* in cases tried upon his " information "—see para. 3 *infra.*

§217(3) together with §§195, 202, 221(2) and 185 form a group of sections which authorize the prosecuting counsel (or proctor) to withdraw the charge with the permission of the presiding Judge. It is to be noted that under §217(3) although the prosecuting counsel may withdraw any *indictment* or charge therein, he has no power unless he is the Attorney-General to withdraw the charges contained in an *information* exhibited by the Attorney-General, or any charge therein—see para. 4 *infra.*

3. **The entering of a nolle prosequi in trials before the Supreme Court.—.**

" *At any stage of a trial before the Supreme Court under this Code* "—These words are wide enough to include every kind of criminal trial which can take place before the Supreme Court, *viz.*, (i) trials by jury before a single Judge, (ii) trials " at bar " with a jury, (iii) trials " at bar " without a jury, (iv) trials upon indictments and (v) proceedings on

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informations exhibited by the Attorney-General, for, such trials as are held under "this Code." But the above forms of trial are not all based upon indictments inasmuch as it is open to the Attorney-General to exhibit informations, which may be tried by Judge and jury or "at bar" with a jury, and in one case "at bar" without a jury. The Legislature by the use of the word "*indictment*" in §217(1) appears to have intended that this sub-section is only to apply to the entering of a *nolle prosequi* in trials based upon indictments, *i.e.*, either of the kinds of indictments referred to in §218 *post*. Accordingly, the power of the Attorney-General to enter a *nolle prosequi* in trials upon his information are not provided for by §217(1). This power is vested in the Attorney-General by §385 *post*, inasmuch as it brings into operation the English Law on the subject. Under the English Law the Attorney-General has the right of entering a *nolle prosequi* in proceedings upon his information. See *Introduction to Chapter XX.* para. 5(A) (6) *ante*.

Does §217(1) justify the entering of a *nolle prosequi* after committal of the accused for trial, but before the actual trial begins ?—See §202 para. 2 (*a*) *ante*.

Before the return of the verdict.—*i.e.*, before the verdict of the jury has been pronounced—see §§247 *et seq. post*. *Qu.*—At what stage of the case should a *nolle prosequi* be entered in a trial "at bar" without a jury, *viz.*, under §440A *post* ? There being no jury, there can be no "verdict returned." If the point were to arise, it is submitted, that it would be held on the analogy of §§195 and 202 *ante*, that the power of the Attorney-General to enter a *nolle prosequi* in such a case extends up to the time the judgment of the Court is delivered.

It is only the Attorney-General who can enter a *nolle prosequi*. Neither the Solicitor-General, the Deputy Solicitor-General nor Crown Counsel has this power—§393 *post*. Where a *nolle prosequi* is entered, the accused is only "discharged." He may, therefore, be charged afresh.—*R v. Appuwa Veda*.

Form of Nolle Prosequi under §217(1).

I,.....His Majesty's Attorney-General for the Island of Ceylon, do hereby inform the Supreme Court in terms of Section 217 (1) of the Criminal Procedure Code, 1898 that I will not further prosecute....., the accused in Police Court.....Case No.....now committed to stand his trial before the said Supreme Court, upon the indictment in the said case.

Given under my hand at Colombo this.....day of.....

(Sgd.) .....

Attorney-General.

4. **Withdrawal of the indictment or any charge therein by the prosecuting counsel.**—See §§185, 195, 202, 221(2).

See §202 para. 2(*b*) *ante*.

It is to be observed that unless the prosecuting counsel happens to be the Attorney-General himself, he may not withdraw the charges or any charge contained in an *information* exhibited by the Attorney-General. It is clear from the language used in §217(3) that this sub-section is confined to trials upon indictment alone, *i.e.*, to trials upon either of the kinds of indictments specified in §218 *post*.

Where an indictment or any charge therein is withdrawn under §217(3), the accused is not acquitted, but merely "discharged." He may, therefore, be recharged in a new proceeding.—*R. v. Appuwa Veda*.

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§217 **5. If the Supreme Court were to order the transfer of a trial either from a Police Court or a District Court for trial before itself, or if in appeal or revision it were to order that a particular case should be tried before the Supreme Court, may the Attorney-General enter a *nolle prosequi* in such a case, or may the prosecuting counsel move to withdraw the charge, and thereby in effect nullify the order of the Supreme Court?** This question was adverted to by Wood Renton, J. in *R. v. Noordeen*. It is submitted that in strict law, there is nothing to prevent the Attorney-General from entering a *nolle prosequi* in such a case. The prerogative of mercy is above the Courts of law. The order of the Supreme Court merely vests jurisdiction in itself, and it cannot be taken to curtail the rights of the Attorney-General in the matter of entering a *nolle prosequi*. As stated by Wood Renton, J, however, the possibility of such a contingency ever arising is very rare.

6. **Discharged.**—See §202 para. 4 *ante*.

7. **Case law.**—

R. v. Appuwa Veda (1907) 10 *N.L.R.* 199, 2 *A.C.R.* 1.—See §202 para. 5 *ante*.

R. v. Noordeen (1910) 13 *N.L.R. at p.* 117.—See §202 para. 5 *ante*.

Indictment.

218. (1) If the case comes before the Court on the committal of a Police Court the accused shall be arraigned on the indictment served upon him as provided by Section 158.

(2) If the case comes before the Court by virtue of an order of the Supreme Court of transfer from another Court the indictment shall be framed upon the facts disclosed in the complaint or information and the evidence taken in the case and a copy of such indictment shall be served on the accused.

Court.—See §3 *ante*.

Police Court.—See §3 *ante*.

Committal of a Police Court.—See §§158 *et seq. ante*.

Arraignment of the accused.—See §219 *post*.

Indictment.—See §§158(2), 161(4), 167 - 186, Form 11, *Schedule III. post*.

Order of transfer by the Supreme Court.—See §§12, 203, 422.

Supreme Court.—See §3 *ante*.

Complaint.—See §§3, 189(3), 194, 195, 203(2), 253B.

Evidence.—See §3 Evidence Ordinance 1895.

Copy served on the accused.—See §§158(1), 161(3),(4), 203(2).

1. §218 based on §§279 - 282 of the Code of 1883.

2. **Scope of §218.**—§218 draws attention to the fact that trials upon *indictment* before the Supreme Court may be of two kinds, *viz.*, (1) trials after a committal by a Police Court having jurisdiction, supported by an indictment drafted and approved of by the Attorney-General, and (2) trials, the transfer of which have been ordered from a minor Court by the Supreme Court to take place before itself without the intervention of a non-summary investigation, committal, or indictment by the Attorney-General. See *Introduction to Chapter XX.* para. 2B *ante*.

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In the former case §218(1) directs that the accused is to be "arraigned" on the indictment served on him under §158 *ante*; in the latter case, §218(2) casts the duty on the officer of the Supreme Court to frame the indictment "upon the facts disclosed in the complaint or information and the evidence taken in the case." As to how this indictment should be drafted—see §203 para. 3A *ante*. When such indictment has been framed, a copy thereof shall be served on the accused—§218(2).

§218 is silent as to the charge in cases, where the proceedings are based upon *informations* exhibited by the Attorney-General. See *Introduction to Chapter XX.* paras. 2B, 5(B) *ante*.

See §439 *post* as to the indictment in summary trials for perjury committed during the course of a Supreme Court trial.

3. **If the case comes . . . on the committal of a Police Court.**—See §203 para. 3 *ante* and §158 para. 2 *ante*.

4. **If the case comes . . . by virtue of an order of the Supreme Court of transfer from another Court.—**

Power of the Supreme Court to transfer the trials of cases.—See *Introduction to Chapter XIX.* para. 2, §203 paras. 2, 3A *ante* *c.f.* §422 *post*.

Power of the Attorney-General to transfer cases—see §47 Courts Ordinance.

It should be noted that §218(2) together with §§203(2) and 439(1) form exceptions to the rule provided in §186 *ante*, *viz.*, that "all" indictments shall be brought in the name of the Attorney-General, and shall be signed by the Attorney-General, Solicitor-General or Crown Counsel. *C.f.* Form 11, *Schedule III. post*.

5. **A copy of such indictment shall be served on the accused.**—See §§158(1), 161(3), (4), 203(2), and *c.f.* §§164, 306(5), 434.

6. **Arraigned.**—See §219 *post* and §204 para. 2, 3 *ante*.

7. **Case law.—**

See §203 para. 5 *ante*.

B.—Commencement of Trial.

Arraignment of accused.

219. When the Court is ready to commence the trial, the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

Plea of guilty may be recorded and accused convicted thereon.

220. If the accused pleads guilty, the plea shall be recorded on the indictment and he may be convicted thereon: provided that when the indictment so pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty.

Refusal to plead and plea of not guilty.

221. (1) If the accused does not plead or if he pleads not guilty, jurors shall be chosen to try the case as hereinafter provided.

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§§219-221

(2) If the accused pleads not guilty, but states that, he is willing to plead guilty to a lesser offence for which he might have been convicted on that indictment and the prosecuting counsel is willing to accept such plea, the Judge may, if he thinks that the interest of justice will be satisfied by so doing order such plea of guilty to be recorded and may pass judgment thereon accordingly, and thereupon the accused shall be discharged of the offence laid in the indictment and such discharge shall amount to an acquittal.

Court.—See §3 *ante.*

Indictment.—See §§158, 161(4), 167 – 186 and 218, Form 11, *Schedule III. post.*

Offence.—See §3 *ante.*

Plea.—See §§155, 187 – 188, 205 – 206 *ante.*

Judge.—See §3 *ante.*

Jurors.—See §§223 *et seq. post.*

Lesser offence.—See §§182 – 183 *ante.*

Murder.—See §296 Penal Code.

Prosecuting counsel.—See §216(2) *ante.*

Pass judgment.—See §251.

Discharge.—See §3 *ante.*

Acquittal.—*C. f.* §§330 – 331 *post.*

Conviction.—See §251 *post.*

1. §219 is based upon §283 of the Code of 1883, and see §271(1) Indian Criminal Procedure Code. §220 is based on §284 of the old Code, and see §271(2) Indian Code. §221 is based upon §285 of the old Code, and *c. f.* §272 of the Indian Code.

2. **Scope of §§219 – 221.**—See *Introduction to Chapter XX.* paras 5(A)(7), 5(B)(5) *ante.*

In this group of sections the draftsman of the Code appears to have overlooked the fact that criminal trials before the Supreme Court could be held upon *informations* exhibited by the Attorney-General besides upon either of the indictments specified in §218 *ante.* The procedure to be followed upon proceedings based upon informations exhibited by the Attorney-General are identical with that indicated in these sections—see *Introduction to Chapter XX.* para. 5(B)(5) *ante.*

The fixing of cases for trial before the Supreme Court is attended to by the Crown Counsel in charge of the Circuit. With the assistance of the Fiscal he will distribute the various cases awaiting disposal for trial on certain dates. On the day fixed for trial the accused, if he is out on bail, will surrender to the Court ; and if he is on remand, he will be brought before the Court in custody.* Thereafter, when the Court "is ready to commence the trial," the first thing that must be done is to "*arraign*" the accused, and record his plea.

The "**arraignment**" of an accused consists in (*a*) calling him to the bar by name, (*b*) reading out to him the indictment referred to in §218 *ante,* or the information exhibited against him, and interpreting its contents to him if necessary—§167(6) *ante,* and *R. v. Vaimbilee* ; and (*c*) calling upon him to plead to the charge or charges preferred against him.—See §219.

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* *Qu.* – May the trial proceed in the absence of the accused?—see §297 para. 4 *post.*

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If the indictment contains any reference to the previous convictions of the accused for the purpose of enhancing sentence after conviction, this fact is not disclosed until after conviction—§253 *post.*

If the accused or his advisers desire to advance any objection against the continuation of the trial, the proper stage at which to raise such objection is before the accused pleads to the charge. Such objections may be :—

(*a*) **That the Court has no jurisdiction to try the accused**—*e.g.*, that the offence was committed outside the territorial limits of the circuit, or that the proceedings which culminated in the committal of the accused for trial are irregular. Under §32 of the Courts Ordinance, if an accused pleads to an indictment or information without objecting to the jurisdiction of the Court, and the evidence discloses that the offence was committed beyond the limits of the circuit, the trial will proceed. It should also be noted that all trials " at bar " must take place at Colombo—§216(1) *ante*, §31 *proviso* Courts Ordinance. Moreover, trials can be transferred from one circuit to another. See the case law cited in §§204 – 206 para. 4(ii), 6 *ante.*

(*b*) **Objections to the indictment or information**—*e.g.*, (i) that it does not set out sufficient particulars of the offence charged—§§167 – 170 *ante.* But no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission—§171 *ante*, and see §425 *post.* Moreover, any such error or omission can be amended by the Court—§§172 – 177 *ante.* (ii) That the indictment or information discloses a misjoinder of charges—§§178 – 181, 168(2) *ante.* See also §425 *post.* (iii) That it discloses a misjoinder of accused—§§178, 184 *ante* and see §425 *post.*

If the Court considers such objection to be well founded, it may either amend the indictment so as to make it regular and proceed with the trial at once or after any necessary adjournment; or it may direct a new trial—§174 *ante.* See generally §§172 – 176 *ante* and *Hami v. Apuhamy* para. 4 *post.*

(*c*) **Pleas in bar**—*e.g.*, (i) the plea of *autre fois acquit* or *convict*—see §§330 – 331 *post*, or (ii) that the accused has been pardoned of the offence charged, (iii) or that the offence has become statute barred—§444 *post.*

The accused standing mute.—If no objection is raised against the continuation of the trial, but the accused does not plead to the charge, he is said to " *stand mute.*"*

(*a*) If the accused stands *mute of malice*, *i.e.*, contumaciously refuses to plead, the trial proceeds as if he had pleaded Not Guilty—§221(1).

(*b*) If he stands *mute by visitation of God*—(i) if the accused cannot make his defence owing to his being insane, the jury will be empanelled and sworn in the first instance to try the issue of such unsoundness of mind or incapacity—§368 *post*, *R. v. Pindorissa* (1927) 5 *T.L.R.* 101. If this issue is decided in favour of the accused, the trial will be postponed—§369 *post.* See *R. v. Stafford* (1909) 2 *K.B.* 81. (ii) If the accused although not insane cannot be made to understand the proceedings, the Court may proceed with the trial—§288 *post.* See *R. v. Harris*, *R. v. Pindorissa* (1927) 5 *T.L.R.* 101.

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* See §6 para. (*vii*) *ante.*

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§§219-221

The plea.—(*a*) If the accused pleads Guilty, such plea is to be recorded, and he may be convicted thereon—§220 and see §251 *post.* The Court must be satisfied that such plea is meant by the accused to be an unqualified admission of his guilt—see the cases cited in §188 paras. 3, 9 *ante*, *R. v. Bhadu*, *R. v. Aiyavu*, *R. v. Luskar*. Before accepting the plea it is the duty of the Judge to ensure that the charge has been translated or explained to the accused in a manner sufficiently explicit to enable him thoroughly to understand the nature of the accusation he is called upon to meet.—*R. v. Vaimbilee.*

Where the charge against the accused is one of murder, the Court may refuse to accept a plea of guilty to the charge, and cause the trial to proceed as if the accused had pleaded Not Guilty—§220. Our law is in accordance with the English rule. See also *R. v. Palasingh*. It should be noted that §271 of the Indian Code contains no special reference to charges of murder.

There are other offences besides murder which are punishable with death, *e.g.*, §§114, 129, 191, 299 Penal Code. If an accused who is charged with such an offence, pleads Guilty to the charge, can the Court refuse to accept such a plea ? It is submitted that the Court may do so, for the reasons which actuated the Legislature in making special provision for the offence of murder, would apply with like force to all offences which are punishable with death.—See *R. v. Palasingh.*

Where a plea of Guilty has been offered and accepted, a formal conviction must follow.—*R. v. Babappu.*

(*b*) If the accused pleads Guilty to a "lesser offence" for which he might have been convicted on that charge, and the prosecuting counsel is willing to accept such plea, the Judge if he thinks that the interests of justice will be satisfied by so doing, may order such plea to be recorded and pass judgment thereon accordingly—§221(2) and see §251 *post.* The effect of such a plea being accepted is that the accused is "acquitted" of the offence laid in the charge, and he may not thereafter be prosecuted in respect of that offence.

Lesser offence.—See §§182 – 183 *ante.*

Qu.—Does the trial of an accused cease with his plea of Guilty ? In the case of *R. v. Laksmayya* it was held that it did, but in the case of *R. v. Chinna* it was held that the trial did not end until the accused was convicted.

(c) If the accused pleads "Not Guilty," this casts the *onus* upon the Crown to establish the guilt of the accused beyond reasonable doubt. Accordingly, the next step in the procedure is to empanel the jury, who are the judges of the facts, to try the case—§221(1).

2A. **Judgment.**—See §221(2) and §304 para. 2 *post.*

3. **May.**—Although a formal conviction must follow where an accused has pleaded guilty to the charge.—*R. v. Babappu*, yet judgment may be deferred—see §251 *post.*

4. **Case law.**—

R. v. Silva (1911) 14 *N.L.R.* 336.
R. v. Perera (1916) 19 *N.L.R.* 310, 3 *C.W.R.* 176.
R. v. Fernando (1905) 8 *N.L.R.* 354.
R. v. ——— (1879) 2 *S.C.C.* 96.
R. v. Nikajutiya (1880) 3 *S.C.C.* 96.

} Objections to jurisdiction—see §§204 – 206 para. 6 *ante.*

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§222

R. v. Babappu (1916) 2 *C.W.R.* 317.—Where an accused pleads guilty to the charge, *held*, that it was the duty of the Judge to have recorded a formal conviction against him. See §220 as to a plea of Guilty on a charge of murder.

Hami v. Appuhamy (1898) 3 *N.L.R.* 101. In a criminal case it is too late to quash the indictment after it has once been accepted by the Court, and the case for the prosecution has been closed. If at that stage the case for the prosecution warrants a conviction, but the facts proved are not in accordance with the charge, the Court should amend the charge and call upon the accused for his defence.

R. v. Palasingh 54 *P.R.* 1905.—A plea of guilty should not be accepted in capital offences.—*R. v. Bhadu* 19 *Alla.* 119 followed.

R. v. Bhadu 19 *Alla.* 119.—The accused was charged with murdering his wife. In answer to the charge he stated " Guilty. I killed my wife. She had abused me. No one was present. I killed her with a *kulkhari*." *Held*, that this was not an unqualified plea of guilty on the capital charge. See also the cases collected under §188 paras. 3, 9 *ante*.

R. v. Aiyavu (1885) 9 *Mad.* 61.—Charge of murder. The indictment having been read to the accused, they pleaded Guilty thereto. The presiding Judge then asked them whether they realized that the effect of their plea was that they would be sentenced to be hanged, whereupon one accused stated " If I am to be hanged, let me be," while the other stated " Is it proper to deny after having done the deed ? " *Held*, that the conviction of the accused should be quashed and a new trial ordered.

R. v. Vaimbilee (1880) 5 *Cal.* 827.—When arraigning an accused and before receiving his plea, the Judge should be careful to ensure that the charge is either explained *or translated* to the accused in a manner sufficiently explicit so as to enable him to understand thoroughly the nature of the accusation made against him. Conviction set aside owing to the faulty translation of the charge to the accused by the interpreter.

R. v. Laksmayya 22 *Mad.* 491.—The trial of an accused ceases with his plea of Guilty. But see *R. v. Chinna* 23 *Mad.* 151.

R. v. Luskar (1885) 11 *Cal.* 410.—Charge of murder. Plea " I did kill my wife. I did not kill her willingly. Finding her in the act of adultery and being wholly unable to restrain myself, I killed her . . ." *Held*, that this was not an unqualified admission that the accused was guilty of murder. New trial ordered.

R. v. Harris (1897) 61 *J.P.* 792.—See §§204 – 206 para. 6 *ante*.

Special jury may be summoned.

222. (1) The prosecuting counsel or the accused may apply to any Judge of the Supreme Court for an order requiring a special jury to be summoned to try any case ; and the Judge shall, if he considers such application just and reasonable, make an order accordingly.

(2) Such application except when made by the Attorney-General, Solicitor-General, or Crown Counsel shall be supported by affidavit.

Prosecuting counsel.—§216(2) *ante*.
Judge.—§3 *ante*.
Supreme Court.—§3 *ante*.

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§222

Special jury.—§§257(1) (4), 276.
Summoned.—See §§270, 271, 274, 276, 280.
Attorney-General.—§3 *ante.*
Solicitor-General.—§3 *ante.*
Crown Counsel.—See Ordinance No. 1 of 1883, §4.
Shall be supported by affidavit.—*C.f.* §422(2) *post.*
Trial not to be invalid owing to defect in jury list or panel.—§281 *post.*

1. §222 is based upon §286 of the Code of 1883. See §269(2) of the Indian Code.

2. **Scope of §222.**—

(1) Where an accused is **committed** for trial before the Supreme Court after a non-summary investigation, §160 *ante* directs that the Magistrate at the time of committing him for trial should ask him to elect from which of the respective panels of jurors the jury* shall be taken for the trial. Such election when made is recorded. "The accused so electing *shall* be bound by and *may* be tried according to his election, *subject however, in all cases, to the provisions of* §224."—See particularly §224(1) *post.*

2. In cases the trial of which have been **transferred** by order of the Supreme Court for trial before itself, there being no previous committal §160 *ante* does not apply. In such cases, it is submitted, when the accused is served with the indictment drafted by the officer of the Supreme Court under §218(2), he will at the same time be called upon to elect the panel of jurors by which he claims to be tried.

(3) In the case of trials upon **informations** exhibited by the Attorney-General the accused should similarly be given an opportunity of electing his panel of jurors unless the trial is to be at Bar without a jury. (§440A *post*).—See Introduction to *Chapter XX.* para. 3 *ante.*

§224 of this Code is a general section which applies to the three cases specified above. §224 directs *inter alia* (*a*) that the jury shall be taken from the panel elected by the accused "unless the Court otherwise directs"—§224(1), and (*b*) that the defence, whether there be one or several accused, shall have the right of challenging any two jurors without showing cause—§224(2). §225 which is also a general section permits the defence to challenge any number of jurors for valid cause shown.

It sometimes happens that either the prosecution or the defence have cause to apprehend that a fair and impartial trial cannot take place before an ordinary jury. §222 accordingly gives both the prosecution and the defence in the case of all criminal trials before the Supreme Court triable by jury the right to move the Court for an order directing that a "special jury" should be summoned to try the case. If the Judge before whom the application is made considers it just and reasonable, he will make order accordingly—§222(1). Such an application, unless made by one of the Law Officers or by a Crown Counsel, shall be supported by an affidavit setting out the various reasons as to why a special jury is considered necessary to try the case—§222(2). In the case of *R. v. Stephen* (Third Western Circuit Criminal Sessions 1923) a controversy arose by reason of the prosecution applying for and obtaining a special jury to try the accused, who under §160 *ante* had elected to be tried by a Sinhalese-speaking jury.

**i.e.*, Whether the accused desires to be tried by an English, Sinhalese or Tamil-speaking jury—see §257 *post.*

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3. **Special jury.**—See §§257(1) (4), 276, 281.
Summoning of special jury.—See §§270-271, 274, 276, 280.

4. **Shall be supported by affidavit.**—*C.f.* §422(2) *post.* Such an affidavit does not require to be stamped—see Exemption to Item 3 of *Schedule B*, Part I., of the Stamp Ordinance 1909, and *Arumogam v. Vaitilingam* (1907) 2 *A.C.R.* 79. The reason why such affidavits are exempt from stamp duty is because they are " required or authorized by law to be made in criminal matters."

If a " prosecuting counsel " not being the Attorney-General, Solicitor-General, or Crown Counsel, applies to the Court for a special jury, should such application be supported by an affidavit ? §222(1) empowered " *the prosecuting counsel* " to make an application for a special jury. If the prosecution is being conducted by " *an advocate generally or specially authorized in that behalf by the Attorney-General* "—§216(2), it is lawful for such a person to move for a special jury. §222(2), however, declares that such application except when made by the Law Officers or by Crown Counsel shall be supported by affidavit. Reading the two sub-sections together, the plain meaning of the words used is that where an advocate generally or specially authorized makes such application, the motion must be supported by an affidavit.

Before whom must the affidavit be sworn ?—See §428 para. 2 *post* and §49(3) *ante.*

5. **Case law.—**

Arumogam v. Vaitilingam (1907) 2 *A.C.R.* 79.—An affidavit tendered in support of an application to the Supreme Court to *revise* certain criminal proceedings must be stamped, such an affidavit not being one " required or authorized by law to be made in criminal matters. " The words ' *required or authorized by law* ' appear to me to involve a direction of the Statute law, that only those affidavits in criminal matters which the Legislature requires or authorizes to be made are exempt from stamp duty. . ., " *per* Middleton, J.

C.—Choosing a Jury.

Number of jury and quorum for verdict.

223. (1) The jury shall consist of seven persons.

(2) The verdict returned shall be unanimous or by a majority of not less than five to two.

Empanelling jury.

224. (1) The jury shall be taken from the panel elected by the accused unless the court otherwise directs.

(2) The jury shall be chosen by lot from the panel.

(3) As each juror is chosen his name shall be called and upon his appearance the accused shall be asked by the Registrar if he objects to be tried by such juror.

(4) Objections without grounds stated shall be allowed to the number of two on behalf of the person or all the persons charged.

(5) On the suggestion of the prosecuting counsel without grounds of objection stated any number of jurors called may

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be ordered by the Judge to stand by until the names of all the jurors summoned and then available for service on the jury have been gone through.

(6) If such names have been gone through without a jury having been made up the names of each of those so ordered to stand by shall be called again and the prosecuting counsel shall be called upon to state the grounds of objection (if any) under the next following section.

(7) If there shall not be a sufficient number of jurors present unchallenged the jury may be made up from such of the bystanders as are not by law disqualified from serving as jurors. Any such bystander shall if called upon be legally bound to serve as a juror.

Grounds of objection.

225. Any objection taken to a juror on any of the following grounds if made out to the satisfaction of the court shall be allowed :

(*a*) Some presumed or actual partiality in the juror ;

(*b*) Some personal ground such as deficiency in the qualification required by any law or rule having the force of law for the time being in force ;

(*c*) His executing any duties of police or being entrusted with police duties ;

(*d*) His having been convicted of any offence which in the opinion of the Judge renders him unfit to serve on the jury ;

(*e*) His inability to understand the language of the panel from which the jury is drawn ;*

(*f*) Any other circumstance which in the opinion of the Judge renders him improper as a juror.

Decision of objection.

226. (1) Every objection taken to a juror shall be decided by the Judge and such decision shall be recorded and be final.

(2) If the objection is allowed the place of such juror shall be supplied by any other juror chosen in manner hereinafter provided.

Foreman of jury.

227. (1) When the jurors have been chosen the Registrar shall address them in the following words : " Gentlemen of the Jury, choose your foreman," and they shall thereupon proceed to do so.

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* See §254 *post*.

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(2) If a majority of the jury do not within such time as the Judge thinks reasonable agree in the appointment of a foreman he shall be appointed by the Judge.

(3) When the foreman has been appointed the jurors shall be sworn.

Duties of foreman.

228. The foreman shall preside in the debates of the jury, ask any information from the Judge that is required by the jury or any of the jurors, and deliver the verdict of the jury.

Procedure where juror ceases to attend, &c.

229. If in the course of a trial by jury at any time before the return of the verdict any juror from any sufficient cause is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted,* the Judge may either order a new juror to be added or discharge the jury and order a new jury to be chosen.

Discharge of jury in case of sickness of prisoner.

230. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require.

Jury.—See §§231, 238-242, 245, *Chapters XXA.* and *XXI. post.*

Verdict.—§§234(1), 246-250 *post.*

Panel elected by the accused.—§160 *ante.*

Registrar.—§3 *ante.*

Prosecuting counsel.—§216(2) *ante.*

Judge.—§3 *ante.*

Disqualifications for jury service.—See §§254-256, 266, 275 *post.*

Offence.—§3 *ante.*

Discharge of jury.—See §§229, 230, 250, 252.

Jurors are "Public servants."—§19(6) Penal Code.

Interpretation of evidence.—§300.

Evidence.—§3 Evidence Ordinance 1895.

Proceedings not to be invalid owing to defect in jury list or panel.—§281 *post.*

Jurors are judges of fact.—§17 *illustration* (*d*) Penal Code.

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*See §254 *post.*

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§§223-230

1. The following table will show the relation which exists between §§223-230 of this Code on the one hand, and the corresponding sections in the Code of 1883 and the Indian Code:—

Section	*Code of* 1883	*Indian Code*
223(1)	287	274
223(2)	287	—
224(1)	289	—
(2)	289	276
(3)	290	277 (1)
(4)	290	277 (2)
(5)	290	277 (2)
(6)	—	—
(7)	289	—
225(*a*)	291 (*a*)	278 (*a*)
(*b*)	(*b*)	(*b*)
(*c*)	(*d*)	(*e*)
(*d*)	(*e*)	(*f*)
(*e*)	(*f*)	(*g*)
(*f*)	(*g*)	(*h*)
226(1)	292	279 (1)
(2)	292	279 (2)
227(1)	—	—
(2)	294	280 (3)
(3)	294	281
228	293	280 (2)
229	295	282
230	296	283

2. **Scope of §§223-230.**—After the accused has been arraigned and his plea recorded—§§219-221, the next thing that has to be done is to select the jurors who are to decide the facts of the case, unless the trial is one for the offence of sedition which the Governor of the Colony under §440A *post* has directed to be tried "at Bar" without a jury, or is a summary trial for a contempt of Court.

§223(1) defines what is meant by the term "jury." A jury is composed of seven persons, who are to be taken from the panel elected by the accused "unless the Court otherwise directs"—§224(1). See *R. v. Booth, R.v. Bradshaw.* When the accused is arraigned the persons summoned as jurors will be present and in waiting. Their names will be placed in one box, and the Registrar will draw such names in rotation. This is what is meant when §224(2) provides that "the jury shall be chosen *by lot* from the panel"—*R. v. Pranjivandas.* As the name of each juror is drawn his name will be called aloud by the Registrar, and when the juror appears, the accused will be asked by the Registrar whether he objects to be tried by such juror—§224(3). This is done in order to enable the accused to exercise his rights of challenge, if he so desires it.—See para. 3A(**c**)(*i*) *infra.* The defence, whether there be one accused or several has the right to challenge any *two* jurors whose names are called *without showing cause for such challenges*—§224(4). The defence has an *unlimited right of challenging any number of jurymen "for cause shown," i.e.*, on proof to the satisfaction of the Judge that any of the grounds specified in §225 exists against permitting a specified juror or jurors from taking part in the trial. The prosecution has the right to ask any number of jurors whose names are called to "stand by" without being obliged to show cause as to why this

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is done—§224(5). If owing to jurors being asked to stand down by the Crown, the panel is exhausted, the names of *such* jurors will be called again, and the prosecuting counsel will be called upon to state the grounds of objection, if any, he may have to urge against such jurors—§224(6). Unless the prosecuting counsel proves one or more of the grounds specified in §225, the juror will be called upon to serve. In murder cases it is the practice of some prosecuting counsel to request all Buddhists to stand down, as it is well known that as a rule such persons are averse to taking life, even although they may be convinced by the evidence that the accused has committed murder—see *R. v. Mansell.*

Every objection to a juror must be decided by the trial Judge on the spot, and his decision will be recorded and is final—§226(1). If the objection is allowed " the place of such juror shall be supplied by any other juror chosen in manner *hereinafter* provided "—§226(2).

If by any chance the panel becomes exhausted without a jury of seven jurymen having been selected, the proper number will be made up " from such of the bystanders as are not by law disqualified from serving as jurors." Any such bystander shall, if called upon, be legally bound to serve as a juror—§224(7). See §§225, 255-256A *post.*

When the jury has been selected the Registrar will call upon them to elect their foreman, and the jury will then proceed to do so—§227(1). If the majority of the jury within a reasonable time fail to agree as to who should be their foreman, the Judge will appoint one of their number to act in that capacity—§227(2). It is the duty of the foreman to preside at all the debates of the jury, to ask any information from the Judge, and to deliver the verdict of the jury—§228.

After the foreman has been appointed, the jurors are sworn—§227(3). See also §5(1)(*c*) Oaths Ordinance, No. 9 of 1895. Jurors instead of being sworn may be affirmed—§6 Oaths Ordinance 1895. In murder cases the jurors are sworn or affirmed singly. In all other cases they are sworn or affirmed together, *i.e.*, all the jurors who swear are sworn *en masse,* while all those who affirm are affirmed together. There can be no right of challenging the jury after they have been sworn—*R. v. Sheppard.*

If during the trial at any time before the return of the verdict any juror " from any *sufficient* cause is prevented from attending *throughout the trial* " or if any juror absents himself, and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given, or when the evidence is interpreted, the language in which it is interpreted, the Judge may either order a new juror to be added, or he may discharge the jury and order a new jury to be chosen—§229. It is to be noted that §229 applies only to cases where the absent juror cannot attend throughout the trial or cannot understand the proceedings. If a juror is temporarily absent or temporarily disabled, *e.g.*, owing to illness, the trial will be postponed.

The Judge may also discharge the jury " whenever the prisoner becomes incapable of remaining at the Bar, and whenever in the opinion of the Judge the interests of justice so require "—§230. See *In re de Sousa, R. v. Virasami* and §297 para. 4 *post.*

§223(2) defines what is meant by the " verdict." A verdict in order to be a legal verdict, should either be unanimous or by a majority of not less than five to two. See also §§247 *et seq. post.*

3. **The jury shall consist of seven persons.**—Except in the instance specified in §440A *post,* and in the case of summary trials

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§§223-230 for contempt of Court, every criminal trial before the Supreme Court must be tried by jury—§216(1) *ante*, §31 Courts Ordinance. As a general rule, whether such trial takes place before a single Judge, a Commissioner of Assize, or "at Bar," whether the proceedings are upon indictment or on information, the trial must take place by jury. The jury may be either an *ordinary jury*—§257(1)(1)—(3) *post*, or it may be a *special jury* summoned to try the case on an order from the Judge under §222 *ante*—see 257(4) *post*.

A. **Empanelling the jury.**—

(*a*) The jury is to be empanelled "from the panel elected by the accused, unless the Court otherwise directs"—§224(1).

(i) In cases which come up for trial after a committal from a Police Court, at the time the accused is committed for trial the Magistrate will call upon him to elect from which of the respective panels of jurors the jury shall be taken at the trial. The Magistrate will record the election made by the accused—§160 *ante*. Note, however, that §160 provides that "the accused so electing *shall be bound by* and may be tried according to his election, *subject however, in all cases to the provisions of* §224."

(ii) In a trial upon an order of transfer—see §218(2) *ante*—the Code contains no express provision indicating the procedure for the accused to make his election in any particular manner. The right of the accused in such cases to elect the panel by which he desires to be tried is presupposed in §224(1). In cases of transfer the accused at the time the indictment specified in §218(2) *ante* is served on him, will be called upon to elect his panel of jurors. It is submitted that §53 of the Courts Ordinance is wide enough to enable rules to be framed to regulate this point.

(iii) In trials upon information exhibited by the Attorney-General although the Code is silent on the point, the accused will also be given an early opportunity of electing his panel of jury if the trial is to take place before a jury. See Introduction to *Chapter XX*. para. 3 *ante*.

The panel elected by the accused.—Such panels are either the panel of the English-speaking, Sinhalese-speaking or Tamil-speaking jury—see §257(1)(1)—(3) *post*.

Unless the Court otherwise directs.—*e.g.*, the Judge acting under §222 may direct that the trial should take place before a special jury, although the accused may have elected to be tried by an ordinary jury. Moreover, under §224(1) it is the practice to allow an accused to change his mind regarding the panel elected by him, *e.g.*, where at the time of commitment he elects to be tried by a Sinhalese-speaking jury, and expresses his wish thereafter to be tried by an English-speaking jury. It would also be open to the Judge to direct that the trial should take place before a panel other than that elected by the accused if it is found to be impracticable or inconvenient to secure the panel elected by the accused, *e.g.*, a Sinhalese-speaking jury in the Northern or Eastern Circuit. See §222 para. 2 *ante*.

(*b*) "The jury shall be chosen by lot from the panel"—§224(2)

"*Chosen by lot*" means that the names of the jury shall all be drawn out of one box containing all the names of persons summoned for that panel" —*R. v. Pranjivandas*.

(*c*) The right of challenge.

(I) As each juror is chosen, his name shall be called and upon his appearance the accused shall be asked by the Registrar if he objects to be tried by such juror—§224(3). This provision is to enable the

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accused as well as the prosecution to exercise their respective rights of challenge. On grounds of convenience where an accused is undefended before the names of the jurors are drawn the Registrar will address the accused and say "The good and lawful men whose names you shall now hear called are the jurors to be empanelled to try the issue between our Sovereign Lord the King and you upon your trial. If you object to any of them, your time to do so is before the juror is sworn or affirmed—and you shall be heard."

(II) Challenges "without cause shown."—(*a*) The defence, whether there be one or more accused, has the right to challenge any two of the chosen jurymen without being obliged to show cause as to the reason for such challenge—§224(4). (*b*) The prosecution has the right to ask any number of the chosen jurymen "to stand by" until the names of all the jurors summoned and then available for service on the jury have been gone through—§224(5). See *R. v. Mansell.*

(III) Challenges "for cause shown."—(*i*) The defence has an unlimited right to challenge any number of the jurors chosen by showing cause for every such challenge. It is the duty of the Judge to decide such objections on the spot, and his decision when recorded is final—§226(1). The *onus* of showing sufficient cause is on the defence, and the nature of the proof required in support of such an objection is stated in §225.* (*ii*) If the prosecution has requested jurors to "stand by" under §224(5), and if the panel has been exhausted without a jury having been made up, "the names of each of those persons so ordered to stand by shall be called again and the prosecuting counsel shall be called upon to state the grounds of objection (if any)"—§224(6). The *onus* is then cast upon the prosecution to establish any objection it may urge against any such juror—§225.* Such objection will be decided immediately by the Judge—§226(1).

(IV) If the objection is allowed by the Judge the place of such juror shall be supplied by any other juror chosen in manner "*hereinafter*† provided"—§226(2).

(V) If the panel becomes exhausted without a jury of seven persons having been chosen, the proper number will be made up "from such of the bystanders as are not by law disqualified from serving as jurors." Any such bystander shall, if called upon, be legally bound to serve as a juror—§224(7). See §§254-257A paras. 4 and 5 *post.*

(VI) There is no right of challenge after the jury has been sworn—*R. v. Sheppard.*

(*d*) A trial held with an unauthorized number of jurymen is invalid—*R. v. Booth.* Jurors being the judges of fact in criminal trials before the Supreme Court, in the absence of a properly constituted jury, a conviction would be invalid—*R. v. Bradshaw.* See §281 *post* and §222 para. 2 *ante.*

(*e*) The Foreman of the jury.—After the jury has been empanelled the next thing that has to be done is to call upon them to elect their Foreman, whose duty it is to preside at their debates, ask for information, and finally deliver the verdict—§228. The Registrar will, accordingly, address the jury and say "Gentlemen of the Jury, choose your Foreman," and they will thereupon proceed to do so—§227(1). If a majority of the jury do not within a reasonable time elect their Foreman, the Judge will appoint one out of their number to act in that capacity—§227(2).

* See *Bailey v. Macaulay* (1839) 13 *Q. B.* 815 and §239 para. 2 *post.*

† The meaning of the word "*hereinafter*" in §226 (2) is not clear.

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(*f*) After the foreman has been chosen the jury must be sworn.—§227(3). See Oaths Ordinance No. 9 of 1895, §5(1)(*c*).

Jurors instead of being sworn may be affirmed—§6, Oaths Ordinance 1895. In murder cases the oath or affirmation is administered to each juror individually, while in all other cases the jurors are sworn or affirmed together.

The jurors' oath.—"I swear that I shall well and truly try and true deliverance make between our Sovereign Lord the King and the prisoner at the bar, whom I shall have in charge and a true verdict give according to the evidence. So help me God."

The jurors' affirmation.—"I solemnly, sincerely, and truly affirm and declare that I shall well and truly try and true deliverance make between our Sovereign Lord the King and the prisoner at the bar whom I shall have in charge and a true verdict give according to the evidence."

See §207. para. 6 *ante* and §253(1)(*c*) *post.*

(*g*) As soon as the jury have been sworn or affirmed the Registrar shall in the hearing of the accused read the charge or charges alleged against the accused, and will inform them that it is their duty to listen to the evidence, and upon that evidence find by their verdict whether or not the accused is guilty of the charge or any of the charges (if more than one) laid against him—see §231 *post.*

B. **Absence of jurors during the trial.**—§229. See §215 *ante* and §240 *post.*

§229 does not apply to cases where a juror is temporarily absent. What §229 is intended to provide for is a case where in the course of a trial at any time before the verdict, any juror is from any sufficient cause prevented from attending *throughout the trial*, or absents himself and it is not practicable to enforce his attendance *throughout the trial*, or if it appears that any juror is unable to understand the language in which the evidence is given, or when such evidence is interpreted, the language in which it is interpreted. In such cases the Judge may either order that a new juror should be added, and continue the trial, or discharge the jury altogether and direct the trial to commence afresh before another jury. The keynote of §229 is that a juror either owing to absence or lack of understanding the language, is not able to take an active part throughout the trial. If any juror is absent temporarily, the trial can be adjourned until the absentee returns. See §§240, 280 *post.* Note that §229 unlike §215(2) makes no provision for the absence or incompetence of all the jurors.

As to the death of a juror during the trial—see 18 *Halsbury's Laws of England* §623, *p.* 254 and para. C *infra.*

Unable to understand the language . . . in which it is interpreted.—English is the language of our criminal courts, with the exception of the Village Tribunals.—See §§298, 299(3), 300, 301(2) *post.* Therefore, if the evidence is given by the witnesses in the vernacular it must be duly translated to the Court in English. If, for example, a case is being tried by an English-speaking jury, and the witnesses all give their evidence in Sinhalese, it would be a disqualification if a juror were found not to understand English. It would be no disqualification under §229 if a juror were found to be only conversant with the English language. It is to be observed, however, that a person who cannot speak, read, or write English, Sinhalese or Tamil will not find himself qualified to be summoned as an English, Sinhalese, or Tamil-speaking juror—§257(1) *post.* *C.f.* §225(*e*).

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Order a new juror to be added.—Under the Indian Code there is no provision of the law which allows a new juror to be added when once the trial has commenced. §229 of this Code follows the provisions of §295 of the Code of 1883. It is obvious that the power of adding a new juror should sparingly be used, and then only in cases where such a course is essential, as where the trial has proceeded to a great length, and it would not be practicable to commence the trial afresh. It may be laid down as a general principle if more than one juror is absent, or does not understand the evidence, that the jury should be discharged, and the trial commenced afresh.

Where a new juror is added, the evidence already adduced will be read out from the official record made under §303 *post* and the trial will proceed.

C. **The discharge of the jury.**—A jury may be discharged by the presiding Judge either before or after verdict.

(*a*) Discharge of the jury before the verdict.—(*i*) If owing to the absence of any juror or owing to his inability to understand the evidence, the Judge acting under §229 decides to discharge the jury and commence the trial afresh. (*ii*) Where the Judge discharges the jury whenever the prisoner becomes incapable of remaining at the bar, or whenever in the opinion of the Judge the interests of justice so require—§230. See *R. v. Alpinu, Sopia Nona v. Fiscal W.P., R. v. Ketteridge, R. v. Twiss. In re de Sousa,* and 9 *Halsbury's Laws of England p.* 370 note (*k*). (*iii*) If the jury are unable to agree upon a legal verdict—§250 *post.*

Whenever the prisoner becomes incapable of remaining at the bar.—*e.g.*, the illness of the prisoner. The powers under §250 are wide and are capable of abuse. They should never be invoked solely to prevent a jury returning a verdict which the Judge does not approve—*R. v. Alpinu.*

(*b*) Discharge of the jury after the verdict.—*i.e.*, after the jury have agreed upon and delivered a legal verdict.

4. **General.**—

(1) All jurors are " public servants " within the meaning of the Penal Code—§19(6) Penal Code. Moreover, every juror is a " *Judge* "—§17 *illustration* (*d*) Penal Code.

(2) It is a criminal offence to personate a juror—§224 Penal Code.

(3) No juror who has been properly empanelled is accountable for, nor will any action lie against him in respect of anything said or done by him in the discharge of his office—18 *Halsbury's Laws of England* §655 *p.* 266.

(4) View of the scene of the offence by the jury—§238 *post.*

(5) Juror giving evidence in the case he is engaged in—§239 *post.*

(6) Obligation of jurors to attend on adjourned dates of the trial—See §§240, 280 *post.*

(7) Keeping jury together—§241 *post.*

(8) Providing refreshment for jury—§242 *post.*

(9) Duties of jurors as judges of fact—§245 *post.*

(10) The verdict of the jury—§§246-250 *post.*

(11) Payment of jurors—*Chapter XXA. post.*

(12) General provisions relating to the summoning of jurors, &c.—*Chapter XXI. post.*

(13) Jury sworn to try preliminary issue of insanity of the accused—§368 *post.*

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5. **The history of trial by jury.**—See §216 para. 3 *ante*.

When a person pleads 'Not Guilty' to the accusation preferred against him, he thereby 'joins issue' with the Crown. This issue must be decided by a trial. If the accused is a peer, and the accusation be either of treason or felony, the trial must take place before the peers of the accused; but in all other cases the issue will be tried *per patriam*—by a petty jury. The history of such trials is noteworthy. Originally, accusations made by the grand jury were tried by ordeal. After the abolition of ordeals in 1215 A.D., every accusation had to be referred back to the grand jury, with the addition of some further colleagues. In the course of a century, it came to be the practice for these new jurors alone to undertake the duty of revision, without the presence of the original accusers, and at last the latter were definitely excluded by a Statute of 1352. This produced the double system of juries, *viz.*, the grand jury and the petty jury (represented in Ceylon by the Attorney-General and the ordinary jury). In 1352, however, both juries proceeded upon common repute or upon their personal knowledge; men who knew the circumstances of the crime being often put on as additional or "afforcing" jurors. About 1500, however, such persons ceased to be added to the jury itself, and instead were sent to give evidence before it. This differentiation of the function of witness from those of the juror was intensified, two centuries later, by allowing witnesses to be called expressly on behalf of the prisoner. The practice of producing witnesses at the trial to give evidence orally in open Court though established in non-political cases as early as 1600, did not become common in trials for treason until the Commonwealth. From that time the modern course of trial has prevailed in all cases. The grand jury has now been abolished in England.

Under Dutch rule the system of trial by jury was unknown.

Under British rule the system was introduced into the Maritime Provinces in 1801 and to the Kandyan Provinces in 1833. The number of jurors selected to decide the facts has varied from time to time. The modern law is stated in §223(1).

6. **Case law.**—

R. v. Booth 26 *Alla.* 211.—A trial held with an unauthorized number of jurors is invalid.

R. v. Pranjivandas 1 *Bom.* 462.—"*Chosen by lot*" means that the names of the jury shall all be drawn out of one box containing the names of all persons summoned for that panel. See also *R. v. Jhubbo* 8 *Cal.* 739, *R. v. Bradshaw* 33 *Alla.* 385, *R. v. Brojendra* 7 *C.W.N.* 188.

R. v. Bradshaw 33 *Alla.* 385.—Jurors are judges of fact, and in the absence of a properly constituted jury, a conviction is illegal.

R. v. Mansell (1857) *Dears & B.* 375.—A juror who has been called to serve on a trial for murder, and who states that he has conscientious objections to capital punishment, may be ordered to stand by.

In re de Sousa (1914) 18 *N.L.R. at p.* 46.—"I felt from personal observation that many of the jurors had not the capacity to appreciate a situation like that induced by the circumstances of the case, and I thereupon formed the opinion that an order discharging the jurors was called for in the interests of justice, and I made order accordingly, as I was entitled to do under the latter part of §230 of the Criminal Procedure Code . . . ," *per* Pereira, J.

R. v. Virasami 19 *Mad.* 375.—Deaf juror. *C.f. R. v. Babulal* 21 *Alla.* 106.

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R. v. Sheppard 1 *Leach* 101.—There can be no right of challenge after the jury have been sworn. See *R. v. Sutton* 8 *B. & C.* 417.

Bailey v. Macaulay (1849) 13 *Q.B.* 815.—Juryman interested in subject-matter of trial (*civil*). Is he competent to try the case? Evidence tendered to show the circumstances under which he came into the jury-box. *C.f.* §225(*a*).

R. v. Ketteridge (1915) 1 *K.B.* 467.—See §246 para. 5 *post.*

R. v. Twiss (1918) 2 *K.B.* 853.—See §246 para. 5 *post.*

Sopia Nona v. Fiscal W.P. (1926) 29 *N.L.R.* 52 ; 8 *C. L. Rec.* 102.—Where a jury returned a verdict by a majority and the Judge asked them to reconsider their verdict and on their so doing, without asking them what their verdict was discharged them and ordered the prisoner to be retried before another jury—held—(without deciding the question of law) (1) that no appeal lies to the Supreme Court against an order of another Judge of the Supreme Court (including a Commissioner of Assize), and (2) that the order could not be reviewed by means of an application for a writ of *habeas corpus.*

R. v. Alpinu (1926) 29 *N.L.R.* 6 ; 8 *C. L. Rec. xliii.*—Scope of §230 explained. The *ejusdem generis* rule does not apply to §230. There is nothing in the language of §230 to suggest any intention that the power to discharge a jury vested in a Judge was to be subject to any limitation other than that specified—the interests of justice. "Whenever" means "In any case in which in the opinion of the presiding Judge such a course was necessary in the interest of justice." The powers conferred by §230 are capable of abuse. They should never be used solely for the purpose of preventing a jury from returning a verdict which the Judge does not approve.

D.—Trial to close of Case for Prosecution and Defence.

Registrar to read indictment to jury.

231. As soon as the jury have been sworn the Registrar shall in the hearing of the accused read the indictment to the jury and shall inform them that it is their duty to listen to the evidence and upon that evidence to find by their verdict whether or not the accused is guilty of the charge, or any of the charges if more than one, laid against him in the indictment.

Jury.—See §§223-230, 238-242, 245, *Chapters XXA. and XXI.*

Swearing of jury.—§227(3) *ante.*

Registrar.—§3 *ante.*

Indictment.—See §218 and §§158(2), 161(4), 167-186, Form 11, *Schedule III.*

Evidence.—§3 Evidence Ordinance 1895.

Verdict.—See §§246-250 *post.*

Charge.—See §§167-185 *ante.*

1. §231 is based upon §297 of the Code of 1883. The Indian Code contains no provision analogous to §231 of this Code; our law is similar to the English Law.—See 9 *Halsbury's Laws of England* §704, *p.* 362.

2. **Scope of §231.**—After the jury has been empanelled and sworn or affirmed, the Registrar must in the hearing of the accused, read out to the jury the "*indictment*" upon which the accused has been

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§231 arraigned. Inasmuch as trials before the Supreme Court may take place upon "*informations*" exhibited by the Attorney-General as well upon indictments and as *Chapter XX.* of this Code is meant generally to provide a procedure for all criminal trials before the Supreme Court, it follows that the draftsman in using the word "indictment" in §231 as well as in §§218, 219, 220, 249, has overlooked the fact that the charge upon which an accused may be brought before the Supreme Court for trial is not necessarily an indictment (*i.e.*, an indictment specified in §218 *ante*). If the proceedings are upon "information" and the trial takes place before a jury (see §440A *post*), the charge or charges set out in the information will be read out to the jury after they have been sworn or affirmed.—See Introduction to *Chapter XX.* para. 5(B)(5) *ante*. In trials before the Supreme Court without a jury, the procedure observed in the District Court will be followed.

If the indictment contains any reference to the previous convictions of the accused for the purpose of enhancing sentence after conviction—see §§167(7) *ante*, 253 *post* and Ordinance No. 2 of 1926—that portion of the indictment must be withheld from the jury until after conviction.—§253 *post.*

After the jury has been informed of the charge or charges which the prosecution allege against the accused, the Registrar will briefly draw the attention of the jury to the duties they are called upon to perform at the trial. The Registrar will say "Gentlemen of the Jury, the indictment (or the information) charges the accused as follows—(He will read out the counts set out in the indictment or information).—To this indictment (or information) the accused has pleaded Not Guilty. Your duty is to listen to the evidence, and upon that evidence to find by your verdict whether or not the accused is guilty of the charge, (or "any of the charges," if more than one) laid against him in the indictment (or information)."*

In trials for treason or felony under the English Law immediately after the jury has been sworn a proclamation is made by the usher of the Court in these terms :—"If anyone can inform my Lords the King's Justices, the King's Sergeant, or the King's Attorney-General, ere this inquest be taken between our Sovereign Lord the King and the prisoner at the bar, of any treasons, murders, felonies, or misdemeanours, done or committed by the prisoner at the bar, let him come forth, and he shall be heard ; for the prisoner now stands at the bar on his deliverance. And all persons who are bound by recognizance to prosecute or give evidence against the prisoner at the bar, let them come forth, prosecute, and give evidence, or they shall forfeit their recognizances. God save the King!"

Opening of case for prosecution.

232. The prosecuting counsel shall then open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused and shall then examine his witnesses.

* Under the English Law a similar charge is given by the clerk of arraigns : "Gentlemen of the Jury the prisoner stands indicted by the name of J.S. for that (reciting the substance of the charges). Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty. Your charge therefore, is to inquire whether he is guilty or not guilty and to hearken to the evidence."

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Statements by prisoner to be put in.

233. All statements of the accused recorded in the course of the inquiry in the Police Court shall be put in and read in evidence before the close of the case for the prosecution.

Procedure after examination of witnesses for prosecution.

234. (1) When the case for the prosecution is closed, if the Judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return a verdict of "Not guilty."

(2) If the Judge considers that there is evidence that the accused committed the offence he shall ask him or his pleader if he means to adduce evidence.

(3) If the accused or his pleader announces his intention not to adduce evidence the prosecuting counsel may address the jury a second time in support of his case for the purpose of summing up the evidence against the accused.

Defence.

235. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then call his witnesses and after they have given evidence may sum up his case.

Right of accused as to examination and summoning of witnesses.

236. The accused shall be allowed to examine any witness not previously named by him if such witness is in attendance.

Witnesses in rebuttal and reply.

237. (1) The prosecuting counsel may by leave of the Judge call witnesses in rebuttal.

(2) The prosecuting counsel shall, subject to the provisions of sub-section (2) of section 296, be entitled to reply on any evidence given by or on behalf of the accused.

Prosecuting counsel.—§216(2) *ante.*
Offence.—§3 *ante.*
Evidence.—§3 Evidence Ordinance 1895.
Prove.—See §3 Evidence Ordinance 1895.
Statements of the accused.—See §§155, 295, 302.
Police Court.—§3 *ante.*
The inquiry in the Police Court.—See *Chapter XVI. ante.*
Judge.—§3 *ante.*
Jury.—§§223-231, 238-242, 245, *Chapters XXA., XXI. post.*
Verdict.—§§246-250 *post.*
Pleader.—§3 *ante.*
Summing up the case for the prosecution.—See §§189(3), 296.

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§§232-237

Facts.—§3 Evidence Ordinance 1895.

Reply by the prosecution on the case for the defence.—See §§189(3), 296.

Evidence in rebuttal.—See §212 *ante*.

Opening the case for the prosecution.—See §§189(3), 208(1) *ante*.

1. The following table will show the connection between §§232-237 of this Code and the corresponding provisions of the Code of 1883, and the Indian Code :—

Section	*Code of* 1883	*Indian Code.*
232	298	286
233	298	287
234(1)	300	289 (3)
(2)	300	289 (1) (4)
(3)	300	289 (2)
235	301	290
236	302	291
237(1)	303	—
(2)	304	292

2. **Scope of §§232-237.—**

(1) After the charge or charges made against the accused have been read out to the jury, and their duties during the trial explained to them as provided by §231 *ante*, the prosecuting counsel will " open " the case for the prosecution " by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused "—§232. The opening speech of counsel for the Crown should state accurately, concisely, and in chronological order, the facts upon which the prosecution relies as establishing the guilt of the accused. No facts should be opened regarding which there is no proof ; and counsel should at this stage abstain from all denunciation or invective against the accused, whose guilt has not yet been established by proof—See *R. v. Banks*, and §189 para. 3 *ante*. The prosecuting counsel should remember that he is there to assist the Court in the administration of justice, and not as counsel for any particular person or party—*R. v. Thursfield*. If the accused is undefended, it is his duty to bring to the notice of the jury any existing points favourable to the defence, which the defending counsel would have done during the trial, had the accused been defended. See also §§208–212 para. 2, §201 para. 4 *ante*.

(2) After the opening speech, the proof for the prosecution is adduced—§232. The material witnesses are called, examined-in-chief, cross-examined,* and re-examined in due form. The evidence will be recorded as provided by §301 *post*. No witnesses may be called, nor may any documents or other productions be produced at the trial on behalf of the Crown, unless the same appear on the lists of witnesses or of productions on the back of the indictment, or are set out in the information—see §§186(2), 161(4) *ante*, or unless the Court can take judicial notice of them without formal proof. It is, however, always open to the Court to allow the indictment or information to be amended by having any omission rectified—§§172-176 *ante*, or by calling for the evidence of its own accord—§429 *post*, and §165 Evidence Ordinance

* See *Dias on the Evidence Ordinance p.* 269.

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1895. It is, of course, open to the prosecution when the case for the defence is in progress to put in new documents for purposes of cross-examination, or thereafter in rebuttal. §§232-237

Before the case for the prosecution is closed, it is the duty of the prosecuting counsel to put in evidence and have read all statements of the accused recorded before the committing Magistrate—§233. See §§155, 295, 302 para. 6 and *R. v. Siddha, R. v. Sinnatamby.** If the proceedings have come before the Supreme Court upon an order of transfer by the Supreme Court—see §218(2), or upon an information exhibited by the Attorney-General, the accused not having been committed for trial by a Magistrate, §233 of this Code has no application.

After the statements of the accused have been read, the prosecuting counsel will intimate that the proof for the prosecution is closed, and he will formally tender for cross-examination by the defence, any witnesses whose names are on the back of the indictment, but who have not been called—*R. v. Kaiya* and the case cited thereunder.

After the close of the case for the prosecution, it is too late to move to quash the indictment or charge which has been accepted by the Court without objection by the accused. If, after the close of the case for the Crown, the evidence warrants a conviction, but the facts proved are not in accordance with the counts set out in the indictment or charge, it is the duty of the Court to amend the same and then call upon the accused for his defence—*Hami v. Appuhamy.*

(3) When the case for the prosecution has been closed the Judge has to decide *as a matter of law* whether he will call upon the accused for his defence or not—§244 (1)(*d*) *post.* It is open to the defence to submit as a matter of law that there is no case against the accused to be left to the jury. The English practice is to allow the jury to remain in Court while such a submission is made—and by reason of §6 *ante* the same procedure would be applicable to Ceylon—See *R. v. Seddon.* (*a*) If the Judge considers that there is "no evidence," or as it is sometimes put, there is not a "scintilla of evidence" that the accused committed the offence, it is his duty to direct the jury to return a verdict of Not Guilty in favour of the accused—§234(1), *R. v. Ukkubanda.* Before deciding that there is no evidence against the accused, the Judge would, in all probability, call upon the prosecuting counsel to sum up his case—§234(3). The words "*no evidence*" as used in §234(1) has been considered in *R. v. Vajiram.* But there is no general principle to be derived from §234 that an accused is only to be convicted upon the evidence led for the prosecution —*R. v. Ukku Banda* (1923) 24 *N.L.R.* 327—*Five Judges.* (*b*) On the other hand, if the Judge considers that there is evidence which, if accepted by the jury, would cause them to return a verdict of Guilty on the charge or for some lesser offence, he will direct the case to proceed and inquire from the defence whether they intend to adduce evidence in exculpation—§234(2).† If the accused is undefended it is the duty of the Judge to observe the provisions of §296(1) *post*, as well as to inform him that without entering the witness-box he may, if he so desires, make an unsworn statement from the dock—*R. v. Sittambaram.*

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* This is read by the Registrar, whose duty it is also to read out all documentary evidence produced in Court.

† See *Dias on the Evidence Ordinance p.* 139 *et seq.*

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§§232-237 Prosecuting counsel is entitled to sum up his case after the accused has given evidence when no other evidence save that of the accused himself is led—§234(3), *R. v. Joronis*, *R. v. Gardner*. If the accused makes an unsworn statement from the dock, it is submitted, that prosecuting counsel is similarly entitled to sum up after such statement has been made. The prosecuting counsel, when the accused or his spouse does not give evidence cannot comment on the omission of the defence to put the accused or his spouse into the witness-box—§296(3) *post*. Therefore, where the accused does give evidence the prosecuting counsel is entitled to comment on that evidence. Hence, the reason for the rule enabling prosecuting counsel to sum up after the accused has given evidence, where the defence calls no other evidence. The same reasons would apply to cases where the accused makes an unsworn statement from the dock without calling evidence. See §296(2) *post*.

(4) **If the defence intends calling evidence, the defending pleader is entitled to "open" his case to the jury by stating the facts or law on which he intends to rely, making such comments as he thinks necessary on the evidence led by the prosecution—§235.** See *Rowel v. Perera*. He will thereafter proceed to call his witnesses, who will be examined-in-chief, cross-examined* and re-examined. The evidence will be recorded as provided by §301 *post*. With regard to the cross-examination of the accused by prosecuting counsel—see Introduction to *Chapter XIX*. para. 8 (13), and Introduction to *Chapter XX*. para. (5)(A)(13) *ante*. The witnesses may be cross-examined not only by the Crown, but by the other accused in the case.

It should be noted that if the defence, even while the case for the prosecution is in progress, puts in a document, this amounts to leading evidence by the party who puts such document in, and gives the prosecution the right to the last word as against him—§237(2). See 3 *Bal. Supp.* 5. *R. v. Stephen*.

An accused has an inherent right to call any competent and compellable witness he pleases—§236, and see 268 *D.C. Crim. Colombo* 16 and *Palihawadene v. Silva*, *R. v. Hinni Appu*, *R. v. Dinoris Appu* and §159 *ante*. Where two accused who are being jointly charged desire to give evidence, each of them is entitled to be present in Court while the other accused is giving evidence—*Peris v. Perera*.

(5) **In cases where the defence has led evidence, other than the evidence of the accused, irrespective of whether such evidence is oral or documentary, the Crown obtains the right to the last word with the jury—§237(2).** Accordingly, the defending counsel must "sum up" his case immediately after the proof for the defence has been led, and before the Crown replies on the whole case—§235. If there be two or more accused charged, one of whom calls evidence other than that of the accused person himself, and the other accused calls no evidence at all, the procedure after the proof is closed would be (*i*) the defending counsel who has called evidence must sum up his case, (*ii*) thereafter, the Crown will reply on the case of the accused who has called evidence, and sum up the case against the other, and (*iii*) the counsel of the accused who has not called evidence will address the Court last.

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* See (*ibid*) *p*. 269.

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(6) **Evidence in rebuttal.** §237(1). The Court may allow the prosecution to call evidence rebutting the evidence led by the defence if it considers that the prosecution has been taken by surprise by the evidence led by the defence. The point which the prosecution seeks to meet with rebutting evidence must be something which arose unexpectedly in the evidence called by the defence, and which the prosecution could not have met at the time its case was in progress—9 *Halsbury's Laws of England* §719 *p.* 368. *See R. v. Ukkubanda.* The trial in *R. v. Steinie Morrison* affords an excellent example as to the circumstances under which rebutting evidence would be allowed to be led. In this case the prisoner was charged with having committed a murder at a certain time during the evening of a certain day. The nature of the defence was not disclosed before the Magistrates, nor in the cross-examination of the witnesses for the prosecution. When the defence was opened, the accused stated in giving evidence and called witnesses to corroborate his statement, that at the time the murder was committed he was at a certain music hall many miles away from the scene of the offence, and that thereafter, he went to bed and slept till next morning. The prosecuting counsel in these circumstances was allowed to rebut this evidence by calling the proprietor of the music hall to prove that the accused and his witnesses were incorrect in stating that they were at the music hall that night, inasmuch as the programme of music hall " turns " described by the accused and his witnesses as having been seen by them were not on show on the night in question, and further, that the prices charged for admission on that night were not as stated by the accused or his witnesses and that previous to the time the accused said he purchased the tickets, there was standing room only. See also *R. v. Crippen, R. v. Seddon* in each of which cases rebutting evidence was allowed to be led. The judgment of the Court of Criminal Appeal in the *Seddon* case (1911) 1 *K.B.* 149, should be studied.

Where rebutting evidence is led after the speech of the counsel for the defence, he is entitled to address the jury on that evidence, after which the Crown can reply on the whole case—*R. v. Steinie Morrison.*

(7) **Reply by the prosecution**—§237(2). Where the defence leads evidence, whether oral or documentary, other than the evidence of the accused himself, this gives the Crown the right to the " last word " with the jury. If the defence puts in a document while the case for the Crown is in progress (see *R. v. Martin* as to procedure), this too, gives the Crown the right to the last word—3 *Bal. Supp.* 5. In *R. v. Stephen* (Third Western Circuit Sessions, August 12, 1923) the defence challenged the accuracy of the above proposition, but without success.

In his reply the prosecuting counsel is entitled to comment not only on the evidence called by the defence, but also on the omission of the defence to lead available evidence on any of the issues—see §114 ill. (*g*), Evidence Ordinance. **The only limitation placed upon this undoubted right of the prosecuting counsel to comment is that the omission of the accused or of his spouse to enter the witness-box is not to form the subject of adverse comment by the Crown —§296(3) *post.*** See *Dias on the Evidence Ordinance pp.* 216-217, where the whole question has been discussed. To deny him this right would be to deny him the right to comment freely on the evidence. To take one example. An accused is charged with committing murder. In his statement to the Magistrate he states that he is not guilty, and that the evidence of X, Y and Z (not one of them being his spouse) will exculpate him of the crime. At the trial, the defence does not call these witnesses.

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§§232-237 It is quite competent for the Crown *either in summing up the evidence, or in replying on the whole case* to comment on the absence of these witnesses—§114 ill. (*g*) Evidence Ordinance. But, neither in the summing up nor in the reply, may the prosecuting counsel be permitted to advert to the omission of the accused or his spouse to enter the box and give evidence—§296(3); and see *R. v. Dickman* (referred to in *Dias on the Evidence Ordinance p.* 216).

Where a prosecuting counsel was allowed to have the last word in a case where he was not entitled to this privilege, the Supreme Court held that the defect was curable under §425 *post—R. v. Martin.*

Under the English Law the Attorney-General or the Solicitor-General if present in Court has the right to the last word irrespective of whether the defence has called evidence or not—see §6 *ante.*

3. **In criminal cases unlike a civil suit, the rules of procedure cannot be departed from even with the consent of the parties.**—*Punchirala v. Punchibanda, Hamiappu v. Babappu, R. v. Sen.*

4. **As to other provisions of the law applicable to the conduct of criminal trials before the Supreme Court.**—See Introduction to *Chapter XX.* para. 6 *ante.*

5. **Juryman giving evidence.**—§239 *post* and see *R. v. Rosser.*

6. **Case law.**—

R. v. Joronis (1921) 22 *N.L.R.* 468.—See §§208-212 para. 6 *ante.* "*Then*" in §235 construed.

R. v. Gardner (1898) 1 *Q.B.* 150—§§208-212 para. 6 *ante.*

R. v. Sittambaram (1918) 20 *N.L.R.* 257, 5 *C.W.R.* 287.—See §§208-212 para. 6 *ante.*

R. v. Thursfield (1838) 8 *C. & P.* 269.—See §§208-212 para. 6 *ante.*

R. v. Kaiya, 6 *Tam.* 90.—See §§208-212 para. 6 *ante.*

R. v. Sinnatamby (1901) 3 *Br.* 36.—See §§208-212 para. 6 *ante.*

R. v. Siddha (1918) 20 *N.L.R.* 190, 5 *C.W.R.* 73.—See §§208-212 para. 6 *ante.*

Hami v. Appuhamy (1898) 3 *N.L.R.* 101.—See §§208-212 para. 6 *ante.*

269 *D.C. Crim. Colombo* 16, (*S.C.M.* August 31, 1915).—See §§208-212 para. 6 *ante.*

R. v. Martin (1915) 2 *Crim. App. R.* 38.—See §§208-212 para. 6 *ante.*

3 *Bal. Supp.* 5—See §§208-212. para. 6 *ante.*

R. v. Vajiram 16 *Bom.* 414.—"*No evidence*" in §234(1) means "No satisfactory, trustworthy or conclusive evidence." If there is evidence, the trial must proceed to a close.

R. v. Seddon (1912) *Notable British Trials p.* 138.—"It has been submitted by the learned counsel on behalf of each of the prisoners, in the first place, that is to say, with regard to the man, that there is not sufficient evidence to justify the jury in coming to a verdict hostile to the defendants, and so, on behalf of the woman, it has been argued that there is no evidence at all. In all the capital cases which I have tried during the many years I have been on the Bench when similar arguments have been addressed to the Court which I have not been able to accept, I have taken care to confine myself to one observation, so that it would be impossible for anyone to think that I have formed any opinion in the matter, and that I do today. I confine my observation to saying that the case must proceed."—*per* Bucknill, J.

R. v. Crippen (1910) *Notable British Trials p.* 143 (and see the judgment of the Court of Criminal Appeal (1911) 1 *K.B.* 149).—§§208-212 para. 6 *ante.*

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R. v. Steinie Morrison (1911) *Notable British Trials p.* 225.—See §§208-212 para. 6 *ante.*

Punchirala v. Punchibanda (1897) 3 *N.L.R.* 38.—See §§208-212 para. 6 *ante.*

R. v. Rosser (1836) 7 *C. & P.* 648.—A juryman may give evidence in the case which he is engaged in.—See §239 *post.*

Hamiappu v. Babappu (1885) 1 *S.C.R.* 120.—See §§208-212 para. 6 *ante.*

R. v. Sen 2 *Cal.* 23.—See §§208-212 para. 6 *ante.*

Peris v. Perera (1912) 1 *B.N.C.* 3.—An accused desiring to give evidence is entitled to remain in Court while his co-accused are giving evidence.

Palihawadena v. Silva (1908) 1 *S.C.D.* 26.—A defence witness cannot be rejected simply because his name appears on the prosecutor's list, and the prosecutor does not choose to call him. See *R. v. Kaiya.*

R. v. Dinoris Appu (1918) 5 *C.W.R.* 266.—A Court cannot reject a witness simply on the ground that he was in or near the Court and heard the other evidence. *Note.*—Expert witnesses are entitled to remain in Court—See §6 *ante.*

R. v. Hinniappu (1916) 2 *C.W.R.* 109.—The Court is bound to issue process to compel the attendance of competent and compellable witnesses for the defence.

Rowel v. Perera (1922) 24 *N.L.R.* 456 ; 4 *C. L. Rec.* 131; 1 *T.L.R.* 43.— In opening the case for the defence, the defending pleader is entitled to comment upon the evidence led by the prosecution —§235. See also §§189, 211 *ante.*

R. v. Ukkubanda (1923) 24 *N.L.R.* 327 ; 4 *C. L. Rec.* 220 ; 1 *T.L.R.* 184.—The effect of §234 of this Code is merely to afford an accused a further chance of escape. There is nothing in §234 to prevent the evidence called for the prosecution being supplemented by evidence which may incidentally be adduced by the defence.

R. v. Stephen (1923). Third Western Circuit Sessions (August 2nd, 1923).—See §§208-212 para. 6 *ante*, where the case is noted under 3 *Bal. Supp.* 5.

R. v. Banks (1916) 2 *K.B.* 621.—See §§208-212 para. 6 *ante.*

View by jury of place where offence committed.

238. (1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Judge shall make an order to that effect ; and the jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such officer shall not, except with the permission of the Judge, suffer any other person to speak to or hold any communication with any of the jury and unless the Court otherwise directs they shall when the view is finished be immediately conducted back into Court.

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§238

Judge.—See §3 *ante*.
Jury.—See §§223 - 231, 239 - 242, 245, *Chapters XXA., XXI.*
Offence.—See §3 *ante*.
View the place.—*C.f.* §§153, 422(1)(*c*).
Transaction.—See §§180(1), 184 *ante*, and §6 Evidence Ordinance.
Under the care of an officer of Court.—See §246 *post*.
Speak or hold any communication.—See §§241(2), 246(3).

1. §238 is based upon §305 of the Code of 1883 and §293 of the Indian Code.

2. **Scope of §238.**—In the course of a criminal trial it sometimes becomes necessary that the Court should visit or inspect the scene where the offence is alleged to have taken place. This has been recognized by the Legislature and we find that besides §238 of this Code, which only applies to criminal trials before the Supreme Court, §422(1) (*c*) *post* specially makes general provision for the transfer of criminal trials from one Court to another on the ground that " a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same."—*R. v. Martin*. Moreover, §153 *ante* provides that when proceedings have been initiated before a Magistrate charging a person with the offence of culpable homicide, it is the duty of such Magistrate as a rule to proceed to the spot and hold the inquiry there.

In the majority of criminal trials a visit to the scene of the offence is unnecessary either because the facts have been clearly deposed to by the witnesses, or because a sketch or plan of the *locus* has been produced by the prosecution and duly proved. There are certain cases, however, where an inspection of the scene is of great importance. In trials by jury, when the presiding Judge has ordered that such an inspection should take place, " the jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge "—§238(1). The officer in charge of the jury " shall not, except with the permission of the Judge, suffer any other person to speak to or hold any communication with any of the jury," and unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court—§238(2). See *R. v. Behari*, *R. Whalley*.

The usual and most convenient practice is to permit the jury to view the scene after the proof on both sides has been closed, because this would enable the jury to inspect the place after having heard all the evidence. Under the English practice the jury may inspect the scene even after the summing up—*R. v. Whalley* and see *R. v. Behari*. It is also the custom to give counsel on both sides an opportunity of being present—*R. v. Behari*, and invariably the Judge himself accompanies the jury, although this is not essential. It has sometimes happened that a part of the trial itself, *e.g.*, the examination of certain witnesses has been conducted at the spot. Such a course would become necessary if the witnesses have to describe certain events which they cannot well do, except at the spot. The case of *Mitra v. Miah* will show the procedure that should be adopted in the case of inspections generally, or in the event of the proof being led at the spot.

3. **An officer of the Court.**—Such " officer " is usually a Registrar of the Supreme Court.—*C.f.* §246 *post*.

Must such officer take an oath.—See §246(2) and Form 14, *Schedule III. post*.

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4. **Case law.**—

R. v. Behari 1 *Cal.L.R.* 143.—If in a sessions trial, the Judge should think it necessary to visit the place of the alleged occurrence, he should give notice to the parties, and should proceed thither with the assessors and not after the close of the case.

Mitra v. Miah 21 *Cal.* 920.—Whenever it is desirable for a Judge to view the place at which an occurrence, the subject matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and *should take care that no information reaches him with reference to the occurrence which he has to investigate, beyond what he acquires by that view*, and if the place of the dispute itself be in dispute, he would be wise in postponing his visit till all the evidence has been recorded. But where a local inquiry takes the form of an investigation into the occurrence on the site of the occurrence (see §153 *ante*) instead of in his own Court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence on which a Judge may act is protected by law. See *R. v. Manikam* 19 *Mad.* 263 and 19 *Alla.* 302. See also §153 para. 2 *ante.*

R. v. Whalley (1847) 2 *Car. & Kir.* 376; *R. v. Martin* (1872) *L.R.* 1 *C.C.R.* 378.—The jury in criminal trials in England may have a view of the *locus in quo*, if it is within the same county as that in which the trial takes place, and if the Judge thinks that a view would be of service to them. Such a view may be had even after the Judge's summing up—*R. v. Martin* (*supra*). If a view is desired in another county the indictment must be removed by *certiorari*—*R. v. Gyde* (1908) 72 *J.P.* 504. See §422(1)(*c*).

When juror may be examined.

239. If a juror is personally acquainted with any relevant fact it is his duty to inform the Court that such is the case whereupon he may be sworn and examined in the same manner as any other witness.

Juror.—See §§223 – 229 *ante.*

Fact.—See §3 Evidence Ordinance 1895.

Relevant fact.—See §3 and *Chapter II.* Evidence Ordinance.

Court.—See §3 *ante.*

Sworn.—See Oaths Ordinance No. 9 of 1895.

1. §239 is based upon §306 of the Code of 1883 and §294 of the Indian Code.

2. **Scope of §239.**—If a juror engaged in trying a criminal case before the Supreme Court is personally aware of any fact relevant to the decision of the case, it is his duty to bring this to the notice of the Judge, whereupon he "may" be sworn and examined "in the same manner as any other witness." This rule holds good both in India and in England. Under the English Law a juror may be sworn as a witness in the jury-box at the trial at which he is acting as juryman, and may continue to act as a juryman after giving evidence—*R. v. Rosser.* In trials of peers before the House of Lords, where the peers sit as jurors, it is lawful for such of them, who are acquainted with any relevant facts to give evidence, and at the same time, take part in the final decision of the case. Even in England there has been no recent instance where

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§239 jurymen have given evidence in the cases tried by them, and the practice appears to be undesirable. If a juror is aware of facts relevant to the issues in the case, it would follow, as an invariable rule, that he is likely to be biased against one side or the other. This would bring him within the provisions of §225(*a*) or 225(*f*), and would give one side or the other the right to challenge him as a juror. If, however, his personal knowledge is discovered after the trial has commenced, the Judge will either direct such juror to be sworn as a witness, or as is more likely, he will discharge the jury altogether, and commence the trial afresh.

The provisions of §239 are by §215(3) *ante* made to apply to District Court criminal trials with the aid of assessors—see §215 para. 5 *ante*.

See §§223 – 230 para. 7 *ante*.

2A. **Personally acquainted.**—*i.e.*, hearsay evidence cannot be given. See §60 Evidence Ordinance 1895.

3. **It is his duty to inform the Court.**—See §§174, 289 Penal Code as to the penalty for not informing the Court.

4. **May.**—The Judge has a discretion whether the juryman is to be allowed to give evidence or not. It would seem that if the Judge decides that the juryman should not give evidence, he will discharge the jury and begin the trial afresh.

5. **He may be sworn and examined in the same manner as any other witness.**—

Sworn.—*i.e.*, sworn or affirmed as an ordinary witness—see Oaths Ordinance No. 9 of 1895.

Examined in the same manner as any other witness.—The juror not having been called either at the instance of the prosecution or the defence, will be in a situation similar to that of a witness called by order of the Court—see §429 *post*.* When a witness is called at the instance of the Court, both sides have the right of questioning him.†

What would happen in such cases is that after the witness has been sworn or affirmed, the Judge would ask him to state what he has to say. Thereafter, the party to whom the evidence so given is favourable would be allowed to examine the witness further, after which the party to whom such evidence is adverse will be allowed to cross-examine the witness. Thereafter, he may be re-examined by the other side. In England the practice is for the juror to give his evidence from the jury-box, and this practice would be followed in Ceylon by reason of §6 *ante*.

C.f. the words "*with the like effect and consequences as any other witness*" in §120(4) Evidence Ordinance 1895.

6. **Case law.**—

R. v. Rosser (1836) 7 *C. & P.* 648.—One juror should not state his personal opinion of facts privately to his colleagues, but should declare them openly in Court upon oath. A juror having been sworn as a witness does not cease to be a juror in the case after having given his evidence.

Jury to attend an adjourned sitting.

240. If a trial is adjourned the jury shall attend at the adjourned sittings and at every subsequent sitting until the conclusion of the trial.

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* See *Dias on the Evidence Ordinance p.* 322.
† *Ibid p.* 323.

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Adjournment of trial.—See §289 *post.*

Jury.—See §§223 – 230, 238 – 239, 241 – 242 245 and *Chapter XXI. post.*

1. §240 is based upon §307 of the Code of 1883 and §295 of the Indian Code.

2. **Scope of §240.**—If from the absence of witnesses or any other reasonable cause it becomes necessary to postpone the commencement of, or adjourn any trial, the Court has, under §289 *post*, the power to order a postponement or adjournment of the trial. A trial is ***"postponed"*** when the trial is put off for some other date, without any evidence having been led, or the jury or assessors having been empanelled and sworn. A trial is said to be ***"adjourned"*** where the jury or assessors have been empanelled and sworn, or where a part of the evidence in the case has been led, and it becomes requisite to continue the trial on some other date.

Whenever, a Supreme Court trial is **adjourned,** the obligation is cast upon the jurors empanelled to try the case, to attend at the adjourned sittings and at every subsequent sitting until the conclusion of the trial —§240. In order to ascertain if they are all present the Registrar will at the commencement of each day's proceedings read out their names. If a juror commits any breach of this obligation he commits a contempt of Court and may be dealt with under §280 *post. C.f.* §229 *ante* and see §215 para. 3 *ante.*

3. **Keeping jury together during adjournments.**—See §§241, 246 *post.*

4. **One panel of jurors is summoned once a fortnight**—See §262(2) *post*, and §26 Courts Ordinance 1889. The particular jurors who are to try a given case are empanelled from this panel. The seven jurors engaged in trying the case are bound to attend at all adjourned sittings of the Court and every subsequent sitting until the conclusion of the trial.

The jurors in waiting, *i.e.*, those who have not been empanelled to try the case will be told when their next attendance in Court is necessary, and it is their duty to attend at the hour specified. If no such directions are given, the jurors in waiting must attend from day to day, until their period of service is over.

5. **Until the conclusion of the trial.**—*i.e.*, even if the jury thereby have to attend Court for more than a fortnight.

When jury may be kept together.

241. (1) It shall not be necessary in any case to keep the jury together during any adjournment previous to the close of the Judge's summing up, but it shall be lawful for the Judge, if it should appear to him to be advisable in the interests of justice in any trial, to require the jury to be kept together during any adjournment.

(2) Where the jury is allowed to separate during the course of any trial the jurors may be first sworn not to hold communication with any person other than a fellow juror upon the subject of the trial during such separation ; and

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§241 (3) If any such juror shall hold any such communication with any person other than a fellow juror, or if any person other than a fellow juror shall hold any such communication with any such juror, such juror or person as the case may be, shall be deemed to be guilty of a contempt of Court and shall be punishable accordingly.

Jury.—See §§223 – 230, 238 – 240, 242, 245 and *Chapter XXI. post.*

Adjournment.—See §289 and §240 *ante.*

Judge.—See §3 *ante.*

Judge's summing up.—See §244 *post.*

Contempt of Court.—See §51 Courts Ordinance 1889.

Holding communication with juror.—*C.f.* §§238(2), 246(3).

1. §241 is based upon §308 of the Code of 1883 and §296 of the Indian Code. *C.f.* §53 Courts Ordinance 1889.

2. **Scope of §241.**—§240 *ante* provided that whenever a criminal trial before the Supreme Court is adjourned, the jurors are bound to attend at the adjourned sittings and at every subsequent sitting, until the conclusion of the trial. §241 provides the rule as to what is to be done with the jurors during such adjournments.

The English rule is that in all cases except those of treason, treason-felony and murder, the Judge may allow the jury to separate at any time before they begin to consider their verdict—*Juries Detention Act* 1897 (60 *Vict. c.*18). In cases where the Judge has no power to allow the jury to separate and they do separate during the course of the proceedings, the result is to make the trial bad, and the trial must be commenced afresh.—*R. v. Ward* (1867) 10 *Cox.* 573, *R. v. Kinnear* 2 *B. & Ald.* 462. The mere fact that a juryman has been allowed to leave the Court during the trial without being in the charge of a sworn bailiff does not constitute a mistrial—*R. v. Crippen* (1911) 1 *K.B.* 149.

Under our law it is not essential that the jury should be kept together during any adjournment " previous to the close of the Judge's summing up," but if the Judge considers that the interests of justice demand that the jurors should be kept together, he may make an order to that effect—§241(1). This is a legal provision which should be given greater effect to than at present.

Where the jurors are allowed to separate, an oath may or may not be administered to them " not to hold communication with any person other than a fellow juror upon the subject of the trial during their separation "—§241(2). The usual practice of the Supreme Court is to require such an oath to be administered in all murder cases, and in other cases where such a course is considered necessary. If any juror whether he has taken such an oath or not acts in violation thereof, he will be guilty of a contempt of Court, and shall be liable to its penalties—§241(3) and see §51 Courts Ordinance 1889. A person who improperly communicates with a juror is also guilty of a contempt of court.

If the jurors are to be kept together during an adjournment they will be committed to the charge of an officer of the Court.—*C.f.* §246(2), (3) *post*, and they will be lodged together and probably catered for at public expense—see §242 *post.*

3. **Keeping jury together after the Judge's summing up.**—See §246 *post.*

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Judge may allow jurors refreshment.

242. The Judge may, if he thinks fit, order reasonable refreshment to be procured for the jury by the Fiscal at the public expense at any time during which they may be kept together either before or after the Judge has summed up.

Judge.—See §3 *ante.*

Jury.—See §§223 – 230, 238 – 241, 245 and *Chapter XXI. post.*

Fiscal.—See §§257 – 262, 269, 271 – 272 and Ordinance No. 4 of 1867.

Judge's summing up.—See §244 *post.*

Jury kept together before Judge's summing up.—See §241(1) *ante.*

1. §242 finds no counterpart either in the Code of 1883 or in the Indian Code.

2. **Scope of §242.**—At any stage of a trial, whether before or after the Judge's summing up, where the jurors have to be kept together, it is within the discretion of the trial Judge to order that reasonable refreshment should be procured for the jury by the Fiscal. The practice was that in all murder trials and in trials before a special jury this section was given effect to. Even where a jury have been ordered to be kept together during an adjournment of the trial from one day to another, §242 vests the Judge with the discretion of deciding whether or not the jury should be catered for at public expense.

E.—Conclusion of Trial.

Charge to jury.

243. When the case for the defence and the prosecuting counsel's reply (if any) are concluded the Judge shall charge the jury summing up the evidence and laying down the law by which the jury are to be guided.

Duty of Judge.

244. (1) It is the duty of the Judge—

(*a*) To decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;

(*b*) To decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) To decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) To decide whether any question which arises is for himself or for the jury.

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§§243-245 (2) The Judge may if he thinks proper in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding.

Illustrations.

(*a*) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.

(*b*) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Duty of jury.

245. It is the duty of the jury—

(*a*) To decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned ;

(*b*) To determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not ;

(*c*) To decide all questions which according to law are to be deemed questions of fact ;

(*d*) To decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(*a*) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury, the distinction between murder and culpable homicide not amounting to murder and to tell them under what views of the facts A ought to be convicted of murder or of culpable homicide not amounting to murder or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong and whether they do or do not agree with it.

(*b*) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

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Case for the defence.—See §§235 - 236 *ante.*
Prosecuting counsel.—See §216(2) *ante.*
Reply by prosecution.—See §§237(2), 296 *post.*
Judge.—See §3 *ante* and §17 *illustration* (*d*) Penal Code.
Jury.—See §§223 - 230, 238 - 242, *Chapter XXI. post.*
Evidence.—See §3 Evidence Ordinance 1895.
Facts.—See §3 (*ibid*).
Relevancy of facts.—See §3 and *Chapter II.* Evidence Ordinance 1895.
Prove.—See §3 (*ibid*).
Admissibility of evidence or the propriety of questions asked by the parties.—See §136 Evidence Ordinance 1895.
Documents.—See §3 Evidence Ordinance 1895.
Meaning and construction of documents.—See §§91 - 99 Evidence Ordinance 1895.
Facts necessary to be proved to enable evidence of particular matters to be given.—See §136 Evidence Ordinance 1895.
Statements of absent witnesses.—See §§32, 33 *et seq.* Evidence Ordinance 1895, and §§406 - 407 *post.*
Secondary evidence of a document.—See §§61 - 66 Evidence Ordinance 1895.
Verdict.—See §§247 - 250 *post.*
Meaning of technical terms, etc.—See §§45, 49, 57, 92, 98 Evidence Ordinance 1895.
Murder.—See §296 Penal Code.
Culpable homicide not amounting to murder.—See §§293, 294 Exceptions, 295, 297 Penal Code.
Summing up.—*C. f.* §213(1) *ante.*
Jurors are judges of fact.—See §17 *illustration* (*d*) Penal Code.

1. The following table will show the connection between §§243-245 of this Code, and the corresponding sections of the Code of 1883 and the Indian Criminal Procedure Code.

Section	*Code of* 1883	*Indian Code*
243	309	297
244(1) (*a*)	310 (*a*)	298 (1) (*a*)
(*b*)	(*b*)	(*b*)
(*c*)	(*c*)	(*c*)
(*d*)	(*d*)	(*d*)
(2)	310	(2)
245(*a*)	311 (*a*)	299 (*a*)
(*b*)	(*b*)	(*b*)
(*c*)	(*c*)	(*c*)
(*d*)	(*d*)	(*d*)

2. **Scope of §§243 - 245.**—If when the case for the prosecution is closed the Judge considers, as a matter of law, that there is no legal evidence to go before the jury that the accused has committed the offence charged, or any lesser offence, it is his duty to direct the jury to find the accused Not Guilty—§234(1) *ante.* In such cases, there is no formal summing up by the Judge, or any deliberation by the jury as to their verdict. The Judge holds as a matter of law that there is no evidence to go to the jury and directs them as a matter of law formally to find the accused Not Guilty.

Where, however, this has not been done, and the trial has proceeded to a conclusion, and the case for the defence and the reply of the pro-

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§§243 245 secuting counsel (if any) are concluded, the Judge will then charge the jury by summing up the evidence and laying down the law applicable to the case, by which the jury are to be guided—§243. *C. f.* §213 *ante*. The respective functions of the Judge and jury in criminal trials before the Supreme Court are laid down in §§244 – 245.

The "summing up" by the Judge.—See §§243 – 244.

(1) He will recall to the minds of the jury the evidence which has been given on either side. In this he acts rather in a ministerial capacity than in a judicial capacity, and should preferably refer to all the evidence—*R. v. Rochia.* If he should make any gross omission or mis-statement, counsel would probably, respectfully, call his attention to the fact.* But all this evidence has already been before the jury, and slight omissions in its recapitulation—especially where counsel have addressed the jury—*R. v. Rochia;* are therefore, not likely to lead to serious results. Consequently, under the English Law, the Court of Criminal Appeal is loath to interfere with a conviction on the ground that the Judge did not refer to certain evidence, unless that Court is of opinion that the omission was really serious. In considering whether the Judge has misdirected the jury on the facts, the summing up must be looked at *as a whole—R. v. Tilak.* In the appeal preferred by *Crippen* against his conviction, the Court of Criminal Appeal held that, "they must look and see whether, *taking the summing up as a whole,* the Judge had put the issue fairly to the jury; whether all the evidence was before them, and whether the Judge adequately directed the attention of the jury to where lay the burden of proof." As to the obligations of the Judge towards an undefended accused—see *R. v. Totty.*

(2) The Judge's second function is to declare and explain to the jury the law relating to the case—§244(1)(*a*) and see *Metropolitan Ry. Co. v. Jackson* (1877) 47 *L.J.Q.B.* 303. Here he is omnipotent so far as his own Court is concerned. He declares the law as the Pope declares matters of faith, and the jury are bound to accept his ruling whatever their private convictions may be. Moreover, it will always be assumed that the jury have so followed his rulings on the law. Consequently, any misdirection on this point is considered to be of the greatest importance by the English Court of Criminal Appeal, and if it is established, the conviction will be set aside, unless it is clear that from the facts of the case it could have had no effect on the verdict. See *R. v. Pramanick.*

(3) He is entitled though not bound, to comment on the evidence, and even to express his private opinion on the inferences he would draw from it—§244(2). See *R. v. Hopper.* But here he is no longer speaking as a superior, whose word is law; he is merely talking to the jury as man to man, and though the jury may quite properly give weight to the opinion which he expresses, it is for them and for them alone, finally to decide the matter. See *R. v. Devji, R. v. Guzzala, R. v. Crippen, R. v. Staunton, R. v. Franz Muller.*

(4) Throughout the trial, as well as during the summing up, the Judge has the general conduct of the proceedings, and it is his duty:—(*a*) To decide upon the meaning and construction of all documents given in evidence at the trial—§244(1) (*b*). Thus, where the issue is as to whether a certain document contains a criminal libel, it is

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* See *Payne v. Ibbotson* (1858) 27 *L. J. Ex.* 341; *R. v. Kams* (1910) 4 *Eng. Crim. App. R.* 8; *R. v. Mowbray* (1912) 8 *Eng. Crim. App. R.* 8; *Seaton v. Burnand* (1900) *App. Cas.* 135.

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a question of law for the Judge to decide whether the meaning attributed to the statement is in law a defamatory meaning. For example, whether the words complained of do in truth impute insolvency or insanity to the aggrieved party, is a question of fact for the jury; whether the imputation is defamatory is a question of law for the Judge. See *Morell v. Frith* (1838) 3 *M. & W.* 402 and §245(*d*); *R. v. Godamune.* (*b*) To decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given —§244(1)(*c*). Thus, for example, where the deposition of a witness is tendered as evidence without calling the deponent, it is for the judge to decide what facts should be established before such deposition can be read, *e.g.*, that the deponent is dead or cannot be found, &c.—see §136 Evidence Ordinance 1895 and the *illustrations* to that section. (*c*) To decide whether any question which arises during the trial is a question of law for the Judge, or a question of fact for the jury—§244(1)(*d*). Thus, the question whether a certain witness is or is not an accomplice is a question of law for the Judge. It is for the jury to decide whether they believe him. It is a question of law for the Judge to decide whether there is sufficient evidence led by the prosecution so as to justify the case being left to the jury—§234(1) *ante.* (*d*) To decide on all questions arising during the trial as to the relevancy of facts tendered for proof, the admissibility of the evidence tendered, whether oral or documentary—see *Bartlett v. Smith* (1843) 12 *L.J.Ex.* 287, and in his discretion to prevent the production of inadmissible evidence, whether the same is objected to or not by the parties—§244(1)(*a*). Thus, the question as to whether a witness is competent or compellable to give evidence is a matter of law for the Judge. The question of the credit that is to be attached to the evidence of such witness is a matter to be decided by the jury—see *Dias on the Evidence Ordinance p.* 210. Again, it is a question of law for the Judge to decide whether any evidence tendered is relevant to any of the issues in the case—see *Chapter II.* Evidence Ordinance, or whether such evidence though relevant is admissible, *e.g.*, (i) statements recorded in an Information Book—§122(3) *ante*, (ii) hearsay evidence—§60 Evidence Ordinance.

It is open to the Judge in his summing up to direct the jury as to whether they should find a verdict on all counts in the charge, or only as to some of them—§248(1) *post.*

The duties of the jury.—See §245. Their duty during the trial is to listen to the evidence, and thereafter to find a verdict—§231 *ante.* The jury are the judges of the facts—§17 *illustration* (*d*) Penal Code.

In determining their verdict—

(*a*) It is their first duty to decide which view of the facts is true, having regard to the summing up of the Judge, and his directions of law applicable to the case, and thereafter to return a verdict accordingly—§245(*a*),(*c*), and *illustrations* (*a*) and (*b*). See *R. v. Franz Muller, R. v. Godamune.*

(*b*) It is also their province to determine the meaning of all technical terms (other than terms of law), and words used in an unusual sense, which it may be necessary to determine, whether such words occur in a document or not. See §§45, 49, 57, 92, 98 Evidence Ordinance. For example, an accused is charged with publishing a criminal libel on X by stating orally "X is an honest man, he never stole Y's watch" intending thereby to cause it to be believed that X did steal Y's watch. It is for the Judge to decide as a matter of law whether the

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words can be defamatory. It is for the jury to decide whether the alleged innuendo placed upon the words has been established by the evidence.

"**Foreign law**" **is a question of fact—not of law**—*Mostyn v. Fabrigas* (1774) 1 *Cowper* 161.

(c) It is their duty to determine whether general, indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning—§245(*d*) and see §244(1)(*b*).

3. **May the jury remain in Court while a question of law is being argued during the trial** ?—See §6 *ante* and §§232 – 237 para. 2(3) *ante*.

3A. **In cases where a reference is made under §355(1) *post*.** —It is desirable that a full note of the Judge's summing-up should be available—*R. v. Godamune*. The provisions of §298 *post* do not apply to Supreme Court trials. The only legal obligation cast on the presiding Judge is to take or cause to be taken in writing a note of the *evidence*—§303 *post*. In practice, however, the Judge takes down his own notes and the stenographer takes down the evidence *verbatim*. There is no legal provision in existence for the taking down of the summing-up. How is one to know what cases will be referred to a higher tribunal? As a result of the observations of the Privy Council in *R. v. Godamune* the presiding Judge in his discretion in certain cases recently tried has directed that the summing-up should be taken down. The legal position, however, is unsatisfactory. The defence cannot demand to be supplied with a copy of the summing-up.—*R. v. Seneviratne* (1934), although they may demand a copy of the Judge's notes of evidence—*R. v. Arnolis* (1908) 11 *N.L.R. at p.* 269.—See §434 para. 3 *post*.

4. **Extracts from famous summings-up.**

In this paragraph are collected extracts from summings-up in famous criminal trials in England, which may prove of assistance to learned Judges and counsel. The extracts deal with the following subjects :—(1) the definition and effect of **circumstantial evidence**, (2) the question of "**motive**," (3)(*a*) the proof of the "***corpus delicti***," (*b*) **the *onus*** incumbent on the prosecution to establish guilt, (*c*) the doctrine of "**reasonable doubt**," (*d*) questions of "**intention**" or "**knowledge**," (*e*) **the failure of the accused (or his spouse) to enter the witness-box, or to lead corroborative evidence**, (*f*) **expressions of opinion by the Judge** on the facts of the case, (*g*) the character of the accused, (*h*) the propriety of the accused "**reserving his defence**" before the Magistrate, and (*i*) **general observations.**

(1) **Circumstantial Evidence.**—

R. v. Dickman (1910) *Notable British Trials pp.* 185 – 186.—*Per* Lord Coleridge, J. " . . . It is perfectly true, as the prosecution say in this case, that this is a case of circumstantial evidence, and circumstantial evidence alone. Now, circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents, through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through.

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It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances all pointing in the same direction, *convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence standing by itself, may admit of an innocent interpretation*, yet the cumulative effect of such evidence may be, I do not say that it is, overwhelming proof of guilt . . ."

R. v. Franz Muller (1864) *Notable British Trials pp.* 132 - 134, 142.—*Per* Pollock, C. B. " . . . I apprehend that circumstantial evidence means this—when the facts stated do not directly prove the actual crime, but lead to the conclusion that the prisoner committed the crime . . . It has been said that that evidence is better than direct evidence. In one sense that may be true, in another sense it is not true. If you have the testimony of witnesses of undoubted character who saw the crime committed, why, then, you can hardly have better evidence than that—the direct evidence of some persons who saw the fact and can depose to the crime as having been committed ; but, undoubtedly, where there be any doubt about the veracity or honour of the witnesses, indirect evidence, coming from different distances and remote quarters, and all tending to the same end, has a force and effect beyond the testimony of more direct evidence. For direct evidence may be mistaken in various ways. There may be an error about the person. The witness may say 'I saw him do it, or a person like him.' He may give a character to the commission of a crime which really does not belong to it ; but indirect testimony from a number of facts, supposing that you believe them . . . and they all concur to the same point, they are free from the objection that there has been either perjury, or omission, or mis-statement . . ."

R. v. Palmer (1856) *Notable British Trials p.* 268.—*Per* Lord Campbell, C. J. " . . . In a case of this kind you cannot expect that witnesses should be called to state that they saw the deadly poison administered by the prisoner or mixed up by the prisoner openly before them. Circumstantial evidence as to that is all that can be reasonably expected ; and if there are a series of circumstances leading to the conclusion of guilt, then, gentlemen, a verdict of guilty may satisfactorily be pronounced . . ."

R. v. Seddon (1912) *Notable British Trials p.* 381.—*Per* Bucknill, J. " . . . Circumstantial evidence is made up of a series of circumstances or facts or events . . . Each circumstance is direct until at last the sum of those circumstances may very rightly and properly impel you to find a verdict of guilty. Therefore, circumstantial evidence is very often absolutely as strong as the most direct evidence that could possibly be adduced . . ."

R. v. Thurtell (1824) *Notable British Trials p.* 143.—*Per* Park, J. " . . . It has been said that circumstantial evidence should always be received with *doubt;* it ought undoubtedly to be received with *caution* and so, indeed, should all human testimony . . . You are not to reject circumstantial evidence any more than direct testimony . . ."

R. v. Blandy (1752) *Notable British Trials p.* 132.—*Per* Legge, B. " . . . In the present case, which is to be made out by circumstances, great part of the evidence must rest upon presumption, in which the law makes a distinction. A slight or probable presumption only has little or no weight, but a violent presumption amounts in law to full proof, that is where circumstances speak so strongly that to suppose the contrary would be absurd . . . I would observe further that where

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§§243-245 that presumption necessarily arises from circumstances they are more convincing and satisfactory than any other kind of evidence, because facts cannot lie . . ."

R. v. Smith (*The Brides in the Bath Case*) (1915) *Notable British Trials p.* 270.—*Per* Scrutton, J. " . . . Circumstantial evidence is a long word, but you, gentlemen, have been acting on circumstantial evidence all your lives, very likely without knowing it. Circumstantial evidence means simply this, that having no direct evidence of a fact, you infer it from the evidence of other facts surrounding it, a process which all of us go through every day of our lives . . . If you see a man going into a public house, and you see him five minutes afterwards coming out, you can conclude that he has had a drink on circumstantial evidence. You have not seen him have a drink, but from the place he has gone to, the purpose for which that place is used, and his action when he comes out, you will be justified in inferring, and everybody would be justified in inferring, that he had had a drink inside, though you had not seen him . . . (*The learned Judge proceeded to give further examples of inferences drawn from circumstances, and continued thus*): . . . Now, in the case of calculated and cold blooded murders, it is very rare that there is direct evidence. The man who in a fit of passion murders may do so before people, and there may be evidence of the outburst of passion and the struggle. In the case of calculation and deliberateness the man generally tries to conceal it, the murder had generally taken place with no witnesses, and calculated and cold blooded murders have generally to be dealt with by circumstantial evidence, the question in each case being, are the circumstances such that the jury can, with certainty, infer that a designed act has taken place. I direct you—and if I am wrong the prisoner will have the advantage of it—that it is not necessary that you should be satisfied exactly how the death was caused if you are satisfied that it was caused by the designed act of the prisoner. I direct you that in my own words, and I also direct you in the words of a judgment, which I regret has not been more widely circulated in England, the judgment of Mr. Justice Windeyer of the Australian Courts (the judgment of the original Court in *Makin v. Attorney-General for New South Wales* 14 *N.S.W. Reports*).—'All that the law requires is that the offence charged must be proved. In proving murder, the exact mode of killing becomes immaterial if there is sufficient evidence to satisfy the jury, that there was a killing by the prisoner under conditions which make it murder.' . . ."

(2) **Motive.**—

R. v. Dickman (1910) *Notable British Trials pp.* 159, 163.—*Per* Lord Coleridge, J. " . . . It is quite inaccurate to say that it is necessary in the case of a crime to prove the motive. Many crimes are committed apparently without motive. Many are committed with what appears to be an inadequate motive, but if the facts are clear, the motive is immaterial. If the facts in this case were abundantly clear, it would not be wise for you to seek about to find a motive . . . As I say, if the facts are clear, the motive is irrelevant. If the facts are not clear, motive may explain what otherwise would be difficult of explanation . . ."

R. v. Seddon (1912) *Notable British Trials p.* 383. " . . . Do not think that motive is proof of crime, it is a matter brought into the case for the purpose of assisting the tribunal . . . to come to the conclusion that, from the Crown's point of view, this murder was the act of the Seddons, or one of them, and that it was a murder, not of passion, not

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of hatred, not done in a moment of heat or anger, but a murder which was designed for the purpose of getting this woman's money . . ." *per* Bucknill, J.

R. v. Maybrick (1889) *Notable British Trials p.* 327.—*Per* Stephen, J. " . . . A question always gone into in matters of this nature is the question of motive. I do not myself think that it is always possible to assign a motive, or that it is always desirable to do so. If you cannot find a motive, well you cannot, and you must consider the facts without the light that motive could throw upon it. But when clear evidence of motive can be given, that clear evidence is a matter of the very first importance to consider . . ."

R. v. Lamson (1882) *Notable British Trials p.* 144.—*Per* Hawkins, J. " . . . The prosecution likewise contend that, the prisoner administered the poison, and, *if a motive were necessary to be assigned*, that motive, the prosecution allege, is found in the desire of the prisoner to acquire the £1,500 which would be due to Mrs. Lamson upon the lad's death . . ."

R. v. Palmer (1856) *Notable British Trials p.* 268.—*Per* Lord Campbell, C.J. " . . . With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not, or whether there is an improbability of its having been committed as not to be overpowered by positive evidence. But, gentlemen, *if there is any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance.* We know from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives, not merely from malice or revenge, but to gain a small pecuniary advantage and to drive off for a time pressing difficulties . . ."

R. v. Wainwright (1875) *Notable British Trials pp.* 206 – 207.—See (3) (*a*) *infra.*

(3) (*a*) **The corpus delicti.***—

R. v. Crippen (1910) *Notable British Trials pp.* 162 – 163.—*per* Lord Alverstone, C.J. " . . . The Crown have from the first stated their case and adhered to it, and that is the case which you have got to try. You need not consider any other. It involves, of course, two questions, not really independent, but, still, the evidence upon them ought to be considered somewhat separately. The first question is, were the remains found at 39, Hilldrop Crescent, the remains of Cora Crippen ? If they were not, there is an end of this case. If you find that they were the remains of Cora Crippen, then you have got to ask yourselves, was her death occasioned by the wilful act of the defendant Crippen. If not, again the defendant is entitled to be acquitted. Those are the two issues that you have got to consider . . . It is open to the prisoner in any case to say to the Crown or the prosecution ' You have not made out your case ; I, through my counsel, say the evidence for the Crown does not substantiate the crime that you have charged against me.' And, in many cases, as no doubt you know, that course has been adopted with perfect wisdom, perfect prudence, perfect justice and prisoners have been acquitted. It is not saying too much to say that in this case, had that course been adopted, Mr. Tobin's (counsel for the defence) task would have been more difficult than it is at present. And, therefore, he recognized that, and in his opening statement his first words to you were ' As soon as I have sat down, my client Dr. Crippen will go into the

* See *Wills on Circumstantial Evidence* (6th ed.) *p.* 323 *et seq.*

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box.' Therefore, gentlemen, in this case there is imported into the case, quite properly, not what I will call a third issue, but a defence which, if made out, exonerates the defendant altogether. The defendant has not contented himself with saying 'You have not satisfied the jury that these remains are the remains of Cora Crippen, or the woman, whose remains are found, died from *hyoscin* poisoning.' He says, 'I will tell you what has happened to the woman as far as I know; she is not dead. As far as I know, she left me of her own accord some time between one and two o'clock or two or three o'clock on 1st February, and six and seven o'clock in the evening when I returned to my house on that evening.' That is the defence put forward by Dr. Crippen, which you must carefully consider. If made out, you need not trouble any more about whose the remains were . . ."

R. v. Wainwright (1875) *Notable British Trials pp.* 206 – 207.—*Per* Lord Cockburn, C.J. " . . . I am bound to tell you that, if you should be of opinion that the prisoner took the life of the person whose body he was dealing with, even though the proof of identity should fail, it will then be your duty to convict him. It is not necessary in a charge of murder that the identity of the person killed should be established; the law throws its protection alike around the unknown and the known as far as it can, and makes him who takes human life amenable to its penalties. If, then, it is shown that the life of the veriest stranger or outcast has been taken, he who takes it will be as responsible as though it was the life of the highest in the land. Although the proposition is unquestionably true, in such a case as this, where the murderer has not been taken redhanded with the blood of his victim upon him, and the instrument of death in his hand, where the evidence is almost entirely circumstantial, it is of importance that the identity of the person murdered should be established, in order to discover the existence of some motive for taking that life. Happily men do not ordinarily commit crime without some motive, though in every instance that motive is inadequate to the crime of murder . . ." The same point arose in *R. v. Rouse* (1931) *Notable British Trials.*

R. v. Thurtell (1824) *Notable British Trials pp.* 141 – 142.—*Per* Park, J. " . . . Before a man can be convicted of murder, it is necessary to prove that the person whose death is laid to his charge is in point of fact a dead man . . ."

(*b*) **The onus which rests on the prosecution.—**

R. v. Crippen.—See (3) (*a*) *supra.*

R. v. Lamson (1881) *Notable British Trials p.* 144.—*Per* Hawkins, J. " . . . The questions you have to determine . . ., were rightly and properly stated to you by the learned counsel, when they said that the issues you had to decide were: Did the deceased, Percy Malcolm John, come by his death by poison? And if he did, was that poison administered by the prisoner? . . ."

R. v. Pritchard (1865) *Notable British Trials pp.* 265 – 266.—*Per* the Lord Justice Clerk. " . . . In order to enable you to return a verdict of guilty in regard to either of the two charges contained in this indictment, there are *three things which you must be satisfied upon the evidence.* In the *first place*, that the deceased died of poison; in the *second place*, that the poison was wilfully administered for the purpose of destroying life;* and in the *third place*, that it was the prisoner at the bar, who so administered or caused it to be administered. If the evidence is defec-

* *i.e.*, the possibility of poisoning by *suicide* or *accident* having been negatived.

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tive in any one of these particulars, the prisoner is entitled to an acquittal ; but on the other hand, if you are satisfied of these three things, then, there remains nothing for you, but the stern and painful duty of conviction . . ." §§243-245

(*c*) **The doctrine of " reasonable doubt."***—

R. v. Lawrence (1933) 13 *C.L.Rec.* 111—(*Privy Council*).—" . . . It has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt ; and it is essential that the tribunal of fact should understand this. Unless the Judge makes sure that the jury appreciate their duty in this respect, his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of Guilty given by a jury who have not taken this fundamental principle into account, is given in a case where the essential forms of justice have been disregarded. In such a case, unless it can be predicated that, properly directed, the jury must have returned the same verdict, a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence. They look to the Judge for authoritative statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their mind the governing principle of our law as to *onus* of proof. Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt "—*per* Lords Atkin, Thankerton & Sir George Lowndes. See *R. v. Rochia* 5 *infra*.

R. v. Seddon (1912) *Notable British Trials p.* 381.—*Per* Bucknill, J. " . . . I must tell you again what your especial duties are in the consideration of the facts which have been laid before you. The Crown has to prove its case . . . and the reason is that unless the Crown has proved to your satisfaction beyond reasonable doubt—not all possible doubt, but beyond reasonable doubt—these people are entitled to your acquittal . . . It is not necessary that a crime should be established beyond the possibility of a doubt, for there are doubts, more or less, involved in every human transaction. There are crimes committed in darkness and secrecy which can only be traced and brought to light by a comparison of circumstances which press upon the mind more and more as they are increased in number. Your duty is calmly and carefully to investigate the case and see what is the conclusion impressed upon your mind as men of the world, as men of sense, and men of solid justice. If the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty that the law requires. So, of course, if you see a reasonable doubt, you must, as you will be very glad, not to give them the ' benefit ' of it, but to acquit them. I do not like those words ' benefit of the doubt,' because, where the Crown has to prove a case, if it has not proved it, there is a doubt ; you do not give the accused person the ' benefit ' of it ; you simply acquit him, because the Crown has not proved its case . . ."

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* See *Babun Hamy v. Silva* (1915) 3 *B.N.C.* 29.

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R. v. Palmer (1856) *Notable British Trials p.* 268.—*Per* Lord Campbell, C.J. " . . . Gentlemen, the burden of proving the guilt rests on the prosecution ; and unless that is fully sustained, and you are not convinced upon the evidence that he is guilty, then, it will be your duty to acquit the prisoner . . . You are not to proceed even upon a strong suspicion ; there must be the strongest conviction in your minds that he is guilty of the offence, and if there be any reasonable doubt remaining in your mind, you will give him the benefit of that doubt, but if you come to a clear conviction that he is guilty, you will not be deterred from doing your duty . . . You will remember the oath that you have taken, and you will act accordingly . . ."

R. v. Franz Muller (1864) *Notable British Trials pp.* 132–134.—*Per* Pollock, C.B. " . . . There is another matter upon which I wish . . . to address you, and that is upon the degree of certainty with which you ought to give your verdict. I collected from my brother Parry's address (*i.e.*, of the counsel for the defence) that he suggested to you that you ought not to pronounce a verdict of guilty unless you were so satisfied of the guilt of the prisoner as if you had seen him do the act, and you yourselves, too, witnessed the completion of it. Gentlemen, I think that is not the certainty which is required of you to discharge your duty on the oath you have taken, to the country to which you belong, or to the prisoner whose safety is in your power " . . . (The learned Chief Baron then directed the jury in terms similar to that adopted by Bucknill, J., in the trial of the *Seddons—supra*) . . . " The learned counsel . . . has referred to a common axiom in which there is, no doubt, some degree of truth, and that is, that it is better that a great many guilty persons should escape than that one innocent man should suffer. Now, gentlemen, it is impossible to deny that, the history of our criminal courts, and I believe that of all criminal courts, will afford instances, where innocent persons have been classed with the guilty, and have been found guilty, and have suffered by it.* But, gentlemen, to make a comparison between convicting the innocent man and acquitting the guilty is perfectly unwarranted. There is no comparison between them. Each of them is a great misfortune to the country and discreditable to the administration of justice. The only rule that can be laid down is, that in the question of a criminal trial you should exert your utmost vigilance, and take care that if the man be innocent he should be acquitted, and that if guilty he should be convicted . . . Take the facts that are proved before you, separate those which you believe from those which you do not believe, take those you are satisfied you can rely upon, and the conclusions which naturally and almost necessarily result from those facts are to be acted upon as much as facts themselves, and whatever may be the conclusion they may lead you to—whatever, on the one side or on the other, that conclusion may be—I think you may rely upon it as a safe and just one . . . Upon the whole case for the prosecution, if you entertain any reasonable doubt, if you cannot come to a satisfactory conclusion, the prisoner is entitled to the benefit of that doubt . . . (The learned Baron then proceeded to investigate the *alibi* set up by the defence on behalf of the prisoner)†. . ."

R. v. Lamson (1882) *Notable British Trials p.* 144.—*Per* Hawkins, J. " . . . In order to sustain these indictments you must be satisfied by the

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* *e.g.*, the famous cases of *Adolf Beck* and *Oscar Slater*. The former led to the creation of a Court of Criminal Appeal for England, the latter of a similar Court for Scotland.

† See *Dias on the Evidence Ordinance p.* 143.

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evidence which has been adduced on the part of the Crown that the crime has been established to your satisfaction . . . If you are not so satisfied, the prisoner has the right, and he claims it at your hands, not the mere benefit of the doubt, but the right of an acquittal . . ."

R. v. Wainwright (1875) *Notable British Trials p.* 231.—*Per* Cockburn, C.J. " . . . Do all the facts which I . . . have brought to your attention lead to the conclusion that this woman, who was murdered by someone, fell by the hand of the prisoner ? If upon that consideration, you entertain any reasonable doubt, it is your duty to give Henry Wainwright the benefit of that doubt. If it be one which you feel, as rational, thinking minds, you cannot reasonably entertain, if the facts taken together lead you irresistibly to the conclusion that the woman fell by the prisoner Henry Wainwright's hand, then, sad and painful as may be the duty, you upon the oath you have taken truly to try between the Crown and the prisoner at the bar, must do that duty sternly and unflinchingly . . ."

R. v. Dickman (1910) *Notable British Trials p.* 186.—*Per* Lord Coleridge, J. " . . . In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties. We ought to act—we do, in fact, act—on just and reasonable convictions founded upon just and reasonable grounds. Juries ought to act upon the evidence, the law asks for no more, and the law demands no less. Gentlemen, if upon a grave and careful purview of the facts any reasonable doubt assail your minds, the prisoner is entitled to go free. The prosecution are bound to allay such doubts and to convince you of the truth of the accusation they bring. Ask yourselves, then, what is the cumulative effect upon your minds of so many, so varied, so independent pieces of evidence, all pointing, it is said, in one direction, all tending, it is said, to inculpate the prisoner, and the prisoner alone, in the commission of this crime. Summon to your aid your just and ordered reason. If it tells you that the guilt of the prisoner is reasonably proved, then, the law and the oath you have taken alike demand that you should act with firmness and with courage . . ."

R. v. Crippen (1910) *Notable British Trials pp.* 161–162.—*Per* Lord Alverstone, C.J. " . . . It is for the Crown to make out their case, and if you have any reasonable doubt as to whether the Crown have made out their case, you must give the prisoner the benefit of the doubt . . . But you will have to decide the case upon the whole evidence, and you must not allow what I may call doubts as to whether minor points have been established to influence your judgment, if upon the whole of the evidence, you have no doubt as to the result. Mr. Tobin (counsel for the prisoner) in his speech to you . . . used two or three times the expression ' Certainty.' Rightly understood, it is not a misleading word, but if by that it is to be supposed that juries are not to act upon the evidence unless it puts them in the position of having actually seen the thing done, it is, of course, a misleading expression. You are to be satisfied upon the whole of the evidence that you have no reasonable doubt as to your verdict, that you have no more doubt than you would have in any important question of your life upon which you have to take action one way or another. You must be satisfied upon the evidence that the Crown have made out their case, if they have not, then, the prisoner is entitled to be acquitted . . . You ought not to hesitate from returning a verdict, if you are satisfied on the evidence, by any fear, or suggestion, or doubt, as to what might occur in the future."

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R. v. Steinie Morrison (1911) *Notable British Trials p.* 275.—*Per* Darling, J." . . . Gentlemen, there is no doubt about it, the evidence leaves much to be explained. All that about the revolver, and so on, is very suspicious . . . but you know you must not convict a man on one suspicion, you must not convict him on a thousand suspicions, you must not add a thousand suspicions together and say 'That is proof.' No, you must find somewhere a solid anchorage upon which you could say 'I am secure of this basis.' . . ."

R. v. Guzzala 26 *Mad.* 467.—See 5 *infra.*

R. v. Smith (*The Brides in the Bath Case*) (1915) *Notable British Trials p.* 269.—" . . . The question you have to consider is—have the prosecution satisfied us, with that reasonable certainty that a jury ought to have in a matter of life and death, have they satisfied us that he is guilty of the death of Bessie Mundy ? If your state of mind after you have considered the matter is this 'We are very suspicious. We are inclined to think he did it, but we are not quite sure'—if that is your state of mind, the prisoner is entitled to what is called in English Law, the benefit of the doubt, and you are bound in return a verdict of Not Guilty. It is for the prosecution to prove the man guilty. They have to satisfy you. It is unnecessary to say to you probably that you must not approach the matter in the attitude of the juryman, who said when he saw the prisoner in the dock, 'If he had not been doing something he would not have been there,' He is there presumed to be innocent until the prosecution have proved him guilty; and approaching the matter from that state of mind, you have to see whether the prosecution have satisfied you with reasonable certainty, the certainty you would expect in a matter of life and death, that he is guilty of the murder of Bessie Mundy . . . I do not know that there is any certainty in this world. If any of you have ever suffered from reading metaphysics you will probably have been convinced that there is none; because the metaphysician will conclusively prove to you that, though you think at the present moment a Judge is addressing you, all that is happening is that there is some impression on the retina of what you think is your eye, which your brain translates into a belief that there is some one in scarlet who is addressing you, but there is really only your mind ; and so, while I think I am addressing twelve jurymen who are listening to me, all that happens is that there are some impressions on what I think is my retina which my mind—which is the only thing that exists in the world—translates into the belief that there are twelve men before me when really there are none. If you once get to metaphysics you will get no certainty at all. Again, I quote Mr. Justice Windeyer—'*In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected;* and it is one of the peculiar advantages of our jurisprudence that the conclusion is to be drawn by the . . . judgment and conscience of twelve men cognizant with the affairs and business of life' . . ." *per* Scrutton, J.

(*d*) **Intention or knowledge.**—

R. v. Casement. (1916) *Notable British Trials pp.* 184-185.—*Per* Lord Reading, C.J. " . . . The last general observation I will make to you on the law is that you must be satisfied before you convict the prisoner of the intention and purpose of his act . . . You never really can get at the actual thoughts passing through a man's mind, except by considering his actions, including, of course, his statements. A man's intentions are to be gathered from his acts. A man must be held to have intended the natural and reasonable consequences of his act. That is

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one of the fundamental principles of our law, and, after all, it is only plain common sense. When a man, particularly an intelligent man, does an act which would appear reasonably to involve certain consequences, you are entitled to assume that he intended those consequences . . ." *N.B.—This was a trial at Bar, Avory & Horridge, JJ. being associated with the Lord Chief Justice at the trial.* The conviction of the prisoner for the offence of high treason was affirmed by the Court of Criminal Appeal.

(*e*) **The Judge may comment on the failure of the accused (or his spouse) to enter the witness-box, or on the omission of the defence to lead corroborative evidence.**—See §296(3) *post.*

R. v. Casement (1916) *Notable British Trials p.* 185.—*Per* Lord Reading, C.J. " . . . I must point out to you that the statement which was made by the prisoner yesterday was a statement which was not made on oath,* and it is right that I should also tell you that it was open to the prisoner, if he chose to avail himself of the opportunity, to go into the witness-box and give evidence . . ."

R. v. Dickman (1910) *Notable British Trials.*—Comment by prosecuting counsel as to the failure of the defence to call the spouse of the accused as a witness—§296(3) *post.* See *Dias on the Evidence Ordinance p.* 216. Needless to say, the Judge has the right and frequently does comment on the absence of such evidence—see *R. v. Kops* (1894) *App. Cas.* 650; *R. v. Rhodes* (1899) 1 *Q.B.* 77; *R. v. Smith* 84 *L.J.K.B.* 2153; *R. v. Voisin* (1918) 1 *K.B.* 531.

R. v. Crippen (1910) *Notable British Trials p.* 168.—*Per* Lord Alverstone, C.J. " . . . It is not in the least the duty or necessity of the defendant to call corroborative evidence if he is only criticising the evidence of the Crown ; but if he is establishing as part of his defence an affirmative story, you are entitled to ask, particularly knowing what sort of a man he is, where are the persons to whom he gave away the money ? . . ."

R. v. Wainwright (1875) *Notable British Trials p.* 220.—*Per* Lord Cockburn, C.J. " . . . Can you doubt that if this Frieake really existed he either would have been called (by the defence) or some reason given to account for his absence ? . . ."† *C.f. R. v. Dhunno* 5 *infra.*

(*f*) **Judge expressing his opinion on the facts.**—See §244(2).

R. v. Crippen (1910) *Notable British Trials pp.* 163 - 164.—*Per* Lord Alverstone, C.J. " . . . If in the course of my summing up I say anything which leads you to think that I am expressing an opinion, please disregard it ; it is your duty to form an opinion as to what those facts establish. Therefore, you must not think, in any matter that I am putting before you, if in the mode of my expression I indicate a certain view to you, that I am doing more than submitting it to you . . ."

R. v. Staunton (1874) *Notable British Trials p.* 263.—*Per* Hawkins, J. " . . . I have the right to form an opinion on the matter, but I have no right to express it to you with the view of *dictating* to you as to what you should believe . . ."

R. v. Franz Muller (1864) *Notable British Trials p.* 144—*Per* Pollock, C.B. " . . . I have called your attention to the circumstances which I think you ought to consider. As far as I could, I have endeavoured to

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* *Casement* made an unsworn statement from the dock.

† *Wainwright's* defence was that the woman alleged to have been murdered by him was not dead but had eloped with a man called Frieake. The defence in *Crippen's* case was similar.

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§§243-245 avoid the expression of my opinion, for it is not for me to decide. It is for you to deliberate and decide according to the best of your judgment. If you have collected any opinion of any sort from what may have fallen from me—unless so far as it goes entirely with your deliberate opinion—treat it as if I had said nothing of the sort. The verdict is yours . . ."

R. v. Devji; *R. v. Guzzala*—see 5 *infra*.

R. v. Smith (*The Brides in the Bath Case*) (1915) *Notable British Trials p.* 269.—*Per* Scrutton, J. " . . . Our duties are these. I have to settle the law. You must take *the law* from me. If I am wrong, there is a Court of Criminal Appeal to set me right. It is my duty to point out to you the aspects from which you can consider certain parts of the evidence ; how far you may use it, how far you ought not to use it. Anything I say as to *fact* is of no importance as against your opinion. You are the judges of fact. If I suggest that I hold a particular view as to a particular fact, you thinking it over do not agree, you are not bound in any way by my opinion as to fact. Mine is the responsibility as to law ; yours is the responsibility as to fact. And your duty is, having taken the law from me, and considered any suggestions I make to you as to the bearing of particular facts, then to find the fact, and the responsibility of finding the fact is yours . . ."

(*g*) **The character of the accused.**—

R. v. Steinie Morrison (1911) *Notable British Trials p.* 277.—Where the prosecuting counsel in cross-examining the prisoner at the trial was allowed to elicit facts concerning his previous convictions, Darling, J., in his summing up explained the reason why this evidence was allowed to be led, and pointed out the evidentiary value of such evidence. " It is right—the Legislature has said it, and you and I must not question it—that in these circumstances . . . a jury should be informed of the past criminal career of the accused ; but, gentlemen, the caution I meant to give you is this. It must not be allowed to prejudice or warp your judgment, and believe me, no one is more conscious than I of the danger that such knowledge as you now have should warp the judgment not only of you, but of myself. It is almost impossible to put as good a construction now upon the most innocent thing that that man may do as it was when you believed him to be an unconvicted man. But, gentlemen, bear in mind that the only use to be made of these previous convictions is to show that when you have to rely upon his word as contradicting something stated by somebody else, or as alleging something which is not corroborated, you have not the word of a person, who has done nothing wrong, who has never told a lie, and who has never broken the laws of England, you have only the word of a man whose past career has been what you know it to have been . . ." The learned Judge also pointed out that the evidence relating to certain of the previous convictions, *viz.*, in respect of offences of burglary, was also relevant to one of the issues in the case, *viz.*, " The capacity or not of the prisoner for getting into or out of a house without making as much noise as a person would make who had never done it before." See §54 Evidence Ordinance.

R. v. Thurtell (1824) *Notable British Trials p.* 156.—*Per* Park, J. " . . . I must observe to you, gentlemen, that testimony as to character ought to prevail only in cases, where fair and rational doubts are entertained as to the other evidence—or I may explain my principle by stating that if this prisoner had been proved to us to have maintained the most respectable character, we should not sit here to try that good character,

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or to allow that good character to prevail against the evidence of facts. And, on the other hand, neither should we try his bad character—for if he had been the worst character in the land, we should not be justified in making use of it to bear out unsatisfactory evidence as to the crime with which he specially stands charged . . ."

R. v. Palmer (1856) *Notable British Trials p.* 266.—*Per* Lord Campbell, C.J. ". . . There has been evidence which certainly implicates the prisoner in transactions of a very discreditable nature. It appears that he has forged a great many bills of exchange, and that he had entered, into transactions not of a reputable nature. These transactions, however, would have been excluded from your consideration altogether, had it not been necessary to bring them forward to assist you in arriving at your verdict . . ." In this case the simple issue to be decided was whether the accused had murdered John Parsons Cook by administering poison to him. The motive alleged by the Crown for the murder was that the accused at this time was desperately in need of money—proved by the fact that he had issued several forged bills of exchange to meet his needs, and that the murder was committed with the object of taking from Cook his winnings in a race, which Cook's horse had won a few days previously. See under **Motive** *supra.*

(*h*) **Accused "reserving his defence" in the Police Court, and not making a full statement under §155 *ante*.—**

R. v. Maybrick (1889) *Notable British Trials pp.* 341 - 342, 344.—*Per* Stephen, J. ". . . At the end of the examination . . . before the Magistrates a question is always put to the prisoner, and which, I have no doubt, was put in this case, and that question is, 'You have heard the evidence against you, do you wish to say anything about it?' The form in which it was put was, 'Florence Elizabeth Maybrick, having heard the evidence, do you wish to say anything in reply to the charge? You are not obliged to say anything unless you desire to do so, but, whatever you say will be taken down in writing, and may be given in evidence against you at your trial. And you are also clearly to understand that you have nothing to hope from any promise or favour that might be holden out to you, and nothing to fear from any threat to induce you to make any admission of your guilt; but, whatever you now say will be taken down in writing, and may be given in evidence against you at your trial notwithstanding such promise or threat.' Whereupon she said, by the advice of Mr. Pickford (prisoner's counsel at the Magisterial inquiry), 'I reserve my defence.' . . . I cannot help thinking that if on that occasion he had said 'Say what you have to say now about the fly-papers and the meat-juice,' and if she had then told the story which she had now told,* I think it would have been better . . . I think if the prisoner really has important things to say, which are capable of being made the basis of defence, then, for his own and the public interest, the sooner he distinctly says them the better for him and for all concerned . . ."

Mr. Pickford (*junior counsel for the defence*)—"My Lord . . . I should like to say something in reference to a remark of your lordship about the prisoner reserving her defence when before the Magistrates. Whether it was wrong, my lord, it was entirely my act and—"

Stephen, J.—"Oh, pray, Mr. Pickford, dismiss from your mind the notion that I, in the smallest possible way, censure what was done,

* In 1889 accused persons could not give evidence at the trial. Mrs. Maybrick's statement was an unsworn statement made from the dock.

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§§243-245 or that I assume there was any kind of division between you and Sir Charles Russell (*leading counsel for the defence*)."

Mr. Pickford.—" It is not that I wish to speak for myself, but for Mrs. Maybrick. I only wish to say the action was mine, and I take the entire responsibility. Whatever might have been the nature of the defence, the Magistrates would have committed on such a charge, and therefore, I reserved the whole of the defence."

(*i*) **General.**—

R. v. Maybrick (1889) *Notable British Trials p.* 299.—*Per* Stephen, J. " . . . You have to exhaust things before coming to a final conclusion . . . Until you have heard the whole of the evidence in the case, have heard the summing up in the case, and have discussed amongst yourselves, your views on the subject, you can hardly lay down what will be your verdict . . . It is a virtue to keep your mind open to any new argument placed before you. That is a great intellectual virtue which all persons should assiduously cultivate . . ."

R. v. Stauntons (1877) *Notable British Trials p.* 251 *et seq.* Directions to the jury as to the weight to be attached to *accomplice* evidence. See *Dias on the Evidence Ordinance p.* 258.

R. v. Franz Muller.—Directions to the jury as to the manner of regarding the evidence relating to an *alibi* set up by the accused—*Dias on the Evidence Ordinance p.* 143.

R. v. Totty (1914) 111 *L.T.* 167 (see *R. v. Immer* (1917) 118 *L.T.* 416)—Where a prisoner is undefended, a Judge should take special pains to point out everything which can be said for the defence.

R. v. Hopper (1915) 2 *K.B.* 431 (*c.f. R. v. Georges* (1915) 85 *L.J. M.C.* 1049)—Whatever the defence raised at the trial by defending counsel, the Judge is bound to put such questions before the jury as appear to him properly to arise upon the evidence, though they were not raised by counsel. *C.f. R. v. Smith* (*supra*).—Judge putting to the jury a new theory as to the cause of death of the deceased, on a charge of murder.

R. v. Godamune (1931) 32 *N.L.R.* 361.—If a document is capable of two or more meanings . . . it is, in my opinion, the duty of the Judge whilst leaving it to the jury as a question of fact to decide what was the meaning intended by the parties as expressed in the document; to state to the jury, the legal effect of any reasonably possible meaning having regard to the words used. For this purpose the whole document must be carefully looked at, greater regard being had to the intention of the parties rather than to the precise words used—*per* Dalton, J. §§244(1)(*b*), 245 applied.

R. v. Godamune (1932) 34 *N.L.R.* 225, 12 *C.L.Rec.* 129.—**Privy Council.**—Under §244(1)(*b*), it is the duty of the Judge to decide upon the meaning and construction of all documents given in evidence at the trial and for that purpose evidence of the surrounding circumstances is available. Under §355(1) *post*, it is desirable that the tribunal dealing with the reference should have a full note of the Judge's summing up. In *R. v. Seneviratne* (1934), it was ruled that the defence cannot demand to be supplied with a copy of the summing up in order to consider whether an application for leave to appeal should be made to the Privy Council.—See hereon §434 para. 3 *post.*

5 **Indian Case law.**—

R. v. Rochia 7 *Cal.* 42.—In his summing up the Judge should direct the attention of the jury to the important and salient points in the

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evidence. *Held also*, that where counsel has addressed the jury, any minor points not alluded to by the Judge in his summing up will be assumed to have been dealt with by counsel and to have been in the minds of the jury. But see *R. v. Lawrence* (3) (*c*) *supra*. See also *R. v. Churn* 10 *Cal.* 140, *R. v. Gangia* 23 *Bom.* 316, *R. v. Lal* 30 *Cal.* 822, *R. v. Farindra* 36 *Cal.* 281.

R. v. Pramanick 25 *Cal.* 711.—It is not sufficient for the Judge merely to read to the jury the definition of the offence and leave them to find whether the evidence has made out a case against the accused. It is the duty of the Judge to call the jury's attention to the various elements constituting the offence and to deal with the evidence. A failure to do so amounts to a misdirection. See also *R. v. Jaspath* 14 *Cal.* 164; *R. v. Mandal* 25 *Cal.* 561; *R. v. Abbas* 25 *Cal.* 736; *R. v. Das* 29 *Cal.* 379.—See also 9 *Halsbury's Laws of England p.* 434 note (*o*).

R. v. Tilak 22 *Bom.* 528 *Privy Council.*—In deciding whether the Judge has misdirected the jury, the summing up must be looked at as a whole, and each part looked at by the light of what else was said.

R. v. Dhunno 8 *Cal.* 121.—Comments by Judge on the failure of the defence to lead evidence. See *R. v. Kops* (1894) *App. Cas.* 650, *R. v. Rhodes* (1899) 1 *Q.B.* 77. *R. v. Smith* 84 *L.J.K.B.* 2153; *R. v. Voisin* (1918) 1 *K.B.* 531.

R. v. Devji 20 *Bom.* 215.—The law no doubt allows a Judge to express to the jury his own view of the facts, but where a Judge lays down that there is not sufficient evidence to establish a certain issue of fact, he in fact encroaches upon the province of the jury.

R. v. Guzzala 26 *Mad.* 467.—Whenever a Judge expresses to the jury his opinion on a question of fact he should not do so without telling them that they are at liberty to form their own opinion, and that any reasonable doubts in their minds should accrue to the benefit of the accused. See also *R. v. Panchu* 34 *Cal.* 698; *R. v. Natabar* 35 *Cal.* 531, and the cases cited under (3) (*f*) *supra*.

Jury may retire.

246. (1) After the summing up the jury may retire to consider their verdict.

(2) If the jury retire they shall be committed to the charge of an officer of the Court who shall first take an oath in the prescribed form.

(3) Except with the leave of the Judge no person other than a member of the jury shall speak to or hold any communication with any member of such jury.

Summing up.—See §§243 – 244 *ante*.

Jury.—See §§223 – 230, 238 – 242, 244, *Chapter XXI. post.*

Verdict.—See §§247 – 250 *post*.

Committed to the charge of an officer of the Court.—*C.f.* §238(1) *ante*.

An oath in prescribed form.—See Form 14, *Schedule III. post.*

Judge.—See §3 *ante*.

Hold communication with the jury.—*C. f.* §§238(2), 241(2) (3).

1. §246 is based upon §312 of the Code of 1883 and §300 of the Indian Code.

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§246

2. **Scope of §246.**—After the Judge's summing up has been concluded, he will direct the jury to consider their verdict. Thereupon the jury may or may not retire into the jury room in order to consider their verdict—§246(1). If they express a desire to retire, they will be committed to the charge of an officer of the Supreme Court, who has already taken the oath specified in Form 14, *Schedule III. post*—§246(2). While, the jury are in his charge his duties are "to suffer none to speak to them, nor to speak to them himself without leave of the Judge, excepting only to ask them whether they are agreed on their verdict."

If during the deliberations of the jury, they desire to ask the Judge for any information as to any question of law or point of fact, their foreman will tell the officer in whose charge they are, and this officer will communicate the requirements of the jury to the Judge through the Registrar.

3. **The jury . . . shall be committed to the charge of an officer of the Court.**—*C.f.* §238 paras. 2 and 3 *ante.*

4. **Who shall take an oath in the prescribed form.**—See Form 14, *Schedule III. post.*

5. **Communications with the jury during their deliberation on the verdict.**—

(1) The Judge can communicate with the jury himself or authorize any other officer of the Court to do so—§246(3). Thus, the Judge may enquire whether they are agreed on their verdict, or where the jury delays, whether there is a likelihood of their finding a legal verdict—§§247(3), 250 *post.* The Judge may answer or cause to be answered, any communications made by the jury through the foreman, during their deliberation. He may recall the jury and redirect them on the law or re-sum up the facts or any part thereof.

(2) Any person with the leave of the Judge may communicate with the jury, *e.g.*, the Registrar—§246(3).

(3) The officer in charge of the jury may ask them, whether they are agreed, but may not communicate with them on any other subject except by leave of the Judge—§246(3).

(4) The jurors may communicate freely as amongst themselves.

If a juror, after the Judge has summed up, separates himself from his colleagues and, not being under the control of the Court, either converses, or is in a position to converse, with other persons, this is an irregularity which renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence the trial afresh.—*R. v. Ketteridge* (1915) 1 *K.B.* 467 and see *R. v. Twiss* (1918) 2 *K.B.* 853 and §230 *ante.*

When jury ready to give verdict.

247. (1) When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2) If the jury are not unanimous the Judge may require them to retire for further consideration.

(3) After such further consideration for such time as the Judge considers reasonable, or if either in the first instance the foreman says that they are unanimous, or the Judge has not required them to retire, the Registrar shall say (the

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jurors being all present): "Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged?"

(4) On this the foreman shall state what is the verdict of the jury.

Verdict to be given on each charge.

248. (1) Unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) If the Judge does not approve of the verdict returned by the jury he may direct them to reconsider their verdict, and the verdict given after such reconsideration shall be deemed to be the true verdict.

Entry and signing of verdict.

249. (1) The Registrar shall make an entry of the verdict on the indictment and shall then say to the jury the words following or words to the like effect:

"Gentlemen of the jury: attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A. B. is guilty" (or "not guilty").

(2) The foreman shall sign the verdict so entered and the verdict when so entered and signed, but not before, shall be final.

(3) When by accident or mistake a wrong verdict is delivered, the jury may before it is signed or immediately thereafter amend the verdict.

Jury.—§§223-230, 238-242, 244, 246, *Chapter XXI.*
Verdict.—§§223(2), 250.
Registrar.—§3 *ante.*
Foreman of the jury.—§§227-228 *ante.*
Unanimous.—223(2), 250.
Judge.—§3 *ante.*
Offence.—§3 *ante.*
Charges.—*C.f.* §§178-186 *ante.*
Indictment.—See §§158(2),161(4),167-186, 218, and Form 11, *Schedule III.*
Amendment of verdict.—*C.f.* §§306(4) *post.*
Sign.—See §3(17), Interpretation Ordinance 1901.

1. The following table will show the connection between §§247-249 of this Code and the corresponding sections of the Code of 1883 and the Indian Act:—

Section	*Code of* 1883	*Indian Act*
247(1)	—	—
(2)	314	302
(3)	314	—

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§§247-249

Section	Code of 1883	Indian Act
(4)	313	301
248(1)*	315	303(1)*
(2)*	—	—
249(1)	—	—
(2)	—	—
(3)	316	304

2. **Scope of §§247-249.**—This group of sections deals with the verdict of the jury in criminal trials before the Supreme Court. It is to be noted that although *Chapter XX.* of this Code is meant to apply to all criminal trials before the Supreme Court, whether upon indictment (§218 *ante*) or upon the Attorney-General's information, the draftsman of the Code appears to have overlooked this fact in §249(1) where reference is made only to trials upon indictment—see Introduction to *Chapter XX.* para. 3 *ante.*

The verdict of the jury is the formal finding by them whether the accused is guilty or not of the accusation preferred against him by the prosecution in the charge. Under the law of Ceylon a verdict must either be unanimous, or by a majority of not less than five to two—§223(2) *ante.* Even a unanimous verdict is not final until the presiding Judge has decided to accept it—§248(2). *R. v. Appu Sinno, R. v. Meany. In re de Souza.*

Verdicts may be either **(*i*) *General,*** *i.e.*, a finding of Guilty or Not Guilty on all the counts in the charge. Unless the Judge has directed them to do otherwise, it is the duty of the jury to return a general verdict upon the whole charge—§248(1) ; see §185 *ante* ; **(*ii*) *Partial,*** *i.e.*, a verdict of Guilty on one part of the charge, and Not Guilty on another part ; or **(*iii*) *Special,*** where the jury finds what facts have been proved in the case, and requests the Judge to apply the law to such facts. It is open to the Judge to put specific questions to the jury in order to ascertain what their verdict is—§248(1), and it is also open to the Judge in his summing up to place specific issues of fact for the determination of the jury—see *R. v. Bastian*, where this course was adopted by the trial Judge. It is also open to the jury themselves to find the facts and ask the Judge to say as a matter of law, whether the facts so found amount to an offence in respect of which the accused can lawfully be convicted. The case of *R. v. Dudley* affords a good example of a special verdict.

The return of the verdict by the jury.—When the jury are ready to give their verdict, whether they have retired or not (§246 *ante*), and are all present, the Registrar will ask the foreman whether the jury are unanimous—§247(1), 223(2), *In re de Souza.*

(*a*) If the foreman replies that they are unanimous, the Registrar will enquire whether they find the accused person (named) Guilty or Not Guilty of the offence (named) with which he is charged—§247(3). Thereupon the foreman will state "what is the verdict of the jury," *i.e.*, whether they find a general verdict on all the counts, or of "lesser offences," or whether they find a partial or special verdict.

The Judge may refuse to accept the unanimous verdict of the jury.—*In re de Souza, R. v. Appu Sinno, R. v. Meany ;* and he may direct them to reconsider their verdict. *If the jury after such reconsideration finds another verdict with a lawful majority, the Judge is bound*

*See *R. v. Appu Sinno* para. 4 *infra.*

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to accept it—§248(2). On the other hand, if after such reconsideration, the jury are unable to agree or find a lawful verdict, *viz.*, being divided four to three, the Judge will discharge the jury under §250 *post*, and direct that the accused should be retried before a new jury—§252 *post*. In a case such as this, where the jury have been asked to reconsider their verdict by the Judge and they divide in the proportion of four to three, the original verdict which the Judge directed them to reconsider is not revived—*R. v. Appusinno, R. v. Meany*. A jury which has been directed under §248(2) to reconsider their verdict can find any lawful verdict unembarrassed by their first verdict—*R. v. Alpinu*. It is improper for a Judge to use §248(2) either by itself or in combination with §230 *ante*, to discharge a jury so as to prevent its returning a verdict which the Judge does not approve—*R. v. Alpinu*.

When a legal verdict is accepted by the Court whether with or without a direction for reconsideration, the verdict is recorded and signed by the foreman—§249.

(*b*) If the foreman when questioned by the Registrar replies that they are not unanimous, the Judge may at once direct them to retire for reconsideration—§247(2), *In re de Souza*. If the jury or the required majority of them cannot agree, the Judge may, after the lapse of a reasonable time, discharge the jury—§250 *post*, and order that a fresh trial should take place before a new jury—§252, *post*.

The jury after such reconsideration will be called upon to state what their verdict is—§247(3). If they find a unanimous verdict or a verdict by six to one, or five to two, it is nevertheless open to the Judge to request them to reconsider their verdict—§248(2), *In re de Souza, R. v. Appu Sinno, R. v. Meany*. If the jury after such reconsideration finds a legal verdict, the Judge is bound to accept it—§248(2). If after such reconsideration the jury cannot find a legal verdict, being divided four to three, the Judge will discharge the jury—§250 *post*, and direct that a new trial should take place before a fresh jury—§252 *post*. See *R. v. Appu Sinno*.

The recording of the verdict—When the verdict is delivered, the Registrar will record it "on the indictment"* and shall say to the jury: "Gentlemen of the jury, attend whilst your foreman signs your verdict. The finding of you (or of so many of you, as the case may be) is that the prisoner A. B. is guilty (or not guilty) of the offence or offences (named)"—§249(1). The foreman will thereupon sign the verdict, and the verdict when so entered by the Registrar and signed by the foreman, but not before, shall be final—§249(2). If, however, by mistake or accident a wrong verdict is delivered, the jury may before it is signed or immediately thereafter, amend the verdict—§249(3), *c.f.* §306(4) *post*. This point came up for consideration in *R. v. Martin*. Lyall Grant, J., ruled that under §249(3) a verdict can be amended only before or immediately after a verdict is recorded, and before the jurors have left the Court and while they are still under the observation of the presiding Judge.

If the indictment or information needs any amendment, this must be done before the verdict of the jury is returned—§172(1) *ante*. Moreover, if the Attorney-General desires to enter a *nolle prosequi*, or if the prosecuting counsel desires to withdraw the charge or any part thereof, these must be done before the verdict of the jury is returned.—See para. 3 *infra*.

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*See para. 2 *supra*.

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§§247-249

As to when judgment is to be pronounced on conviction.—See §251 *post*.

3. **Withdrawal of charges by the prosecution.**— (1) **Before the return of the verdict.**—See §217(1), (3) *ante*. (2) **After the return of the verdict.**—See §185 *ante*. The prosecuting counsel usually acts under §185 where, for example, the accused is charged with committing murder and with causing grievous hurt in the course of the same transaction. If the jury finds the prisoner guilty on the capital charge, the remaining count in the indictment is invariably withdrawn with the permission of the Judge.

4. **Case law.**—

In re de Souza (1914) 18 *N.L.R. at p.* 45. " Mr. Bawa, to my surprise I must confess, argued that this Court has not the power to direct a jury to reconsider a unanimous verdict. On this point the words of §248 of the Criminal Procedure Code appear to me to be too clear for argument. §247 enacts that where before the verdict is announced the jury, in answer to a question put, state that they are not unanimous, the Judge may order them to retire for further consideration. §248 refers to a later stage of the case. It enacts in effect that after the verdict is declared by the jury, whether they are unanimous or not, the Judge may direct them to reconsider it, if he does not approve of it. There is neither any word or expression in §248, nor is there any rule or canon of construction, that would limit the operation of sub-section (2) of §248 to the case mentioned in sub-section (1). The Indian authorities cited by the learned counsel for the accused do not apply, because, according to the Indian Code, it is only when the jury are not unanimous that the Judge can require them to reconsider their verdict . . . ." *per* Pereira, J.

R. v. Appu Sinno (1920) 22 *N.L.R.* 353, 8 *C.W.R.* 278, 2 *C. L. Rec.* 199.—The jury returned a verdict of Not Guilty against the accused who was charged with murder. The Judge directed the jury to reconsider their verdict. The jury then divided four to three. The Judge then discharged the jury. The accused was arraigned afresh before a new jury, when the plea of *autrefois acquit* was taken on his behalf. *Held*, that the plea was bad. " The contention on behalf of the accused is that, as the jury on their second retirement were unable to return such a verdict as could be accepted under the law, the verdict they were prepared to give after their first consideration must be received as the verdict to be entered in the case. I find myself quite unable to agree with the contention. The provisions of §248 which follow the English procedure stated in *R. v. Meany* (1862) 32 *L.J.M.C.* 24, is as follows . . . (The learned Judge set out the provisions of §248) . . . It appears to me that until the Judge has decided whether or not to exercise his discretion to direct the jury to reconsider their verdict, no final verdict can be given by the jury in the case. The only " true verdict " they can give, if they are directed to reconsider their verdict, is the verdict given after such reconsideration. There is no direct authority either in the English reports or our own as to the effect of a disagreement after a reconsideration of a verdict, but it is inconceivable to me that the law can require a verdict to be entered to which the jury after consideration may possibly be opposed by a majority of four to three. In my opinion there was no true verdict returned at the first trial, and the Judge was right in discharging the jury without a verdict . . . ." *per* Shaw & de Sampayo, JJ.

R. v. Bastian (1902) 2 *Bal. at p.* 97.—This case affords an example of a special verdict of the jury in answer to specified questions put to

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them by the Judge. See *R. v. Dudley* (*The "Mignonette" Case*) (1884) 14 *Q.B.D.* 273 which also affords a very good example of a special verdict where the jury found the facts and requested the Judge to apply the law thereto.

R. v. Alpinu (1926) 29 *N.L.R.* 6; 8 *C. L. Rec. xliii.*—Sub-sections 1 and 2 of §248 refer to separate and distinct matters wholly unconnected save in one respect that they both relate to the verdict. A jury directed under §248(2) to reconsider a verdict may unembarrassed by any conclusion indicated in their first verdict return any (legal) verdict they choose on the indictment. The powers under §248(2) are capable of misuse, and a Judge should not use §248(2) either singly or in combination with §230 to prevent a jury from returning a verdict the Judge does not approve.

R. v. Martin (1929) 6 *T.L.R.* 157.—After the jury had returned a lawful verdict and had left the jury-box the defence on the following day contended that it was a mistaken verdict, or alternatively that it was not the considered verdict of the jury. *Held*, that under §249(3) a verdict can only be amended either before or immediately after a verdict is recorded before the jurors have left the Court and while they are still under the observance of the trial Judge.

Discharge of jury when they cannot agree.

250. If the jury or the required majority of them cannot agree the Judge shall, after the lapse of such time as he thinks reasonable, discharge them.

Jury.—§§223-230, 238-242, 244, 246, *Chapter XXI.*

Required majority.—§223(2) *ante.*

Judge.—§3 *ante.*

Discharge of the jury.—§§229, 230.

1. §250 is based on §316 of the Code of 1883 and §305(4) of the Indian Code.

2. **Scope of §250.**—If the jury cannot agree upon a unanimous verdict, or a verdict of six to one or five to two, the Judge "after the lapse of such time as he thinks reasonable" will discharge them. When this course is adopted, the accused will be retried before another jury—§252 *post.*

A jury may be discharged under §250 in the following circumstances:—(1) Where, without delivering their verdict, the foreman states that the jury are not unanimous, and the Judge has asked them to retire for further consideration—§247(2), and they are unable to find a legal verdict. (2) Where the Judge has refused to accept a lawful verdict, and has directed the jury to reconsider such verdict under §248(2), and thereafter they are unable to find a lawful verdict—*R. v. Appu Sinno.* In such a case the original verdict of the jury is not revived—*R. v. Appu Sinno*; and the jury must be discharged and the accused retried before a new jury.

3. **Case law.**—

R. v. Appu Sinno (1920) 22 *N.L.R.* 353, 8 *C.W.R.* 278, 2 *C. L. Rec.* 199.—See §§247-249 para. 4 *ante.*

Judgment in case of conviction.

251. If the accused is convicted the Judge shall either forthwith or before the close of the sessions pass judgment on

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§§250-251 him according to law. Provided always that if it appears to the Judge expedient, the Judge instead of pronouncing judgment may direct that the accused be released on his entering into a bond, with or without sureties and during such period as the Judge may direct, to appear and receive judgment if and when called upon, and in the meantime to keep the peace and be of good behaviour.

Judge.—§3 *ante.*

Judgment.—See *Chapters XXIV., XXV., XXVI. post.*

Keep the peace.—*C.f.* §§80, 81.

Good behaviour.—*C.f.* §§82-83 *ante*, 325 *post.*

Bond.—See *Chapter XXXIX. post.*

Sentence.—§13 *ante* and *Chapter XXV., XXVI. post* and §§310, 312, *et seq.*

1. §251 is based on §317 of the Code of 1883 and §305(1) of the Indian Code.

2. Scope of §251.—If the accused is acquitted by the jury after trial, or if at the close of the case for the prosecution, the Judge as a matter of law directs the jury to find the accused Not Guilty—§234(1) *ante*, the prisoner will at once be discharged from the bar, and the acquittal duly recorded.

On the other hand, if the jury convicts the accused of the charges preferred against him, or of any "lesser offence"; or if the accused has pleaded Guilty to the charge—§220 *ante*; or in respect of some "lesser offence"—§221(2), the Judge shall either "*forthwith*" or "*before the close of the sessions*" pass judgment upon him according to law—§§251, 304. Upon a conviction for the offence of murder, there is only one sentence which can be passed, *viz.*, a sentence of death.—See §308, but no sentence of death can be pronounced against a person who in the opinion of the Court is under the age of sixteen years, "but in lieu thereof the Court shall sentence such person to be detained during the Governor's pleasure"—§296A Penal Code, and see §310A *post.* Before a sentence of death is passed the "*allocutus*" takes place, *viz.*, the formal calling on the accused to state whether he has anything to say why judgment of death should not be pronounced against him according to law—§305 *post.* This question is asked not to enable the accused to protest his innocence, but to enable him to state any reasons which he has to urge against the pronouncement of the sentence of death or for the stay of its execution, *e.g.*, that the accused being a female is about to be delivered of a child—§309(*e*), or that the accused is under sixteen years of age—§296A Penal Code. The prisoner cannot be allowed to utilise the opportunity for making a speech—*R. v. Wainwright.* See §305 para. 2 *post.* A sentence passed in the absence of the accused is bad—*R. v. Lawrence.*

With regard to sentences other than sentences of death—see §310 *post.* The Supreme Court may pass any sentence authorized by law—§13 *ante.* It should be noted that without passing sentence, the Judge may, if he think it expedient to do so, direct that the accused be liberated on his entering into a bond, with or without sureties and during such period as the Judge may direct, to appear and receive judgment if and when called upon, and in the meantime to keep the peace and be of good behaviour—§251. See *R. v. Pary* (1904) 1 *Bal. at p.* 24. *C.f.* §§325-327A *post.* If the accused is sentenced to pay a fine, the Court may direct that the whole or part of such fine shall be applied in defraying

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the costs of the prosecution, or in compensation for the injury caused by the offence—§253D *post*. §253E *post*, empowers the Court to order the accused to pay compensation to the aggrieved party. As to "youthful offenders."—See Ordinance No. 1 of 1886.

After conviction it is always open to the Judge to enquire into the antecedents of the accused, in order to enable him to regulate the measure of punishment—*R. v. Kandaiya*, *Nikapota v. Gunesekera*. It is also possible that there will be a further indictment against the accused charging him with previous convictions for the purpose of enhancing sentence after conviction—see §167(7) *ante*, and Ordinance No. 2 of 1926, §§8, 10. This indictment is withheld until after the conviction of the accused—§253(1)(*a*), (*b*). When the accused has been convicted, the prosecuting counsel will formally move to have the further indictment read, and it will then be read out and translated to the accused, who will be called upon to admit or deny the accuracy of the statement of his previous convictions —§253(1)(*c*). If the accused admits the accuracy of the convictions, the Judge will proceed to consider the sentence. If the accused denies them, the previous convictions must be proved as provided by §253(1((*c*) and §7 Ordinance No. 2 of 1926. Ordinarily, the committing Magistrate will have questioned the accused in regard to the convictions and recorded his admission thereto, prior to committal.

2A. **Judgment.**—See §304 para. 2 *post*. As to the judgment of death.—See §§305, 308(1), 309 *post*.

Instead of pronouncing judgment.—*R. v. Pary*. See *Chapter XXVI.* as to the release of offenders on probation.

3. **Forthwith.**—Means "*immediately*." See §214 para. 3 *ante*, and §304 paras. 3, 4 *post*.

3A. **Execution of sentences.**—See *Chapter XXV. post*.

3B. The Court has no power to reserve to the Crown the right to bring a fresh charge in cases where the accused has been acquitted in respect of offences falling within §§181, 182.—*Canagasingam v. Bawa*, (1931) 9 *T.L.R.* 29.

4. **Case law.**—

R. v. Wainwright (1875) *Notable British Trials* pp. 232-233. *The Deputy Clerk of the Court*: "Prisoner at the Bar . . . what have you to say why judgment should not be pronounced against you ?"

The Prisoner: "I should like to make one or two observations, and they shall be very short indeed. I have first to express my deep obligation for the untiring energy and ability of my counsel during this protracted trial . . . My thanks are due to the very many friends who have, with such promptitude and alacrity, come forward to give me their valuable and substantial assistance. I have not been able to reply to all the persons—"

Lord Cockburn, C.J.: "I cannot allow you to make a speech. You can only reply to the question whether you have anything to say why sentence should not be passed." In *R. v. Casement* (1916) Lord Reading, C. J. allowed the prisoner after his conviction to make what amounted to a political speech and which had nothing to do with the stay of execution.

R. v. Kandaiya (1911) 14 *N.L.R.* 211.—See §214 para. 9 *ante*.

Nikapota v. Gunesekera (1911) 14 *N.L.R.* 213.—See §214 para. 9 *ante*.

R. v. Pary (1904) 1 *Bal. at p.* 24.—"Instead of pronouncing judgment."

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§§250-251

R. v. Lawrence (1933) 13 *C. L. Rec.* 111.—A Court as a rule must pass sentence in the presence of the accused in the case of an indictable offence—*Privy Council.*

F.—Retrial of Accused after discharge of Jury.

Retrial of accused.

252. Whenever the jury is discharged the accused shall be detained in custody or released on bail, as the Judge may think fit, and tried by another jury.

Jury.—§§223-230, 238-242, 244, 246, *Chapter XXI.*

Discharge of jury.—§§229, 230, 250 *ante.*

Bail.—§§394-400, 410-412 *post.*

Judge.—§3 *ante.*

1. §252 is based upon §318 of the Code of 1883 and *c.f.* §308 of the Indian Code.

2. **Scope of §252.**—Whenever a jury is discharged (except when they are discharged after finding a legal verdict) the accused shall either be remanded back to custody or enlarged on bail, as the Judge may deem fit, and be tried by another jury.—*Sopia Nona v. Fiscal W.P.* (1926) 8 *C. L. Rec. at p.* 104 ; 29 *N.L.R.* 52.

A jury may be discharged under the circumstances set out in §§229, 230 and 250. In every one of these cases the accused must be retried. The accused cannot raise a plea of *autrefois acquit* at such retrial by pleading that the discharge of the jury at the first trial amounts to an acquittal, for he is still being tried on the charge which was before the Court at the original trial. See also *R. v. Appu Sinno* §§247-249 para. 4 *ante.*

G.—Procedure in case of Previous Conviction.

Procedure in case of previous conviction.

253. (1) In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction for any offence, the procedure hereinbefore laid down shall be modified as follows :

(*a*) The part of the indictment stating the previous conviction shall not be read out in court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to or been convicted of the subsequent offence.

(*b*) If he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.

(*c*) If he answers that he has been so previously convicted, the Judge may proceed to pass judgment on him accordingly ; but if he denies that he has

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been so previously convicted or refuses to or does not answer such question, the jury or the District Judge and the assessors (as the case may be) shall then inquire concerning such previous conviction and in such case it shall not be necessary to swear the jurors or assessors again.

(2) Notwithstanding anything in this section contained, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under any law for the time being in force in this Island.

Trial by jury.—*Chapter XX.* §§385, 440A *post.*
Trial with the aid of assessors.—*Chapter XIX.*
Offence.—§3 *ante* and see §3 Ordinance No. 2 of 1926.
Indictment.—§§186, 203, 218 *ante.*
Court.—§3 *ante.*
As alleged in the charge.—§167(7) *ante.*
Pleaded guilty.—§§205, 220, 221(2) *ante.*
Judge.—§3 *ante.*
District Judge.—§3 *ante.*
Judgment.—§§214, 251 and *Chapter XXIV.*
Jury.—§§223-230, 238-242, 244, 246 *ante.*
Assessors.—§207 *ante.*
Swearing of jury or assessors.—§§227(3), 207 *ante.*
Proving previous convictions.—§7 Ordinance No. 2 of 1926.
Relevancy of previous conviction.—See Evidence Ordinance §§3, 5-16, 53-54.

1. §253 is based upon §319 of the Code of 1883 and §310 of the Indian Code.

2. **Scope of** §253.—See §§167(7) (8) *ante* and §291 *post.* During the progress of a criminal trial the bad character of an accused cannot as a rule be proved—§54 Evidence Ordinance 1895. Such evidence, however, becomes relevant and admissible as part of the proof for the prosecution (1) where the accused puts his character in issue—§54 (*ibid*), (2) if such character is itself a fact in issue, *e.g.*, as proving a motive for the offence—§54 *Explanation* 1. (*ibid*)—and see *de Silva v. Kiriya* (1916) 3 *C.W.R.* 225, *Cooray v. Rowel* (1914) 2 *B.N.C.* 42, and §§408-409 *post.* If evidence of the prisoner's bad character is relevant and admissible as part of the case for the prosecution—the prisoner's previous convictions can be proved—§54 *Explanation* 2, Evidence Ordinance and §253(2) of this Code.

After conviction, however, even although no proof of the prisoner's bad character has been led during the trial, such character can always be proved in order to enable the Judge to fix the measure of punishment that should be meted out to the accused.

Rule 1.—Our law has adopted the rule of the law of England that *any* criminal court after the accused has been convicted, may enquire into his antecedents for the purpose of regulating the sentence—*R. v. Kandaiya, Nikapota v. Gunesekera.* This rule has nothing to do with §253 and is quite independent of it.

Rule 2.—§68 of the Penal Code provides that in the case of certain specified offences where a person having been convicted of such an

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§§252-253

offence shall be again convicted of any other similar offence, he is to receive enhanced punishment.—See §291 para. 2 *post*.

Rule 3.—The Reconvicted Criminals Ordinance No. 2 of 1926 provides a special procedure for the proof of previous convictions on conviction for the purpose of awarding an enhanced punishment.

In trials in the District Court with the aid of assessors, and in the Supreme Court by jury—that part of the indictment stating the previous convictions will not be read out in Court nor will the accused be questioned thereon, unless and until he has either pleaded guilty to or been convicted of the offence with which he is being charged at the trial—§253(1)(*a*). If he pleads guilty to the charge or to any lesser offence, or if he is convicted —he will be asked whether he has been previously convicted as alleged—§253(1)(*b*). If he admits the convictions the Court will then pass judgment—§253(1)(*c*), and see §§214, 251 *ante*. If he denies them, or refuses to or does not answer, the Court will proceed to prove them. If the trial is with the aid of assessors or by jury they will "inquire" concerning such previous convictions—§253(1)(*c*). In so doing it is not necessary to administer a fresh oath to the assessors or to the jury—§253(1)(*c*). The evidence required to prove such convictions is indicated in §7 of Ordinance No. 2 of 1926. If the accused has admitted his previous convictions before the Magistrate, and the same have been regularly recorded under §302 *post*, no further proof will be required.

§253(2) draws attention to the fact that nothing stated in §253(1) is to preclude the admission of evidence proving a previous conviction against the accused—if the same is relevant under any law for the time being in force in this Island.—See §54 *Explanation* 2, Evidence Ordinance 1895.

3. **Case law.—**

R. v. Kandàiya (1911) 14 *N.L.R.* 211.—See §214 para. 9 *ante*.

Nikapota v. Gunesekera (1911) 14 *N.L.R.* 213.—See §214 para. 9 *ante*.

End of Volume I.

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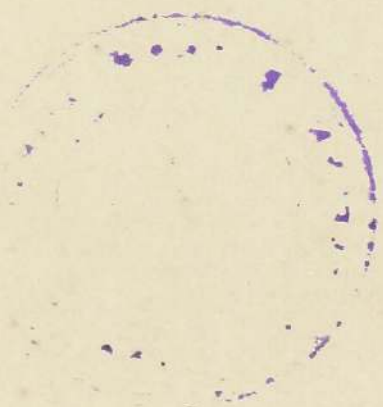

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